RESPONSE TO PETITIONS FOR PARTY STATUS, STATEMENT OF ISSUES BY THE APPLICANT, AND THE STATEMENT OF COMPLIANCE WITH LOCAL LAWS AND REGULATIONS

In the Matter of the

APPLICATION FOR WIND FACILITY PERMIT PURSUANT TO EXECUTIVE LAW §94-c

of

Heritage Wind, LLC
Town of Barre, Orleans County
Matter No. 21-00026

§94-c Wind Facility Permit Application

In compliance with Executive Law §94-c, Heritage Wind, LLC (hereafter referred to as "Heritage Wind" or the "Permittee") filed an application with the Office of Renewable Energy Siting ("ORES" or the "Office") requesting a permit for the siting, design, construction, operation and maintenance of a new 184.8 megawatt (MW) wind energy generating facility ("Facility") located in the Town of Barre, Orleans County.

The Permittee's application was originally submitted to the New York State Board on Electric Generation Siting and the Environment (the "Siting Board") on March 13, 2020, pursuant to Article 10 of the Public Service Law (PSL) and the Siting Board's rules (16 NYCRR Part 1000, *et seq.*) ("Article 10 Application"). On December 8, 2020, the Chair of the Siting Board determined that the Article 10 Application, together with the supplemental filings made on September 4, 2020, October 28, 2020, complied with Public Service Law Section 164. On December 21, 2020, the Permittee notified the Secretary to the Public Service Commission of its intent to transfer the Facility to New York State's new major renewable energy facility permitting process set forth in Executive Law §94-c.

On January 13, 2021, the Permittee filed an application to transfer review of the proposed Facility to the Office pursuant to Executive Law §94-c ("Transfer Application"). That same day, Notice of Application Filing and Availability of Local Agency Account Funding were provided to the Town of Barre pursuant to Executive Law §94-c. Accordingly, the proposed Facility is now before the Office as a transfer of a prior Article 10 application for which a completeness determination has been issued, in compliance with Executive Law §94-c(4)(f).

Issuance of Draft Permit, Combined Notice and Other Rulings

Executive Law §94-c(5)(c)(i) requires that no later than sixty (60) days following the date upon which an application has been deemed complete, the Office shall publish for public comment draft permit conditions, which public comment period shall be not less than sixty (60) days from public notice thereof.

Executive Law §94-c(5)(a) provides that until the Office establishes Uniform Standards and Conditions (USCs) and promulgates regulations specifying the content of a permit application, an application to the Office shall conform substantially to the form and content of an application required by PSL §164. Accordingly, Permittee's Transfer Application included the full Article 10 Application along with supplemental materials demonstrating compliance with Executive Law §94-c. The Permittee also included a discussion of the proposed Facility's potential compliance with the Office's then-proposed regulations, including proposed USCs at 19 NYCRR Subpart 900-6.[1]

Pursuant to Executive Law §§ 94-c(4)(f)(i) and (5)(a), the Office accepted the Transfer Application during the pendency of the Office's rulemaking, and completed review of the Permittee's Transfer Application within the sixty (60) day period required by Executive Law §94-c(5)(c)(i). On March 15, 2021, the Office issued a Draft Permit for a Major Renewable Energy Facility ("Draft Permit"). The Draft Permit was posted for public comment on the Office's official public website under the Project DMM Matter Number (21-00026) (Permit Applications page, https://ores.ny.gov/permit-applications) (Record 25).

On March 15, 2021, the assigned Administrative Law Judges (ALJs) issued a Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure ("Combined Notice"), in compliance with 19 NYCRR §900-8.2 (Record 24).

The Combined Notice, *inter alia,* established May 18, 2021, as the date for submission of all petitions for party status, the local municipal statement of compliance with local laws and regulations, and the Permittee's statement of issues, in compliance with 19 NYCRR §§ 900-8.2(d)(3), 900-8.4(d) and 900-8.4(b), respectively. The Combined Notice also established a public comment hearing on the Draft Permit for May 20, 2021, with a public comment period extending through May 21, 2021, for the submission of written comments on the Draft Permit, in compliance with 19 NYCRR §§ 900-8.3(a) and 900-8.2(d)(1), respectively. Additionally, the Combined Notice gave notice of the commencement of the issues determination procedure in compliance with 19 NYCRR §900-8.3(b).[2]

Affidavits of service and/or publication of the Combined Notice were subsequently posted on the Office's official public website, and are available for review under the Project DMM Matter Number (21-00026) (Permit Applications page, https://ores.ny.gov/permit-applications) (Record 31).

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[1] Executive Law §§ 94-c(3)(b) and (c) provided a one year period for ORES to adopt USCs for the siting, design, construction and operation of major renewable energy facilities relevant to issues that are common to particular classes or categories of facilities and which will avoid, minimize or mitigate, to the maximum extent practicable, potential adverse environmental impacts from the siting, design, construction and operation of such facilities. Executive Law §§ 94-c(3)(g) also required ORES to adopt rules and regulations for the processing of applications for major renewable energy facilities. Effective March 3, 2021, the Office met its statutory obligation and promulgated all required regulations at 19 NYCRR Part 900, within one year of the April 3, 2020 effective date of Executive Law §94-c.

[2] Assessment of public comment to follow in compliance with 19 NYCRR Subpart 900-8.

## ISSUES REQUIRING ADJUDICATION

The decision on whether an adjudicatory hearing is required is made by the presiding ALJs during the issues determination procedure in compliance with 19 NYCRR §900-8.3(b). An issue is adjudicable if: (i) it relates to a substantive and significant dispute between the Office and the Permittee concerning a proposed term or condition of the Draft Permit (including USCs); (ii) if public comment (including comments by a municipality) on a Draft Permit condition published by the Office raises substantive and significant issues; (iii) it is related to a matter cited by the Office as a basis for denial and is contested by the applicant; or (iv) it is proposed by a potential party and is both substantive and significant. 19 NYCRR §§900-8.3(c)(1). Hearing participation is authorized pursuant to a petition process set forth in 19 NYCRR §900-8.4.

Petition for Full Party Status

The submission of a petition for full party status is not a pro forma exercise. In accordance with the Office's permit hearing regulations (19 NYCRR Subpart 900-8), where contested issues are not the result of a dispute between the Permittee and the Office, but are proposed by third parties, the issue must be both "substantive" and "significant" (19 NYCRR §900-8.3(c)(1)(iv)).

An issue is "substantive" if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to a project, such that a reasonable person would require further inquiry (19 NYCRR §900-8.3(c)(2)). In determining whether such a demonstration has been made, the ALJ shall consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination and any subsequent written or oral arguments authorized by the ALJ. Id.

An issue is "significant" if it has the potential to result in a denial of a permit, a major modification to the proposed facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit (including USCs) (19 NYCRR §900-8.3(c)(3)).

In order for a potential party to participate in an adjudicatory hearing, it must file a petition in writing that, among other things, contains an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect each issue identified (19 NYCRR §900-8.4(c)(2)(ii)).

Any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of an expert witness offered by a potential party may also be subject to consideration at this stage. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the Transfer Application, the Draft Permit, USCs and proposed Site Specific Conditions, the analysis of Office and NYSDEC staff, or other relevant materials and submissions. In areas of staff expertise, the staff's evaluation of the application and supporting documentation is important in determining the adjudicability of an issue.

In situations where, as here, the Office has reviewed a Transfer Application and finds that a component of the Permittee's Facility, as proposed or as conditioned by the Draft Permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant (19 NYCRR §900-8.3(c)(4)).

## FINDINGS AND DETERMINATIONS OF DRAFT PERMIT

Within the first 60 days following the filing of the Transfer Application, the Office reviewed the entire record including each of the exhibits and all related figures, appendices and attachments, and performed a thorough regulatory analysis of the proposed Facility's potential impacts on a wide range of issues, including but not limited to existing land uses, local law compliance, threatened and endangered species, environmental and cultural resources, visual impacts, noise impacts, facility design and civil engineering, electrical interconnection, and facility decommissioning and site restoration. Following detailed review and analysis, the Office made the following findings and determinations with respect to the Draft Permit:

a. Compliance With Uniform Standards and Conditions

The Office conducted a thorough review of the Transfer Application, including all exhibits, reports and supporting information, to determine the Facility's compliance with the USCs at 19 NYCRR Subpart 900-6 and the potential need for additional site specific terms and conditions to avoid, minimize and mitigate potential significant adverse environmental impacts from construction and operation of the Facility to the maximum extent practicable (19 NYCRR §900-3.2(a)(2)). USCs that were determined by the Office to be not applicable to the Facility were labeled accordingly, as stated in subpart 5 to the Draft Permit (Draft Permit at subpart 5, Record 25).

b. Compliance with Local Laws and Ordinances

In its Article 10 Application (Article 10 Exhibit 31 at pp. 7-16, Record 5), Heritage Wind requested that the Siting Board not apply certain provisions in local laws or ordinances of the Town of Barre falling within eight general categories discussed below (Article 10 Exhibit 31 at pp. 7-16, Record 6). The Office evaluated each of Permittee's requests against the local laws and ordinances in effect both at the time of the Siting Board's December 8, 2020 determination of compliance, and at the time of Permittee's filing of the Transfer Application with the Office on January 13, 2021. The Office thoroughly reviewed the Transfer Application and considered all applicable New York State law concerning CLCPA targets[3] and the environmental benefits of major renewable energy facilities,[4] and the detailed information in the Transfer Application concerning CLCPA targets and the environmental benefits of the proposed Facility.

[3] See, e.g., Climate Leadership and Community Protection Act (Chapter 106 of the Laws of 2019) and the Accelerated Renewable Energy Growth and Community Benefit Act (Part JJJ of Chapter 58 of the Laws of 2020) (as amended by Part BBB of Chapter 55 of the Laws of 2021).

[4] Id.

Based upon this thorough review, the Office determined in subpart 4 of the Draft Permit (Record 25) that, to the extent not obviated by recently-proposed amendments to the Town's local laws, the Office elected not to apply the provisions of the Barre Town Code described below on the grounds that they are unreasonably burdensome in view of CLCPA targets and the environmental benefits of the proposed Facility (Executive Law §94-c(5)(e) and 19 NYCRR §900-2.25).[5]

The Office further expressly determined that, "[e]xcept for the provisions of local law indicated below, the Office finds that the Facility, as proposed and permitted herein, shall comply with the substantive provisions of the applicable local laws as identified in the Transfer Application," indicating that with the exception of the matters described hereinbelow, the Permittee's Facility would comply with substantive provisions of local laws. Id.

1. Barre Town Code §350-103(B)(1)

The Permittee requested relief from Barre Town Code §350-103(B)(1), which requires that wind turbine noise be limited to 45 dBA measured at a distance 1,000 feet from the base of the wind turbine (Article 10 Exhibit 31 at pp. 7-8, Record 6). In support of its request, Permittee noted that compliance with this standard would be technologically infeasible as no available commercial turbine model meets this standard. Id. Permittee further noted that its Facility was designed to meet the same noise standards imposed in recent Siting Board cases, which cases Permittee asserted included a noise limit of forty-five (45) dBA Leq (8-hour) at the outside of any non-participating residence and a fifty-five (55) dBA Leq (8-hour) at the outside of any participating residence. Id. Permittee noted that Heritage Wind's comprehensive noise studies in the record demonstrated compliance with these established standards (Article 10 Exhibit 19 and Appendix 19-A, Record 6-8, 11 and 20-22) (Transition Supplement Overview, pp. 7-8 and Appendix D, Record 13), and argued that Heritage Wind had appropriately avoided or minimized adverse noise impacts to the extent practicable by designing its Facility to comply with these existing standards. Id. Permittee further argued that since there were no changes or other measures that Permittee could implement to meet local standards, the application of Barre Town Code §350-103(B)(1) effectively forecloses wind facilities in the Town. Id.

The Office conducted a thorough review of Permittee's Transfer Application, including Permittee's analyses of potential significant adverse noise impacts and proposed measures to avoid, minimize and/or mitigate such impacts to the maximum extent practicable. This review included the analysis of broadband overall (dBA) noise levels at participating residences and non-participating residences and any portion of non-participating lands; full-octave band (dB) infrasound and low-frequency sound levels at non-participating residences; and tonality and tonal penalties.

[5] Where relevant, this discussion also includes recommended minor modifications to the Draft Permit proposed by the Office to reconcile the Draft Permit with certain recently-adopted amendments to the wind-related provisions of the Barre Town Code ("2021 Amendments"), which amendments occurred after the date of the Siting Board's December 8, 2021 determination of completeness and the Permittee's January 13, 2021 filing of the Transfer Application with the Office, and were not in the record at the time the Office's Draft Permit was issued (see, March 18, 2021 Town Letter at Record 27).

Based upon this review, the Office found §350-103(B)(1) of the Barre Town Code to be unreasonably burdensome in view of CLCPA targets and the environmental benefits of the Facility, and determined that the Office's uniform standards for wind facility noise at 19 NYCRR §§ 900-2.8(b) and 900-6.5(a) were applicable, to wit:

1. a maximum noise limit of forty-five (45) dBA Leq (8-hour) at the outside of any non-participating residence; and

2. a maximum noise limit of fifty-five (55) dBA Leq (8-hour) at the outside of any participating residence.

(19 NYCRR §§ 900-2.8(b) and 19 NYCRR 900-6.5(a)).

The Office further determined pursuant to 19 NYCRR §900-3.2(a)(2), to include a site specific condition requiring the submission of updated noise modeling in compliance with 19 NYCRR §900-2.8 for the turbine(s) selected and substation details, with all updated computer noise modeling to be submitted for Office review and approval as an additional pre-construction compliance filing consistent with 19 NYCRR §900-10.2 (Draft Permit, subpart 6(d), Record 25).

Town/County Joint Petition and Statement of Compliance

The Town's Statement of Compliance advised that the Town's 2021 Amendments repealed the 45 dBA limit measured at a distance of 1,000 feet from the base of the wind turbine in §350-103(B)(1), and thereby, rendered the Office's finding moot (Statement of Compliance at pp. 1-2 and 9, Record 32). Accordingly, the Town's Statement of Compliance did not raise any substantive or significant issues for adjudication or claims for party status with respect to this original finding (Draft Permit at subpart 4, Record 25).

The Town maintained, however, that substantial and significant issues requiring adjudication existed due to the Facility's non-compliance with the Town's new wind turbine standards at §§ 350-103(a)(1) and (2), undertaken by the Town late in the Office's review as noted above:

1. 45dBA Leq 8-hour at non-participating structures and 40 dBA Leq night (10:00 p.m. to 7:00 a.m.) outside at non-participating structures; and

2. 55 dBA Leq 8-hour at participating structures and 50 dBA Leq night (10:00 p.m. to 7:00 a.m.) outside at participating structures.

(Joint Petition at pp. 9-12 and Statement of Compliance at p. 3, Record 32).

In support of the Town's position, the Town offered the testimony of the Town Supervisor who would elaborate on the Town Board findings with respect to an enforceable nighttime noise standard. The Town also offered the testimony of a Senior Acoustical Engineer from LaBella Associates, who would opine as to the reasonableness of the Town's standard, practicality of measuring compliance as compared to an annual noise standard, and likelihood that the Facility could comply with Town standards with reasonable mitigation measures.

Permittee's Statement of Issues

The Permittee objected to both the late assertion and sufficiency of the Town's new standards and requested waivers in all respects from these provisions (Statement of Issues at pp. 3-5, Record 34). In support, Permittee provided a technical memorandum and noise analysis to demonstrate the lack of basis for the Town's selection of a different wind turbine noise regulations than the Office's regulations (Statement of Issues, Attachment C, Record 34).

The Permittee states that the adoption of the 40 dBA nighttime standard may have arisen from a misunderstanding of annual noise design goals versus short-term regulatory limits. Permittee argued that there is no scientific basis to support the more stringent 40 dBA Lnight standard in the Barre Town Code, and that the 45 dBA Leq standard in the Draft Permit is consistent with Siting Board precedent as well as the Office's regulations. Id.

Permittee further argued that there are 327 residential receptors that would meet the 45 dBA Leq standard during daytime hours (i.e., the same standard in the Office's regulations) but would not meet the 40 dBA Lnight limit at night, and that the extension of this requirement to an even broader category of unoccupied structures made this provision even more unreasonably burdensome and emphasized the lack of a scientific basis for the Town's limit. Id. Permittee argued that this new provision has a prohibitory impact and noted that, for reasons supported in its Transfer Application, the Facility is consistent with CLCPA targets and will contribute environmental benefits and approximately 184.8 MW of renewable energy to the State of New York. [6]

Office Recommendation

The Office respectfully recommends the continuation of relief currently provided in the Draft Permit from the Town's 40 dBA Leq night / 50 dBA Leq night to be consistent with the Office's standards for wind facility noise at 19 NYCRR § 900-2.8(b) and USCs at 19 NYCRR §900-6.5(a). The Office's determination relies upon, and is consistent as a matter of law with, established precedent in Article 10 wind facility proceedings developed over an approximately seven year period from 2014 to date – and accomplishes the very goals of Executive Law §94-c to establish uniform standards and conditions that applicants must comply with to ensure protection of the environment, and avoid the delay and uncertainty of litigating and re-litigating issues that are common to renewable energy wind facilities in New York.[7]

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[6] See, e.g., Permittee's Article 10 Application (Record 6) at the following: Exhibit 2 at section (e)(5) (Determinations Pursuant to PSL Section 168); Exhibit 8 (Electric System Production Modeling); Exhibit 9 at section (f) (No Action Alternative); Exhibit 10 (Consistency with Energy Planning Objectives); Exhibit 27 (Socioeconomic Effects); and Exhibit 31 (Compliance with Local Laws and Ordinances) at section (e).

[7] See, High Bridge Wind (18-F-0262), March 11, 2021 Order Granting Certificate at pp. 26-27 (citations omitted):

"The sound levels proposed by the Settling Parties are the same noise limits that we consistently have deemed appropriate to be protective of health and minimize potential annoyance for other recently approved projects, including Deer River Wind (16-F-0267), Bluestone Wind (16-F-0559) and Alle-Catt Wind (17-F-0282). As we previously have indicated, we expect to apply these sound level standards in future

The Canisteo Wind (16-F-0205) Order relied upon by the Town is distinguishable. The requirements cited relate to a separate issue – i.e., the Siting Board's determination with respect to required noise design modeling and the need to conform with certain local standards in connection therewith.[8] This finding did not change the maximum noise limit adopted by the Siting Board in that case, which again, is consistent with other Siting Board precedent in requiring 45 (dBA) Leq (8-hour) at any permanent or seasonal non-participating residence existing as of the issuance date of the Certificate, and 55 dBA Leq (8-hour) for any participating residence existing as of the issuance date of the Certificate for any other litigated proceeding under Article case.[9]

The Office respectfully submits that the Town did not raise any substantive or significant issues for adjudication or claims for party status with respect to the Permittee's ability to duly comply with the Office's wind turbine noise limitations in 19 NYCRR §§ 900-2.8(b) and 900-6.5(a), as referenced in subparts 4(1) and 5 (section V(a)(1)(ii)) of the Draft Permit (Record 25). There is no factual dispute that the Permittee has designed (or will design) its Facility to comply with the Office's standard for wind facility noise as provided in the Office's Draft Permit (id.), and the Office's regulations.

Accordingly, the Office respectfully recommends a minor modification to its determination at subpart 4(1) of the Draft Permit (Record 25) to include an additional determination that the Town's new provisions at §§ 350-103(a)(1) and (2) of the Barre Town Code are unreasonably burdensome in light of CLCPA targets and the environmental benefits of the proposed Facility, and that the Office's standards at 19 NYCRR §§ 900-2.8(b) and 900-6.5(a) shall be applicable. The Office respectfully submits that this clarification is reasonable and not material, given that the subject matter remains the same (i.e., the application of the Office's uniform standards for wind turbine noise under 19 NYCRR Part 900), and necessary, due to the late timing of the Town's 2021 Amendments.

CSAB, Inc. Petition

The CSAB, Inc. Petition expressed generalized objections that the record lacks evidence in support of the Office's Draft Permit findings and determinations regarding unduly burdensome local laws and ordinances (CSAB, Inc. Petition at pp. 14-16, Record 33). CSAB, Inc. generally supported the Town's position that the Facility would not comply with the Barre Town Code if it were designed in accordance with the Office's regulations. Id. As an offer of proof, CSAB, Inc. submitted an Exhibit 3 to its Petition for Party Status, which is a PowerPoint presentation prepared by counsel to the Barre Town Board listing instances where the Draft Permit would not comply with the Town's recently-adopted 2021 Amendments. Id.

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cases unless and until new scientific evidence develops that suggests the approach is not adequately protective of human health. We specifically considered the use of the WHO 2018 recommendation that is proposed by [Intervenor], including in the Baron Winds and Number Three Wind Orders, but rejected use of that recommendation because of its reliance on low quality data and the lack of strong evidence of health impacts. [Intervenor] has provided no compelling evidence to justify a departure from our prior precedent or the application of stricter sound level limits than have been proposed by the Settling Parties."

[8] Canisteo Wind (16-F-0205), March 13, 2020 Order Granting Certificate at Condition 68(d).

[9] Id. at Condition 72(a).

Office Recommendation

The Office respectfully submits that its findings and determinations concerning compliance with local laws and ordinances are clearly stated in direct language in subpart 4 of the Draft Permit (Draft Permit at subpart 4(1) – (8), Record 25) and supported by ample evidence in the written record of the Transfer Application. CSAB, Inc. has failed to meet its burden of proving a substantive and significant issue with respect to the Office's findings and determinations, and the submission of the Town counsel's PowerPoint presentation (CSAB, Inc. Petition at Exhibit 2, Record 33) is legally insufficient to support party status and/or CSAB, Inc.'s conclusory claims with regard to the validity of the Office's extensive review, determinations and findings.

In subpart 4 of the Draft Permit, the Office explicitly found:

> The Office hereby determines (to the extent not obviated by recently-proposed amendments to local law) not to apply the following local law provisions, which when applied to the proposed Facility, are unreasonably burdensome in view of the Climate Leadership and Community Protection Act targets and the environmental benefits of the proposed Facility. Except for the provisions of local law indicated below, the Office finds that the Facility, as proposed and permitted herein, shall comply with the substantive provisions of the applicable local laws as identified in the Transfer Application.

The Office's findings and determinations are in response to a direct request from the Permittee. This request includes a statement of justification at Article 10 Exhibit 31 (Local Laws and Ordinances), section (e), entitled *List of Substantive Local Ordinances/Laws That the Applicant Requests to Board Not Apply* (Record 6), and substantial additional justification presented in the form required by Article 10 which includes discussion of CLCPA targets and the environmental benefits of the proposed Facility.[10] The Permittee also included a detailed Transition Supplement Overview with its Transfer Application (Record 13), including the requested relief and supporting justification concerning unduly burdensome local laws, CLCPA targets and the environmental benefits of the proposed Facility. Additional justification is not required pursuant to Executive Law §94-c(5)(e), although the Permittee could certainly provide additional information if the request for relief was grounded in additional factors such as existing technology, costs or economics, or needs of consumers (see, e.g., 19 NYCRR §900-2.25(c)(1)-(3)).

In exercising its jurisdiction, the Office granted the minimum relief necessary, and conditioned relief on the Facility's compliance with Office standards at 19 NYCRR Part 900 and/or Site Specific Conditions to avoid, minimize and/or mitigate, to the maximum extent practicable, potential significant adverse environmental impacts of the Facility (e.g., Draft Permit at subparts 4, 5 and 6, Record 25).

[10] See, e.g., Permittee's Article 10 Application (Record 6) at the following: Exhibit 2 at section (e)(5) (Determinations Pursuant to PSL Section 168); Exhibit 8 (Electric System Production Modeling); Exhibit 9 at section (f) (No Action Alternative); Exhibit 10 (Consistency with Energy Planning Objectives); Exhibit 27 (Socioeconomic Effects); and as discussed herein, Exhibit 31 (Compliance with Local Laws and Ordinances) at section (e).

The Office also notes for the record the Town's position that several (but not all) of the Office's findings and determinations may have been mooted by recent changes to the Barre Town Code in the 2021 Amendments (Statement of Compliance at p. 9, Record 32).

Based upon the foregoing, the Office respectfully submits that CSAB, Inc. has failed to raise any substantive or significant issues for adjudication or claims for party status with respect to the Office's determinations and findings and determinations on unreasonably burdensome local laws and ordinances (Draft Permit subpart 4, Record 25).

For convenience, the Office's response to CSAB, Inc.'s claims regarding the Office's findings and determinations in subpart 4 of the Draft Permit will be addressed by reference to this summary.

2. Barre Town Code §350-103(A)(6)

The Permittee requested limited relief from Barre Town Code §350-103(A)(6) to the extent such provision would prohibit the use of guy wires at: (a) substation and transmission infrastructure as needed due to practicability and safety; and (b) where unanticipated circumstances require the relocation of underground collection lines to an overhead design that requires guy wires (Article 10 Exhibit 31 at pp. 7-8, Record 6). In support, the Permittee noted that guy wire structures may be necessary within proposed substations to ensure that masts and dead end structures are safely and adequately secured, or in cases where on-site and/or underground conditions make buried collection lines impracticable. Id.

Noting the limited nature of Permittee's request and the technological, environmental and/or safety needs that could require the use of guy wires, the Office elected not to apply this provision of the Barre Town Code in the limited circumstances requested by the Permittee (Draft Permit, Section 4 Required Findings at (2), Record Item No 25).

The Town's Statement of Compliance advised that subsequent changes to the wind facility provisions of the Barre Town Code adopted by the Barre Town Board in February 2021 (Local Law No. 1 of 2021) have rendered the Office's finding moot (Statement of Compliance at pp. 1-2 and 9, Record 32). Accordingly, the Town's Statement of Compliance does not raise any substantive or significant issues for adjudication or claims for party status with respect to this particular finding in subpart 4 of the Draft Permit. The Permittee concurs with this position (Statement of Issues at pp. 2-3, Record 34). Accordingly, there are no substantive or significant issues requiring adjudication of the Office's finding in subpart 4(2) of the Draft Permit (Id.).

3. Barre Town Code §350-103(J)

The Permittee requested relief from Barre Town Code 350-103(J), which required that the Facility be designed such that shadow flicker from an individual wind turbine will not fall on any specific area of a roadway or any portion of a residential structure in excess of 25 hours per year (Article 10 Exhibit 31 at pp. 9-11, Record 6). In support of its argument, Permittee noted the lack of basis for the Town standard and that the Siting Board has reviewed the available science and other considerations on shadow flicker and adopted a 30 hour per year shadow flicker limit in recent Siting Board cases, such as Cassadaga Wind (14-F-0490), Eight Point Wind (16-F-0062), Number Three Wind (16-F-0328) and Bluestone Wind (16-F-0559). Id. Permittee also argued that the standard in the Barre Town Code would result in additional curtailment of wind turbine

operations, reduced production of renewable energy and associated loss of environmental benefits of carbon emissions reductions. Id.

Based upon a thorough review of the record of this Transfer Application and Permittee's request, the standards in 19 NYCRR Part 900, Siting Board precedent, CLCPA targets and the environmental benefits of renewable energy facilities, the Office made the requisite findings and determined not to apply this provision of the Barre Town Code, both with respect to shadow flicker on any portion of a roadway or any portion of a residential structure in excess of 25 hours per year, and determined that shadow flicker shall be limited to 30 hours per year at any non-participating residence in compliance with 19 NYCRR §900-2.9(d)(6) (Draft Permit, subpart 4(3), Record 25).

Town/County Joint Petition and Statement of Compliance

The Town's Statement of Compliance indicates that subsequent changes to the wind facility provisions of the Barre Town Code adopted by the Barre Town Board in February 2021 (Local Law No. 1 of 2021) have partially rendered moot that portion of the Office's finding that relates to shadow flicker along roadways (Statement of Compliance at pp. 1-2 and 9, Record 32). Accordingly, the Town's Statement of Compliance raises no substantial or significant issue or claim for party status with respect to shadow flicker along roadways.

The Town maintains, however, that a substantive and significant issue exists with respect to that portion of the Office's finding which elects not to apply the Town's shadow flicker limitation of 25 hours per year (Joint Petition at pp. 5, 21-23 and Statement of Compliance at p. 8, Record 32), and the Office's determination that shadow flicker shall comply with the Office's 30 hour per year limitation for non-participating residences at 19 NYCRR §900-2.9(d)(6).

In support, the Town offered the testimony of the Town Supervisor who would attest to the concerns of local residents with potential shadow flicker and aesthetic impacts leading to the Town Board's decision to not raise the flicker standard from 25 to 30 hours per year. The Town also offered the testimony of a Senior Environmental Analyst from LaBella Associates, who will opine as to the lack of a scientifically-based standard in the Office's regulations for a 30-hour annual shadow flicker limit.

Permittee's Statement of Issues

In its Statement of Issues (Record 34), the Permittee states that it has submitted substantial evidence, in both its Article 10 Application materials and the Transfer Application, to demonstrate that it designed (or will design) its Facility to comply with the Office's 30 hours/year shadow flicker requirements at 19 NYCRR §900-2.9(d)(6) and avoid, minimize and/or mitigate, to the maximum extent practicable, potential significant adverse environmental impacts through appropriate curtailment measures (Article 10 Exhibit 15, Appendix 15-A, Exhibit 24 and Appendix 24-A, Record Item Nos. 3, 6, 10) (Transition Supplement Overview, Record 13). This includes Permittee's proposed Visual Impacts Minimization and Mitigation Plan (19 NYCRR §900-2.9) and USCs concerning operational effects minimization measures, including shadow flicker minimization, mitigation and other measures necessary to achieve a maximum of 30 hours/year at any non-participating residential receptor, subject to verification using shadow

prediction and operational controls at appropriate wind turbines in compliance with 19 NYCRR §900-6.4(l)(1)(iii). Id.

The Permittee restated its position in Article 10 Exhibit 31, that the 25 hour per year limit in Town standards is incompatible with industry standards and past Siting Board precedent (Article 10 Exhibit 31, pp. 9-11, Record 6). Available science does not support the notion that a 25 hour per year limit is necessary to avoid and minimize potential adverse visual impacts, and the Siting Board has reviewed available science and adopted a 30 hour per year standard as sufficiently protective in multiple past cases. Id.

The Permittee also restated its arguments on CLCPA targets and the environmental benefits of the proposed Facility and expressed concern with prohibitive effects. The Permittee estimates that in order to meet the Town's 25 hour/year standard, the Facility would need to impose additional curtailment resulting in 150% loss of energy generation compared to the 30 hour/year standard, or an additional 3,030 MW hours/year in lost generation. Id. This would be inconsistent with CLCPA targets and the environmental benefits of the proposed Facility would be diminished. Id.

Office Recommendation

The Office respectfully recommends continuation of the relief currently provided in the Draft Permit from the Town's 25 hours/year shadow flicker requirement, subject to Permittee's compliance with the Office's requirements for wind facility shadow flicker of 30 hours/year in 19 NYCRR §§ 900-2.9(d)(6) and associated mitigation requirements in the USCs at 19 NYCRR §900-6.4(l)(1)(iii).

19 NYCRR §§ 900-2.9(d)(6) requires that an analysis of a full year of hourly potential and realistic shadow flicker be determined and establishes a 30-hour-per-year limit at any non-participating residence. The 30-hour limit is consistent with the standards established in past precedent in Article 10 cases and the overwhelming majority of other jurisdictions and is a reasonable limit to avoid nuisance conditions at residential locations.

There is no factual dispute that the Permittee assessed shadow flicker in accordance with the Office's 30 hours/year limit at 19 NYCRR §900-2.9(d)(6), as the Office's standard is based upon the same Article 10 standard established in this past precedent (Article 10 Exhibit 15, Appendix 15-A, Exhibit 24 and Appendix 24-A, Record Item Nos. 3, 6, 10). Permittee has determined, and informed all parties, that curtailment minimization and/or mitigation will be required for its proposed Facility. Id. Permittee has stipulated in its Transfer Application to compliance with the Office's USCs, including but not limited to requirements for operational effects minimization and mitigation in 19 NYCRR §900-6.4(l)(1)(iii) (Transition Supplement Overview, Section 4 at p.4, Record 13).

The Office respectfully submits that the Town's Joint Petition and Statement of Compliance (Record 32) do not raise any substantive or significant issues for adjudication or claims for party status with respect to the Permittee's efforts or ability to duly comply with the Office's uniform shadow flicker limitations and related standards, as required in the Draft Permit (Draft Permit at subparts 4(3) and IV(l)(1)(iii), Record 25).

4. Barre Town Code §350-103(F)

The Permittee requested relief from Barre Town Code §350-103(F), which limits the height of wind turbines to 500 feet (Article 10 Exhibit 31 at p. 11, Record 6). In support, the Permittee noted changing manufacturing standards and available turbine heights, technological needs, CLCPA targets and the environmental and ratepayer needs for affordable renewable energy in New York State. Id. The Permittee further noted that its Facility design would comply with the setback requirements in the Barre Town Code, which are indexed to overall turbine height (id.), and its assessment of potential alternative heights in its visual simulations (Article 10 Exhibit 31-B, Record 6).

In its Transition Supplement Overview, the Permittee further reiterated that its proposed overall turbine height of 675 feet and proposed turbine layout complied with all existing and proposed setback requirements in the Barre Town Code, i.e., including those setback requirements under discussion but not yet adopted by the Town (Transition Supplement Overview at pp. 5-7 and Appendix C, Record 13). Permittee further noted that its design and layout were based upon wind resource analyses including meteorological data gathered over a two year period from 2017 – 2018, to optimize turbine layout within the parameters of existing site-specific constraints, while also supporting the clean energy production capacity targeted for the Facility. Id.

Based upon a thorough review of the record of this Transfer Application and Permittee's request, the standards in 19 NYCRR Part 900, CLCPA targets and the environmental benefits of renewable energy facilities, the Office made the requisite findings and determined not to apply this provision of the Barre Town Code, on the condition that overall turbine tip height shall not exceed 675 feet as limited and requested by the Permittee. The Office further required a site specific condition that the Permittee shall comply with the more stringent setbacks under consideration in the Town of Barre in lieu of the setbacks required by 19 NYCRR §900—2.6(b), which the Office waived (Draft Permit, Record 25).

The Town's Statement of Compliance advised that subsequent changes to the wind facility provisions of the Barre Town Code adopted by the Barre Town Board in February 2021 (Local Law No. 1 of 2021), establishing a maximum height of 700 feet at §350-103(6), have rendered the Office's finding moot (Statement of Compliance at pp. 1-2 and 9, Record 32). Accordingly, no substantive or significant issues for adjudication or claims for party status have been raised with respect to this particular finding in subpart 4 of the Draft Permit. The Permittee concurs with this position (Statement of Issues at pp. 2-3, Record 34).

5. Barre Town Code §350-106(A)

The Permittee requested relief from Barre Town Code §350-106(A), which required at least 40% reforestation of any woodlands that have been cleared (Article 10 Exhibit 31 at p. 12, Record 6). In support, Permittee noted that reforestation is neither feasible nor reasonable in all cleared areas because approximately twenty (20) acres of the approximately thirty-eight (38) acres will be converted to built-use (approximately three (3) acres) or maintained by Permittee in a successional state (approximately seventeen (17) acres) to prevent vegetation from interfering with equipment. Id.

The Office elected not to apply this provision of the Barre Town Code and determined that the Permittee's proposed landscaping and restoration mitigation measures shall comply with 19 NYCRR §900-10.2(e)(4), which requires Permittee to provide a pre-construction compliance filing consisting of a comprehensive Vegetative Management Plan that will be subject to prior review and approval of the Office before a Notice to Proceed with Construction is granted.

The Town's Statement of Compliance advised that subsequent changes to the wind facility provisions of the Barre Town Code adopted by the Barre Town Board in February 2021 (Local Law No. 1 of 2021) have rendered the Office's finding moot (Statement of Compliance at pp. 1-2 and 9, Record 32). The Permittee concurs with this position (Statement of Issues at pp. 2-3, Record 34). Accordingly, the Town's Statement of Compliance does not raise any substantive or significant issues for adjudication or claims for party status with respect to this particular finding in subpart 4 of the Draft Permit.

6. Barre Town Code §350-103(M)

The Permittee requested limited relief from Barre Town Code §350-103(M), which limited construction to 9:00 a.m. – 8:00 p.m. daily with exceptions for emergencies which are undefined (Article 10 Exhibit 31 at pp. 12-13, Record 6). Specifically, Permittee requested an allowance "for extended hours for turbine construction activities on an as-needed basis to address unusual circumstances, such as a time-sensitive construction stage that may be affected by inclement weather, or the need to exceed those hours for a continuous concrete pour or turbine erection effort." Id. The Office elected not to apply this provision of the Barre Town Code in the limited circumstances requested by Permittee; otherwise the Barre Town Code provision would be applicable.

The Town argued that a substantive and significant issue exists with respect to the Office's finding which elects not to apply the Town's designated construction hours in the limited circumstances requested by Permittee, because – after taking into account a late amendment to the Barre Town Code that was not in the record – the Office's finding would allow construction on Sundays (Joint Petition at pp. 5 and 23 and Statement of Compliance at pp. 8-9, Record 32).

The Office notes that its finding was limited to circumstances that have been addressed in the Town's 2021 Amendments to the Barre Town Code, and that otherwise, the Office intended for the prior standard of the Barre Town Code to be applicable. The Permittee has indicated that it will adhere to the Town's new construction hour limits, subject to the exception set forth in the 2021 amendment for certain activities or conditions requiring deviations from those hours (Statement of Issues footnote 3, Record 34). Accordingly, this issue appears to have been rendered moot. The Office recommends a clarification to the finding in subpart 4(6) of the Draft Permit, to reference agreed-upon construction hours consistent with the Town's local law.

7. Barre Town Code §350-103(L)

The Permittee requested relief from Barre Town Code §350-103(L), which required that the foundation top of each wind turbine shall be buried to a depth of four feet below ground, or to the specifications of the New York State Department of Agriculture and Markets guidelines, whichever is greater (Article 10 Exhibit 31 at pp. 13-15, Record 6). In support of its argument, the Permittee cited to technical infeasibility, increased impact to the community resulting from

compliance with the requirement, potential degradation of steel turbine towers through corrosion due to burial, and the lack of such a requirement in the NYS Department of Agriculture and Markets *Guidelines for Agricultural Mitigation for Wind Power Projects*. Id. The Office elected not to apply this provision of the Barre Town Code and determined that wind turbine foundations and their removal shall comply with 19 NYCRR Part 900, including without limitation 19 NYCRR §§ 900-2.6, 900-2.11, 900-2.22, 900-2.24, 900-6.6 and 900-10.2.

The Town's Statement of Compliance advised that subsequent changes to the wind facility provisions of the Barre Town Code adopted by the Barre Town Board in February 2021 (Local Law No. 1 of 2021) have rendered the Office's finding moot (Statement of Compliance at pp. 1-2 and 9, Record 32). Accordingly, the Town's Statement of Compliance does not raise any substantive or significant issues for adjudication or claims for party status with respect to this particular finding in subpart 4 of the Draft Permit. The Permittee concurs with this position (Statement of Issues at pp. 2-3, Record 34).

8. Barre Town Code §§ 350-105 and 350-106(D)

The Permittee requested relief from Barre Town Code §§ 350-105 and 350-106(D), which specify decommissioning timelines and related requirements (Article 10 Exhibit 31 at pp. 15-16, Record 6). Permittee noted that the provisions requiring removal due to turbine non-operation fail to take into account the myriad circumstances which could cause a turbine not to operate, such as an Independent System Operator ("ISO") directives to suspend operations to address a problem elsewhere in the system; governmentally-imposed curtailment requirements; act of God or manufacturer delays or other circumstances outside of Permittee's control. Id.

After review, the Office elected not to apply these provisions of the Barre Town Code and determined that the Permittee's Final Decommissioning and Site Restoration Plan shall comply with the requirements of 19 NYCRR §900-10.2(b) (see 19 NYCRR §§ 900-2.24 and 900-6.6), which requires a pre-construction compliance filing by Permittee, and prior review and approval of the Office before a Notice to Proceed with Construction is granted.

The Office further determined to include a Site Specific Condition requiring Permittee's Final Decommissioning and Site Restoration Plan which requires detailed (line item) information for the Office's review concerning any claimed salvage value, together with Permittee's plan for the repair of non-operational turbines due to manufacturer complications or other delays in excess of one (1) year and beyond Permittee's control, to also include requirements for notice, supporting justification, periodic updates and a commitment to diligently complete all work (Draft Permit, subpart 6(h), Record 25).

Town/County Joint Petition and Statement of Compliance

The Town argues that a substantive and significant issue exists to the extent that the Office's finding on the application of the Office's regulations and Final Decommissioning and Site Restoration Plan would make allowance for reduction in financial assurance due to salvage value (Claim 4) and lack of defined triggers for an operational default requiring Facility removal and the Town being able to draw on the financial assurance to complete removal (Claim 5) (Joint Petition at pp. 4-5 and 13-18, and Statement of Compliance at pp. 4-6, Record 32). The Town notes that while there is an implication that the salvage value offset is limited to the value of scrap metal

from the Facility components, such treatment for the purposes of financial assurance is not explicit. Id.

Office Recommendation

The Office respectfully submits that no factual issue is presented because the Office has yet to make its determination and these matters can be addressed through administrative process (i.e., pre-construction compliance filings pursuant to 19 NYCRR Subpart 900-10).

Regarding salvage value, the Office will review the Final Decommissioning Site Restoration Plan as a mandatory pre-construction compliance filing (19 NYCRR §900-10.2(b)(1)), including the additional detailed information listed at site-specific condition 6(h) (Draft Permit, subpart 6(h), Record 25), and determine if the final net decommissioning and site restoration cost estimate is acceptable. Pursuant to 19 NYCRR §900-6.6, if the Permittee and the Town cannot come to an agreement as to the appropriate amount of financial security to be provided to the Town, the Office will determine sufficient funds will be available to the Town if they are forced to undertake decommissioning of the Facility. That determination will be based on the analyses of the Final Decommissioning and Site Restoration Plan. The Office will consider inclusion of salvage value (related to salvageable material) but generally will not accept re-sale value of major facility components.

Regarding the Town's concerns with a lack of defined triggers for an operational default requiring Facility removal, and the Town being able to draw on the financial assurance to complete removal, final decommissioning triggering protocols shall be established in the Final Decommissioning and Site Restoration Plan, the proof of filing of letter(s) of credit (or other financial assurance approved by the ORES) and agreements between the Permittee and the Town establishing a right for each municipality to draw on the letter of credit (19 NYCRR §900-10.2(b)). Discussion of the triggering protocol in the Final Decommissioning and Site Restoration Plan shall incorporate language of site-specific condition 6(h) (Draft Permit, subpart 6(h), Record 25), which requires inclusion of the Permittee's plan for the repair of non-operational turbine(s) due to manufacturer complications or other delay(s) in excess of one (1) year and beyond Permittee's control, including requirements for notice to the Office accompanied by supporting justification, evidence of Permittee's commitment to diligently complete all work, and periodic status updates to the Office during such occurrences.

Accordingly, there are no substantive or significant issues requiring adjudication of the Office's finding in subpart 4(8) of the Draft Permit. Id.

c. Determinations on Permittee's 19 NYCRR Part 900 Waiver Requests

The Permittee stated that it designed the proposed Facility to comply with the more stringent setback requirements in the Barre Town Code, and accordingly, requested a waiver from the setbacks provided in the Office's regulations at 19 NYCRR §900-2.6(d). The Office granted the Permittee's request to comply with the more stringent setback in the Barre Town Code and imposed a site specific condition at (d)(1) below requiring compliance with the more stringent minimum setbacks in the Barre Town Code in lieu of the Office's regulations at 19 NYCRR §900-2.6(d) (Draft Permit at subpart 4, p. 5, Record 25).

d. Site Specific Conditions

In compliance with Executive Law §94-c, the Office determined to include eight (8) additional site-specific conditions which the Permittee must comply with during construction and operation of the Facility over the life of the Draft Permit:

1. Compliance With Town Setback Standards

As noted in sections (b)(4) and (c) above, the Office approved Permittee's request for relief from the 500 ft. turbine height limit in Barre Town Code §350-103(F) (now mooted by subsequent amendment to §350-103(6) of the Barre Town Code per the Town), and imposed a site specific condition that the Permittee shall comply with the following setbacks set forth in the Barre Town Code in lieu of the setbacks required by 19 NYCRR §900—2.6(b):

> (1) 1.5 times turbine tip height from non-participating property lines, public roads, aboveground transmission lines and substations; and
>
> (2) 2.0 times turbine tip height from non-participating residences and non-participating commercial buildings.

The Permittee did not raise any substantive or significant issues for adjudication or claims for party status based upon this site-specific condition and has designed its Facility to comply with the Town's setback standards (Transition Supplement Overview at pp. 5-7 and Appendix C, Record 13) (Statement of Issues, Record 34). The Municipalities' Joint Petition and Statement of Compliance (Record 32), CSAB, Inc. Petition (Record 33) and SOS, Inc. Petition (Record 36) did not raise any substantive or significant issues for adjudication or claims for party status based upon this site specific condition of the Draft Permit.

Accordingly, the Office respectfully submits that there are no substantive or significant issues for adjudication regarding this site-specific condition of the Draft Permit (Draft Permit at subpart 6(a), Record 25).

2. Additional Net Conservation Benefit Plan

The record on this Transfer Application is extensive, and includes all information developed during the Article 10 Application process, which began on September 23, 2016, and ended on January 28, 2021. Specifically, the Transfer Application includes numerous habitat assessments and field survey reports completed during December 2016 – July 2018 in compliance with New York State Department of Environmental Conservation (NYSDEC) and U.S. Fish and Wildlife Service (USFWS) guidelines and requirements (Article 10 Exhibit 22 Terrestrial Ecology and Wetlands at p. 15, Record 19).

The Office in consultation with NYSDEC conducted a thorough review of the Transfer Application, including the voluminous exhibits, field studies and reports submitted by Permittee in the Transfer Application to demonstrate the proper assessment of potential significant adverse impacts to threatened and non-threatened species, and Permittee's efforts to avoid, minimize and/or mitigate, to the maximum extent practicable, any such impacts.

Additionally, the Office in consultation with NYSDEC conducted a thorough review of existing public information on bird, bat, and other species in the vicinity of the Facility, including, but not limited to, New York's Environmental Assessment Form Mapper, New York Natural Heritage Program, USFWS iPaC and ECOs databases, New York's Environmental Resource Mapper, Nature Explorer, and Biodiversity and Wind Siting Mapping Tool, eBird, Audubon Christmas Bird Counts, United States Geological Survey breeding bird surveys, the current New York Breeding Bird Atlas III program, New York State Ornithological Association, local birding organizations, Bat Conservation International's database on bat species ranges and NYSDEC bat information.

Further, the Office consulted with regional wildlife staff at NYSDEC for additional information, if any, concerning the area of the Facility site and reviewed the Permittee's interactions with NYSDEC during the Article 10 Application process between 2016 – 2020 and the Permittee's efforts to comply with NYSDEC Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects (DEC Guidance).

Based upon the comprehensive review of the Transfer Application described above, the Office in consultation with NYSDEC identified potential impacts to four (4) T&E species. Two (2) T&E species were identified during the Article 10 Application review stage. The Transfer Application included a proposed Net Conservation Benefit Plan (NCBP) for the identified T&E species (Northern Long-eared Bat and Bald Eagle) (Exhibit 22-H, Net Conservation Benefit Plan, Record 8). Two additional species are covered by a Site Specific Condition drafted by the Office in consultation with NYSDEC, which require a supplemental NCBP to include wintering habitat relative to the Northern Harrier and Short-eared Owl (Draft Permit at subpart 6(b)(i), Record 25). The proposed NCBP and supplemental NCBP remain under review, and no decisions have been made.

Finally, noting the proximity of the proposed Facility to the Iroquois National Wildlife Refuge and nearby Bald Eagle nests, the Office, in consultation with NYSDEC, drafted a Site Specific Condition requiring a post-construction avian and bat monitoring plan, to include at least two years of monitoring during the first five years of Facility operation (Draft Permit at subpart 6(b)(ii), Record 25). All information covered by the Site Specific Conditions (Draft Permit at subpart 6(b)(i) and (ii), Record 25) will be provided to the Office as a required pre-construction compliance filing, consistent with 19 NYCRR §900-3.2(a)(2).

CSAB, Inc. and SOS, Inc. Petitions

In its Petition, CSAB, Inc. claimed that the scope and methodology of the Permittee's studies are flawed, underrepresent potential significant adverse impacts, and are generally insufficient for the Office to exercise its discretion (Claim 1 at Record 33). CSAB, Inc. claimed that the likely impact to birds and bats are potentially significant, adverse and greater than presented by the Permittee in its materials (Claim 2 at Record 33). CSAB, Inc. claimed that, based upon local conditions, the mitigation measures proposed in the Draft Permit are insufficient (Claim 3 at Record 33).

In its Petition, SOS, Inc. claimed that the proximity of the Facility to Iroquois National Wildlife Refuge and two New York State Wildlife Management Areas require a factual hearing and that the Permittee has not completed sufficient studies in or near these resources (Claim 1, Record 36).

SOS, Inc. claims that not all threatened and endangered ("T&E") species required to be listed are listed in the Net Conservation Benefit Plan submitted by the Permittee (Claim 3, Record 36).

Permittee's Statement of Issues

In its Statement of Issues, the Permittee notes two items for clarification and/or potential adjudication. The Permittee disputes the Office's determination (Draft Permit at subpart 6(b)(i), Record 25) that the Facility is likely to result in the take of grassland bird wintering habitat such that a NCBP and associated mitigation are required (Statement of Issues, Record 34). In support of its claim, Permittee provides a Technical Memorandum summarizing that the results of agency consultation and publicly available data review do not support the presence of wintering habitat for the identified species (Northern Harrier and Short-eared Owl), and therefore, there is no basis for requiring an additional Net Conservation Benefit Plan and associated mitigation (Attachment D, Record 34).

The Permittee requests a clarification to the Office's second determination (Draft Permit at subpart 6(b)(i)), that the required post-construction monitoring plan would be consistent with post-construction monitoring required for other wind facilities. The Permittee further requests that requirement be listed as a separate condition that is not associated with an NCBP, because the NCBP will contain information limited only to T&E species. The Permittee further requests that the term "bat" be removed from this requirement, given that the monitoring would be for migratory birds and any post-construction monitoring for T&E bat species is already covered by USCs specified in the Draft Permit (Draft Permit at subpart 5, section IV(o)(4)(v)(b), Record 25).

Office Recommendation

The Office respectfully submits that no substantive or significant issues are presented which require adjudication because the concerns identified are addressed by the terms and conditions of the Draft Permit, and no factual dispute has been raised with respect to Permittee's ability to comply with the Draft Permit terms and conditions.

In compliance with Executive Law §§ 94-c(3)(d) and (e), the Draft Permit, together with USCs (Draft Permit at subpart 5, section IV(o), Record 25) and Site Specific Conditions (Draft Permit at subpart 6(b), Record 25), achieves a net conservation benefit to the impacted threatened and endangered species.

The Office, in consultation with NYSDEC, has thoroughly reviewed the claims made by CSAB, Inc. and SOS, Inc. regarding T&E species study flaws. The Office concluded that all T&E species known to occur within the Facility area are currently addressed by the Transfer Application, Draft Permit, and requirements for the proposed NCBP and supplemental NCBP. (CSAB, Inc. Petition at Claim 1, Record 33) (SOS, Inc. Petition at Claim 3, Record 36).

The Office, in consultation with NYSDEC, has thoroughly evaluated potential impacts to both threatened and non-threatened species, and considered the proximity of the proposed Facility to the Iroquois National Wildlife Refuge and other natural resources, and drafted Site Specific Conditions requiring a post-construction avian and bat monitoring plan to address potential impacts to migratory birds (to include at least two years of monitoring during the first five years of Facility operation).

The Office, in consultation with NYSDEC, has determined that the habitat assessments and field survey reports included in the Transfer Application were prepared in compliance with established NYSDEC and USFWS guidelines and requirements (Article 10 Exhibit 22 Terrestrial Ecology and Wetlands at p. 15, Record 19), and in compliance with Article 10 procedures. The habitat assessments and field survey reports meet the Office's standard for following existing survey protocols (19 NYCRR §900-1.3). No factual dispute has been raised in this regard.

The scope and methodologies advanced by SOS, Inc., CSAB, Inc. and CSAB, Inc.'s witness in these claims go beyond the critique of work done under a standard that is accepted and consistent with the law and regulations, and cross into advocacy for new standards. Until experts in the field propose an alternative methodology that is more appropriate for large-scale wind facilities -- and until that methodology becomes more widely accepted -- the established methodology in NYSDEC and USFWS guidelines and requirements utilized in the Transfer Application is acceptable for assessing potential avian impacts.

CSAB, Inc.'s claims of greater impact to birds and bats (Claim 2) and insufficient mitigation measures for listed species (Claim 3) lack merit. In compliance with Executive Law §§ 94-c(3)(d) and (e), the Draft Permit, together with USCs (Draft Permit at subpart 5, section IV(o), Record 25) and Site Specific Conditions (Draft Permit at subpart 6(b), Record 25), achieves a net conservation benefit to the impacted threatened and endangered species.

Claims 1 and 3 of SOS, Inc.'s Petition (Record 36) are unsupported and provide no facts or scientific information for the Office to evaluate. In situations where the Office has reviewed a Transfer Application and finds that a Facility, as conditioned by the Draft Permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant (19 NYCRR §900-8.3(c)(4)). CSAB, Inc. and SOS, Inc. have not met that burden.

No changes are proposed to Site Specific Condition 6(b) (Record 25).

3. Wetland Restoration and Mitigation Plan

The record on this Transfer Application is extensive, and includes all information developed during the Article 10 Application process, which began on September 23, 2016, and ended on January 28, 2021. The Transfer Application includes comprehensive wetland and stream delineation reports that were conducted through on-site field investigations of the Facility site within 500 feet of areas to be disturbed by construction (Article 10 Exhibit 22 Terrestrial Ecology and Wetlands at pp. 52-65, Record 19 and Appendix 22-J Wetland and Stream Delineation Report, Record 5 and 11 et seq.) (Article 10 Exhibit 23 Water Resources and Aquatic Ecology, Appendix 23-A and Figures, Record 7, 8 and 18).

The determination of wetland boundaries during on-site field delineations was made by the Permittee in accordance with the three-parameter methodology described in the U.S. Army Corps of Engineers (USACE) Wetland Delineation Manual (Environmental Laboratory, 1987), and the appropriate Regional Supplement to the Corps of Engineers Wetland Delineation Manual. Determination of wetland boundaries was also guided by the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region

(USACE, 2012). The boundaries of freshwater wetlands regulated under Article 24 of the New York Environmental Conservation Law (ECL) were delineated according to methods described in the New York State Freshwater Wetlands Delineation Manual (1995).

In addition to on-site delineations, a functions and values assessment was also conducted following the general methodology described in the Wetlands Functions and Values: Descriptive Approach described in the September 1999 supplement to The Highway Methodology Workbook (USACE Supplement) by the New England Division of the USACE (USACE, 1995). Wetland functions are ecosystem properties that result from the biologic, geologic, hydrologic, chemical and/or physical processes that take place within a wetland.

All delineated and predicted wetlands were mapped and keyed to the Preliminary Design Drawings consistent with USACE and NYSDEC standards, and provided to federal and state officials for review. Wetlands mapping includes wetlands identified within 50 meters of NYSDEC mapped wetlands, as well as vernal pools. A total of 57 wetlands were delineated within the wetland study area, totaling approximately 317.2 acres. The delineations state jurisdictional areas were then field-verified by NYSDEC regional wildlife staff. This information was then assembled into report form which included discussion of proposed measures to avoid, minimize and/or mitigate potential significant adverse environmental impacts to the maximum extent practicable (Exhibit 22, Appendices J-K and Figure 22-3, Record 5, 7, 9, 11 and 19).

The Office conducted a thorough review of the Transfer Application, including the voluminous exhibits, field studies and reports submitted by Permittee in the Transfer Application to demonstrate the proper assessment of potential significant adverse impacts to wetlands, streams and waterbodies, and Permittee's efforts to avoid, minimize and/or mitigate any such impacts to the maximum extent practicable.

Based upon the comprehensive review of the §94-c Transfer Application described above, the Office, in consultation with NYSDEC, determined that the Facility would require a Wetlands Restoration and Mitigation Plan in compliance with 19 NYCRR §§ 900-2.15(g) and 900-10.2(f). Accordingly, the Office, in consultation with NYSDEC, included the following Site Specific Condition in the draft Permit:

> Pursuant to §900-3.2(a)(2) and consistent with 19 NYCRR § 900-10.2(f), the Permittee is required to submit a Wetland Restoration and Mitigation Plan which shall mitigate the following impacts using the prescribed ratios and type:
>
> > (1) 0.006 acres of Class I Wetlands at a 3:1 mitigation ratio for impacts to emergent wetlands (creation only);
> >
> > (2) 1.10 acres of Class II Wetlands at a 2:1 mitigation ratio by area of impact (creation, restoration and enhancement);
> >
> > (3) 0.80 acres of Class III Wetlands at a 1:1 mitigation ratio by area of impact (creation, restoration and enhancement);
> >
> > (4) 0.003 acres of Unmapped Wetlands >12.4 acres at a 1:1 mitigation ratio by area of impact (creation, restoration and enhancement); and

(5) 1.42 acres of Adjacent Area of Class I and Class II Wetlands using enhancements and/or mitigation (e.g., planting of adjacent area, mitigating hydrologic changes).

CSAB, Inc. and SOS, Inc. Petitions

CSAB, Inc.'s Petition raised a general objection that the Transfer Application and Draft Permit failed to address or mitigate environmental impacts (CSAB, Inc. Petition at Issue Number 6, Record 33). In support, CSAB, Inc. offered the testimony of a former state agency employee with an M.S. in Environmental and Forest Ecology who would discuss deficiencies with respect to fish and wildlife and plant communities providing habitat (CSAB, Inc. Petition at Exhibit 4, Record 33).

SOS, Inc.'s Petition alleges that the proximity to the Iroquois National Wildlife Refuge warrants extra review to protect national and state resources from adverse environmental impacts, and that the documentation in the Transfer Application raises questions on the adequacy of the review (SOS, Inc. Petition at Claim 6, Record 36). SOS, Inc. further claims that the proximity to these resources also warrants extra review of invasive species management, and alleges that the site specific conditions in the Draft Permit fail to provide appropriate best management and mitigation measures to protect national and state resources from adverse environmental impacts (SOS, Inc. Petition at Claim 7, Record 36).

Office Recommendation

The Transfer Application included extensive wetlands and waterbodies documentation which was thoroughly reviewed by the Office in consultation with NYSDEC. The investigation of wetlands and waterbodies described in the Transfer Application is comprehensive, prepared in accordance with applicable federal and state standards, and includes detailed evaluation of potential on-site and off-site impacts and proposed mitigation measures.[11]

The Draft Permit, together with applicable USCs (Draft Permit at subpart 5, sections IV(p), (q) and (r), Record 25), Site Specific Conditions (Draft Permit at subpart 6(b), Record 25), and required Compliance Filings (Draft Permit at subpart 7, Record 25) avoids, minimizes and/or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the Facility on protected wetlands, streams and waterbodies, in compliance with Executive Law §§ 94-c(3)(d) and (e).

The Office in consultation with NYSDEC has thoroughly reviewed the claims made by CSAB, Inc. and SOS, Inc.

[11] This analysis includes consideration of direct and indirect impacts, such as requirements for a Stormwater Prevention and Pollution Plan ("SWPPP") and associated erosion and sedimentation control plan to address the anticipated stormwater management issues, prepared in accordance with New York State Standards and Specifications for Erosion and Sediment Control (NYS Standards), and the New York State Stormwater Management Design Manual (Article 10 Exhibit 23 Water Resources and Aquatic Ecology, Record 19).

The information presented by CSAB, Inc.'s witness in "summary note" form (Claim 6) does not provide any factual or scientific foundation that is supported by evidence (CSAB, Inc. Petition at Claim 6 and Exhibit 4, Record 33). Claim 6 is rebutted by the comprehensive analysis of wetlands, streams and waterbodies described above, as well as the Draft Permit, USCs and proposed Site Specific Conditions and Compliance Filings, and the analysis of expert Office and NYSDEC staff.

The Office's regulations and Draft Permit follow an avoid, minimize and/or mitigate hierarchy to balance the need to efficiently advance renewable energy facilities while ensuring protection of the environment. For example, a number of USCs are prospective in nature, and Compliance Filings for matters such as the Invasive Species Control and Management Plan (Draft Permit at subpart 7(I)(f)(4), Record 25) are subject to additional Office review and approval at the pre-construction stage in compliance with 19 NYCRR Subpart 900-10. The Wetlands Restoration and Mitigation Plan referenced in the comment on page 3 (p. 34, q, 10) (CSAB, Inc. Petition, Exhibit 4 at p. 3, Record 33) is the very document that this Site Specific Condition addresses, and the relevant information is required albeit at a different time. (Draft Permit at subpart 6(c), Record 25).

Similarly, Claims 6 and 7 of SOS, Inc.'s Petition are unsupported by factual or scientific foundation, and are rebutted by the Transfer Application materials described above. Claim 7 overlooks the Office's extensive requirements for an Invasive Species Control and Management Plan (19 NYCRR §§ 900-2.14(b)(3) and 900-10.2(f)(4)), incorporated as an express compliance condition in the Draft Permit (Draft Permit at subpart 7(I)(f)(4), Record 25). SOS, Inc.'s claims are also rebutted by the Draft Permit and the analysis of the Office and NYSDEC.

Office and NYSDEC's expertise in evaluating an application and supporting information is critical to determining whether an issue is adjudicable. The burden of persuasion is on the potential party proposing the issue related to that component to demonstrate that it is both substantive and significant. CSAB, Inc. and SOS, Inc. have failed to do so here.

4. Updated Noise Modeling and Analyses

The Applicant has filed sound contours associated with the turbine selected for the project, as well as sound impacts predicted with the computer noise model for participating and non-participating receptors and for portions of non-participating lands. The Applicant has also indicated that the location of the collection substation has changed slightly and that it will present final computer noise modeling with mitigating solutions as part of the compliance filing. Id., p. 8.

Consistent with 19 NYCRR §900-3.2(a)(2), the Office determined to include a site-specific condition requiring the submission of comprehensive updated noise modeling in compliance with 19 NYCRR §900-2.8 for the turbine(s) selected by Permittee, to be submitted as an additional pre-construction compliance filing consistent with 19 NYCRR §900-10.2 (Draft Permit, subpart 6(d), Record 25).

The Municipalities' Joint Petition and Statement of Compliance (Record 32) raised no challenge with respect to this site-specific condition. Accordingly, the Office respectfully submits that the

Town of Barre and County of Orleans did not raise any substantive or significant issues for adjudication or claims for party status based upon this site specific condition of the Draft Permit.[12]

Accordingly, the Office respectfully submits that there are no substantive or significant issues for adjudication regarding this site specific condition of the Draft Permit (Draft Permit at subpart 6(d), Record 25).

5. Noise Complaint Resolution Protocol and Sound Testing Compliance Protocol

The Office conducted a thorough review of Permittee's December 4, 2019 Noise Complaint Resolution Plan, submitted to the Siting Board in connection with Permittee's Article 10 Application at Appendix 19-B, for compliance with the Office's regulations (including USCs) (Appendix 19-B Noise Complaint Resolution Plan, Record 6). Based upon this review, the Office determined that Permittee's proposed plan did not comply with the Office's requirements, and included a Site Specific Condition requiring a final Noise Complaint Resolution Protocol and Sound Testing Compliance Protocol at §§ 900-6.5(a)(2)(i), (a)(4)(iv) and (a)(4)(v), and §900-6.4(k)(2) at subpart 6(e) of the Draft Permit:

> Pursuant to §900-3.2(a)(2) and consistent with 19 NYCRR §900-10.2, the Permittee shall submit a final Noise Complaint Resolution Protocol and Sound Testing Compliance Protocol meeting the requirements of §§ 900-6.5(a)(2)(i), (a)(4)(iv) and (a)(4)(v), and §900-6.4(k)(2).

The Town maintains that a substantive and significant issue exists requiring adjudication due to the failure of Permittee's proposed Noise Complaint Resolution Plan to comply with the noise complaint requirements in §350-106(3) of the Barre Zoning Code (Joint Petition at pp. 18-21 and Statement of Compliance at 6-7, Record 32). The Town further maintains that its standards are required to ensure (through a fund) that actual noise impacts are consistent with modeled noise impacts from the facility, and further maintains that Permittee's proposed plan is deficient in several respects with the Town's standards. Id. In support of its position, the Town offered the testimony of a Senior Acoustical Engineer from LaBella Associates who would opine as to the reasonableness of the Town's standard, deficiencies in the noise monitoring requirements in the Draft Permit and in Permittee's proposed plan, and its potential impact on noise standard compliance. Id.

The Office respectfully disagrees that this is a substantive and significant issue because the Office is not required to make a final determination on the sufficiency of Permittee's proposed plan at this stage of the proceeding under 19 NYCRR Part 900. Permittee's plan, as noted in the Draft Permit condition, remains subject to staff review at the pre-construction compliance filing stage in accordance with 19 NYCRR §900-10.2. Based upon a detailed review by the Office's noise expert, who found that the Permittee's proposed plan was insufficient to comply with the Office's standards, the Office determined in compliance with 19 NYCRR §900-3.2(a)(2) to: (a) include a site-specific condition to require additional information to avoid, minimize and mitigate potential

[12] As discussed hereinabove, the Office acknowledges that the Town asserted a different nighttime standard for wind facility noise than the Office's standards at 19 NYCRR §§ 900-2.8(b) and 19 NYCRR 900-6.5(a), and that the Office elected not to apply the Town's standard in compliance with Executive Law 94-c(5)(e) and §19 NYCRR §900-2.25.

significant adverse noise impacts to the maximum extent practicable; and (b) add requirements for additional compliance filings requiring additional Office review and approval of Permittee's plan consistent with 19 NYCRR §900-10.2. In other words, to address the issue raised by the Town, the Office already imposed additional site-specific conditions as part of the Draft Permit; there is therefore no potential for this issue to result in denial of the permit, a major modification to the project, or the imposition of additional conditions. The additional requirements included by the Office serve to ensure that the Permittee will comply with the Office's standards; there is, therefore, not sufficient doubt about the Permittee's ability to meet the standards. The Office respectfully submits that this does not rise to the level of an adjudicable issue, as sufficiency of future compliance filings by the Permittee have yet to be reviewed by the Office pursuant to 19 NYCRR §900-10.1.

Accordingly, the Office respectfully submits that there are no substantive or significant issues for adjudication regarding this site specific condition of the Draft Permit (Draft Permit at subpart 6(e), Record 25).

6. Updated Screen Planting Plans

The Office conducted a thorough review of Permittee's comprehensive Visual Impact Assessment ("VIA") included with the Article 10 Application (Exhibit 24 Visual Impact, Visual Impact Report and Appendices A-F, Record 6) for compliance with the Office's standards at 19 NYCRR Part 900, including an updated conceptual planting plan included in the Transfer Application to further avoid, minimize and mitigate visual impact at nearby residences by screening the substations and the operations and maintenance building from view (Transition Supplement Overview at Section 5, Exhibit 8 (Appendix E), Record 13). Based upon this review, the Office determined that additional plan details were required to avoid, minimize and mitigate potential visual impacts to nearby properties. Accordingly, the Office included a site-specific condition requiring:

> Pursuant to §900-3.2(a)(2) and consistent with 19 NYCRR §900-10.2, the Permittee shall submit, as a required component of the Visual Impacts Minimization and Mitigation Plan under 19 NYCRR §900-6.4(l)(1), updated Screen Planting Plans for the Substation Site, to include plan details for the location and arrangement of electrical substation equipment and perimeter fencing, screening vegetation maintenance heights, and separation distances from screen planting vegetation, and demonstrating that safe and reliable clearance distances from any tall-growing tree species proposed can be achieved or if revised planting schedule(s) and tree species selection(s) are proposed.

The Office respectfully submits that there are no substantive or significant issues for adjudication regarding this site-specific condition of the Draft Permit (Draft Permit at subpart 6(f), Record 25).

7. Updated Visual Impacts Minimization and Mitigation Plan and Wind Facility Lighting Plan

As noted, the Office conducted a thorough review of Permittee's Transfer Application, including Permittee's comprehensive Visual Impact Assessment included with the Article 10 Application (Exhibit 24 Visual Impact, Visual Impact Report and Appendices A-F, Record 6) and Federal Aviation Administration (FAA) requirements for tower marking and lighting (Exhibit 25 Effect on Transportation, section (f), Record 6), for compliance with the Office's standards at 19 NYCRR Part 900. This review also included consideration of an updated conceptual Lighting Plan

submitted with the Transfer Application for the collection substation and the operations and maintenance building (Transition Supplement Overview at Section 5, Exhibit 8 (Appendix F), Record 13). Based upon this review, the Office determined that additional plan details were required to avoid, minimize and mitigate potential visual impacts to nearby properties. Accordingly, the Office included a site specific condition requiring:

> Pursuant to §900-3.2(a)(2) and consistent with 19 NYCRR §900-10.2, the Permittee shall submit, as a required component of the Visual Impacts Minimization and Mitigation Plan under 19 NYCRR §900-6.4(l)(1), the following:
>
> > (1) an updated Wind Facility Lighting Plan, to include plan and profile lighting plan details; cut sheets for lighting luminaires, and site perimeter lighting and building wall pack lighting fixtures utilizing full-cutoff design for avoiding off-site glare; and
> >
> > (2) an updated Collector Substation Yard Lighting Plan, to include lighting fixture details and manufacturer cut sheets for the entire station including the substation control building.
>
> (Draft Permit at subpart 6(g), Record 25).

Town/County Joint Petition and Statement of Compliance

The Town maintains that a substantive and significant issue exists with respect to the Permittee's proposed Lighting Plan because the plan lacks the use of an aircraft detection lighting system ("ADLS") or similar lighting mitigation, as required by §350-104(4) of the Town of Barre Zoning Code (Joint Petition pp. 7-9 and Statement of Intent pp. 2-3, Record 32).

The Office disagrees with the Town's interpretation as a matter of law. After conducting a thorough review of the Permittee's materials, the Office required that Permittee submit an updated Wind Facility Lighting Plan as a required component of the Visual Impacts Minimization and Mitigation Plan under 19 NYCRR §900-6.4(l)(1). The "Lighting Plan" and "Visual Impacts Minimization and Mitigation Plan" in 19 NYCRR §900-6.4(l)(1) are defined in 19 NYCRR §900-2.9(d), which includes a requirement for consideration of ADLS at 19 NYCRR § 900-2.9(d)(9)(iii)(c):

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

This requirement is incorporated into the Draft Permit (Draft Permit at subpart 5, section IV(l)(1)(iv) at p. 14, Record 25). The updated Lighting Plan shall be submitted to the Office for

prior review and approval as a pre-construction compliance filing consistent with 19 NYCRR §900-10.2. Accordingly, the Lighting Plan required under 19 NYCRR §900-2.9(d)(9)(iii)(c) expressly includes as part of the exterior lighting design that the Permittee complete an evaluation of ADLS (19 NYCRR §900-2.9(d)(iii)(c)). Based upon the foregoing, the Office respectfully submits that no substantive and significant issue exists with respect to the assessment of ADLS to mitigate potential visual impact.

SOS, Inc. Petition

SOS, Inc. also maintained there was a substantive and significant issue with respect to the Permittee's Lighting Plan if ADLS is not provided (SOS, Inc. Petition at Claim 4, Record 36). Because the requirement to consider ADLS was included within the Draft Permit (Draft Permit at subpart 5, section IV(l)(1)(iv), and subpart 6(g), Record 25), the Office respectfully submits that Claim Four of the SOS, Inc. Petition did not raise any substantive or significant issues requiring adjudication.

SOS, Inc. further maintained that the location of the Facility in proximity to extensive wildlife resources requires that additional visual studies be completed (SOS, Inc. Petition at Claim 2, Record 36). This claim is discussed with the CSAB, Inc. claim, next.

CSAB, Inc. Petition

CSAB, Inc. claimed that substantive and significant issues requiring adjudication are presented by the evidence submitted by the Permittee to support its Transfer Application and Permittee's assessment of potential significant adverse visual impacts (CSAB, Inc. Petition, Record 33). CSAB, Inc. stated that the comprehensive visual impact assessment conducted by the Permittee failed to fully quantify potentially adverse significant visual impacts, and that the Draft Permit failed to minimize or mitigate potential visual impacts (CSAB, Inc. Petition at Claim 4, Record 33). In support of its claim, CSAB, Inc. proffered the testimony of, and a report prepared by, James Palmer, PhD (Claim 4, Exhibit 2, Record 33) assessing the scope and methodology of the Visual Impact Assessment ("VIA") Report submitted by the Permittee (Article 10 Exhibit 24 Visual Impacts, Appendix 24 Visual Impact Assessment Report, and VIA Appendices A-F, Record 6).

The Office conducted a thorough review of Permittee's comprehensive VIA Report included with the Article 10 Application (Exhibit 24 Visual Impact, VIA Report and VIA Appendices A-F, Record 6) for compliance with the Office's standards at 19 NYCRR Part 900. This review included evaluation of the measures proposed by the Permittee to avoid, minimize and mitigate visual and other impacts to the maximum extent practicable. The Office found that the Permittee's VIA Report had been conducted in accordance with accepted methodologies and standards.

CSAB, Inc. does not bring substantive and significant offers of proof or showings that would lead to a different determination regarding the overall characterization of probable visual impacts or needs for additional mitigation measures beyond those imposed by the recommended Draft Permit USCs, Site Specific Conditions and Compliance Requirements (Draft Permit, Record 25).

CSAB, Inc.'s witness asserts that the 5-mile radius minimum visual study area ("VSA") required by the regulatory requirements for wind energy facilities, and the actual 10-mile radius VSA that was analyzed in the VIA are not sufficient; and, that "a radius of 20 miles is not unreasonable."

(CSAB, Inc. Exhibit 2, un-numbered page 2, Record 33). The Office notes that there is no basis upon which to require that the Transfer Application and VIA should be subject to re-consideration and challenge due to an alleged deficiency based on papers cited by CSAB, Inc.'s witness Initial Review: the Sullivan, et. al., papers are based on conditions not applicable to the instant proceeding, since the Facility location is not in the desert and mountainous regions of the western United States, nor is this an offshore wind project, where large distances of open water would afford unobscured vistas across greater distances.

CSAB, Inc.'s witness also poses the unfounded critique that "there is no systematic analysis that accounts for turbines in the foreground having greater visual prominence that *(sic)* turbines in the middle ground or background." Id. The Office has reviewed the VIA and supporting information and readily recognizes that the distance from a viewpoint location to the turbines depicted in the photographic simulations of the Facility affects the spatial and visual prominence of those turbines in the landscape.

CSAB, Inc.'s witness also attempts to find fault with the photosimulations, asserting that improper photographic focal lengths were used, and that there are problems with the project representations at Viewpoint 64, Viewpoint 71, and Viewpoint 98, since he alleges that descriptions of the photosimulation views to turbines "greater visual prominence not represented in the photosimulations" (CSAB Ex. 2, unnumbered pg. 3). The Office review of the VIA for these cited viewpoint photosimulations indicates that these specific photo-simulations include multiple-page panoramic photosimulations of multiple turbines as described in the VIA. Photosimulations of Viewpoint 64 includes a 4-panel panoramic view (Application, VIA Appendix D, Sheet 34 of 70); simulation of Viewpoint 71 includes a 2-page panoramic view showing three turbines (VIA Appx. D, sheet 40 of 70). Camera information and lens focal lengths are also reported in Ex. 24 VIA Appx. D, and are appropriate.

CSAB, Inc.'s witness complaints in this regard do not reflect a thorough review of the exhibits with which he is taking specific issue: the representation of photosimulations in Ex. 24 do not account for the full analysis and presentation of additional contextual photographs, supporting locational information and simulation views as presented in VIA Appendices. CSAB, Inc. presents further arguments or questions, but also acknowledges that Heritage Wind's consultant "EDR has prepared a VIA that meets the profession's technical standards" (CSAB Ex. 2, unnumbered page 2).

Other disputes raised by CSAB, Inc. regarding a survey of residents living near a wind farm in Lewis County, as reported in the VIA, do not raise material facts that would lead to a different outcome.

Based upon the foregoing, the Office respectfully submits that no substantive and significant issues were raised by the CSAB, Inc. Petition (Record 33) or SOS, Inc. Petition (Record 36) with respect to the assessment of the VIA to evaluate potentially adverse significant visual impacts of the Facility.

8. Updated Final Decommissioning and Site Restoration Plan

Pursuant to §900-3.2(a)(2) and consistent with 19 NYCRR § 900-10.2(b), the Permittee shall submit an updated Final Decommissioning and Site Restoration Plan for the Wind Facility, to include: details concerning the weight of salvageable material and approximation of percentage of material contained in each component (e.g., tower steel, nacelle, etc.); line items for each material's overall weight value per unit, and corresponding salvage value; line items for access road installations (including length) over stable and weak subgrade locations in the civil works removal cost section; and Permittee's plan for the repair of non-operational turbine(s) due to manufacturer complications or other delay(s) in excess of one (1) year and beyond Permittee's control, including requirements for notice to the Office accompanied by supporting justification, evidence of Permittee's commitment to diligently complete all work, and periodic status updates to the Office during such occurrences.

As described above, the Office will review the required Final Decommissioning Site Restoration Plan required as a pre-construction compliance filing (19 NYCRR §900-10.2(b)(1)), including the additional detailed information listed at site specific condition 6(h) (Draft Permit, subpart 6(h), Record 25) and determine its validity. The Office will consider inclusion of salvage value (related to salvageable material) but generally will not accept re-sale value of major facility components. Per 19 NYCRR §900-6.6, if the permittee and the host municipalities cannot come to an agreement as to the appropriate amount of financial security to be provided, the Office shall make the final determination based on the content of the Final Decommissioning and Site Restoration Plan. Final decommissioning triggering protocols shall be established in the Final Decommissioning and Site Restoration Plan, the proof of filing of letter(s) of credit (or other financial assurance approved by the Office) and agreements between the Permittee and the Towns, Cities, and Villages, establishing a right for each municipality to draw on the letter of credit dedicated to its portion of the Facility, required at (19 NYCRR §900-10.2(b)). Discussion of triggering protocol in the Final Decommissioning and Site Restoration Plan shall incorporate language of site specific condition 6(h) (Draft Permit, subpart 6(h), Record 25), which requires inclusion of the Permittee's plan for the repair of non-operational turbine(s) due to manufacturer complications or other delay(s) in excess of one (1) year and beyond Permittee's control, including requirements for notice to the Office accompanied by supporting justification, evidence of Permittee's commitment to diligently complete all work, and periodic status updates to the Office during such occurrences.

Accordingly, the Office respectfully submits that there are no substantive or significant issues for adjudication regarding this site specific condition of the Draft Permit (Draft Permit at subpart 6(h), Record 25).

e. Required Compliance Filings

The Office conducted a thorough review of the Transfer Application, including all exhibits, reports and supporting information, and determined the Facility's compliance (or ability to comply) with all required pre-construction and post-construction compliance filings in 19 NYCRR Subpart 900-10, to further avoid, minimize and mitigate potential significant adverse environmental impacts of the Facility to the maximum extent practicable. Compliance filings that were determined by the Office to be not applicable to the Facility were labeled accordingly, as stated in subpart 7 to the Draft Permit (Draft Permit at subpart 7, Record 16).

With the exception of the foregoing, the Permittee indicated that its Facility will comply with all remaining USCs at 19 NYCRR Subpart 900-6 and compliance filings under 19 NYCRR Subpart 900-10.

## OTHER SIGNIFICANT AND SUBSTANTIVE ISSUES

1. Recording of Waivers for Setbacks, Noise and Shadow Flicker

The Joint Petition and Statement of Compliance, the County of Orleans and Town of Barre indicate concern with the lack of a recording requirement to put subsequent landowners on notice of the waiver of any Town requirements for setbacks, noise and shadow flicker pursuant to an agreement between Permittee and a landowner (Joint Petition at pp. 12-13 and Statement of Compliance at p. 4, Record 32). The Town argues that this deficiency is substantive and significant because it violates §350-104(A)(3) of the Barre Town Code and would require a substantial modification to the Draft Permit to correct. The Office disagrees that this is a substantive and significant issue and notes that this concern will be addressed as a required real property pre-construction compliance filing in accordance with 19 NYCRR §900-10.2(h).

2. Proposed New County Wireless Broadband System

In their Joint Petition, the County of Orleans and Town of Barre indicated concern with potential technical interference of the Facility with a new wireless broadband system that County officials recently began evaluating, to expand reliable and affordable high-speed broadband internet access to residents of the Town and County (Joint Petition at pp. 24-25, Record 32). Noting that the proposed system does not yet exist, the Office respectfully submits that this proposed new wireless broadband system does not present any substantive or significant issues requiring adjudication and notes that the parties will need to separately comply with all applicable technical rules and regulations of the Federal Communications Commission ("FCC") independent of the Executive Law §94-c siting permit process (Executive Law §94-c(4)(a)).

3. Socioeconomic Impacts

SOS, Inc. argues in its Petition that the Transfer Application and Draft Permit do not comply with §900-2.19(h), which requires an application to contain a "comparison of the fiscal costs to the jurisdiction that are expected to result from the construction and operation of the facility to the expected tax revenues (and payments in lieu of taxes, benefit charge revenues and user charge revenues) generated by the facility," because "it does not factor in the impacts to tourism, birding and other wildlife uses." (SOS, Inc. Petition at Claim 5, p. 12, Record 36). However, there is no such requirement in the regulation.

The Office thoroughly reviewed the Article 10 Application Exhibit 27 "Socioeconomic Effects," which contains a thorough analysis of socioeconomic impacts, including a discussion of the incremental annual taxes or payment in lieu of taxes (PILOT) payments. (Exh. 27(i), p. 18, Record 19). Additional analysis of impacts to tourism were not required under Article 10[13] and are not required by Executive Law §94-c or the regulations. Based upon this review and Article 10 precedent, the Office properly concluded Permittee shall comply with the USCs at 900-6(I)(h). Accordingly, the Office respectfully submits that no substantive or significant issue has been raised.

Recommendation Approving Draft Permit

Based upon comprehensive review of the Transfer Application, the Office found and determined that the proposed Facility, together with the USCs, site specific conditions and required compliance filings set forth in the Draft Permit, would comply with Executive Law §94-c and applicable provisions of the Office's regulations at 19 NYCRR Part 900, and avoid, minimize and/or mitigate, to the maximum extent practicable, potential adverse environmental impacts of the Facility. Accordingly, the Office recommends the issuance of the Draft Permit subject to minor modifications as discussed herein.

Dated: June 4, 2021

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[13] See Canisteo (Case 16-F-0205) at pp. 40 – 41: "neither Article 10 nor its comprehensive implementing regulations require the Board to consider a project's impacts on property values or tourism. For example, although Mr. Sharkey asserts that the CWE should have considered these impacts pursuant to its evaluation of socioeconomic impacts, Part 1001.27 - which establishes the application requirements related to assessing such impacts - does not require such an analysis."