STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE
OFFICE OF RENEWABLE ENERGY SITING
AND ELECTRIC TRANSMISSION

ORES DMM Matter Number 23-03023[1] – Application of FORT EDWARD SOLAR, LLC, for a Major Renewable Energy Facility Siting Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 100-Megawatt (MW) Solar Energy Facility Located in the Town of FORT EDWARD, WASHINGTON COUNTY.

RULING OF THE ADMINISTRATIVE LAW JUDGE
ON ISSUES AND PARTY STATUS, AND ORDER OF DISPOSITION

(Issued December 11, 2025)

HENRY JAMES JOSEPH and DAWN MacKILLOP-SOLLER,
Administrative Law Judges:

I. Background and Proceedings

On August 22, 2024, Fort Edward Solar, LLC (applicant), applied pursuant to Public Service Law (PSL) article VIII to the New York State Office of Renewable Energy Siting (Office or ORES) for a permit to construct and operate a 100-megawatt (MW) wind energy facility (facility or project) in

[1] As previously noted in the ruling amending the caption dated January 27, 2025, effective February 3, 2025, the case number changed from ORES Permit Application No. 23-00085 to ORES DMM Matter No. 23-03023 due to the migration of the electronic case file in this matter from the Office of Renewable Energy Siting and Electric Transmission's Permit Application Portal to the Department of Public Service's (DPS) Document and Matter Management system (see DMM Item No. 65).

the Town of Fort Edward (the Town), Washington County.[2] The proposed facility components include commercial-scale solar arrays utilizing bifacial solar panels affixed to single-axis tracking racking systems, access roads, inverters, fencing, medium voltage 34.5 kV underground collection lines, and electrical interconnection components. The facility would interconnect to the New York power grid via a point-of-interconnection (POI) switching station to National Grid's Mohican to Battenkill 115 kV Line #15 transmission line.[3]

After receiving a notice of incomplete application from ORES staff on October 21, 2024, applicant filed supplemental materials on February 3, and May 23, 2025, and an amended application on March 28, 2025. On May 27, 2025, ORES staff issued a notice of complete application.[4]

On July 28, 2025, the Office issued a draft siting permit for the facility, which was posted for public comment on the Department of Public Service Document and Matter Management System (DMM).[5] Also issued on that same date and posted on DMM was a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement

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2 See DMM Item No. 42, Notice of Application Filing and Availability of Local Agency Account Funding, Aug. 26, 2024; DMM Item Nos. 34 and 41, application materials.

3 See DMM Item No. 29, application exhibit 2, overview and public involvement at 1.

4 See DMM Item No. 54, notice of incomplete application (NOIA); DMM Item No. 61, applicant amendment letter; DMM Item No. 66, applicant response to NOIA; DMM Item Nos. 74 and 77, applicant responses to NOIA and minor modification; DMM Item No. 78, notice of complete application; see also 16 NYCRR 1100-4.1(g).

5 See DMM Item No. 80, draft siting permit.

of the issues determination procedure (combined notice).[6] Applicant published the combined notice in the Glen Falls Post-Star on August 12, 2025, and the Eagle Newspaper on August 14, 2025, and served the combined notice on the party list and persons and entities required to receive copies of the application pursuant to 16 NYCRR 1100-1.6(a) or notice of the application pursuant to 16 NYCRR 1100-1.6(c).[7]

The combined notice advised that a public comment hearing on the draft siting permit would be held at 6:00 p.m. on Tuesday, September 30, 2025, at the Durkeetown Church, 2 Durkeetown Road, Fort Edward, NY 12828, with written comments accepted until 5 p.m. on Friday, October 3, 2025. Pursuant to the combined notice, petitions for party status to participate in the issues determination procedure and, if necessary, any adjudicatory hearing, were to be filed on or before 4:00 p.m. on Monday, October 6, 2025. In addition, the combined notice established deadlines for the submission of applicant's issues statement, and the municipal statements of facility compliance with applicable local laws (October 6, 2025), and for submission of responses by applicant and ORES staff, and the submission of applicant's response to comments received during the public comment period (October 27, 2025.)[8]

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[6] See 16 NYCRR 1100-8.2(d); DMM Item No. 81, combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of issues determination procedure.

[7] See DMM Item No. 89, affidavits of service and publication. Note that the transcript of the public comment hearing should state that the combined notice was published as stated above. See DMM Item No. 83, public hearings transcript at 3-4.

[8] See 16 NYCRR 1100-8.2(d)(3), 1100-8.4(d), and 1100-8.4(b).

II. Public Comment Hearing; Summary of Public Comments

In accordance with the combined notice, the public comment hearing convened as scheduled on September 30, 2025, at 6:00 p.m. at the Durkeetown Baptist Church, 2 Durkeetown Road, Fort Edward, New York. Approximately 75 individuals were in attendance, including staff from ORES, and 20 individuals provided comments. Those in favor of the facility generally cited the need for renewable energy and particularly the sustainability of family farms only as a result of the revenue from leasing part of the farm to the facility; several commenters were participating landowners and farmers themselves. One speaker elaborated on his experience living proximate to another solar facility, denied that it is an "eyesore" and observed no negative impacts to wildlife. Those opposed to the facility generally were concerned with impacts to grassland bird habitat and the conservation thereof, and many voiced general support for solar power and renewable energy; several voiced more generalized concerns including corporate integrity and impacts from panel manufacture and disposal. Four speakers identified themselves as officers or board members of the intervenor group Grassland Bird Trust (GBT) and one identified as a member.

By the close of the public comment period on October 3, 2025, ORES received a total of 258 written comments[9] posted to DMM, or sent by email to the ORES hearings or the ORES general email boxes, via U.S. mail, or by other delivery service. Organizations posting comments include GBT, the New York State Ornithological Assoc., Inc., the National Audubon Society, the American Bird Conservancy, the Northern Catskills Audubon

[9] A total of 263 comments were posted, however, five individuals posted twice each.

Society, the Audubon Society of the Capital Region, the Brooklyn Bird Club, and the South Shore Audubon Society. Notably, many comments opposing the facility were sent from locations far outside of Fort Edward. At least 40 comments were from sent from the City of New York, 11 from Nassau and Suffolk Counties, three from New Jersey, one from Massachusetts, and several from Westchester County.[10]

Eighteen comments support the project, including comments from members of the New York State Laborers Local 190. Supporters note the "amount of care" that the project took to avoid impacts to avian species, that the facility would only use private agricultural land to site panel arrays, and that the more important danger to birds is climate change. In general, those opposed to the facility, similar to the commenters at the public comment hearing, were primarily concerned with grassland bird impacts, with most stating their support "in general" of renewable energy, but not this facility in this "ecologically sensitive" location.

III. Petitions for Party Status and Proposed Issues for Adjudication

Applicant

In accordance with the deadline in the combined notice, applicant timely filed a statement of issues on October 6, 2025, indicating it "has not identified any substantive or significant issues requiring adjudicatory hearings in this proceeding" and that it "generally finds the terms of the Draft Permit acceptable." It notes however two conditions, uniform

[10] A precise count is difficult without determining in which county some of the addresses are located.

standard and conditions 4.4(o)(4) and 4.4(o)(6), are inapplicable to the facility as there is no evidence of "nests or roosts" for Northern Long-eared Bats or Bald Eagles, species to which those conditions are addressed and, therefore, requests that they be omitted.[11]

Grassland Bird Trust (GBT)

On October 6, 2025, GBT timely filed its petition for party status and statement of issues for adjudication, seeking full-party status, or in the alternative amicus status.[12] GBT raises the following issues for adjudication:

1) "The Draft Permit fails to avoid, minimize, or mitigates significant adverse impacts to grassland birds by failing to account for the facility's location within a Grassland Bird Conservation Center, an Audubon Important Bird Area, and a DEC Wildlife Management Area."
2) "Whether the uniform standard condition in the draft permit setting a default mitigation ratio of less than 1:1 will achieve a net conservation benefit in this case given the unique and enhanced adverse impacts flowing from the project's location in a GBCC, IBA, RWCA, and surrounding a WMA."
3) "The Applicant's proposed Net Conservation Benefit Plan cannot Achieve [*sic*] even the regulatory minimum mitigation ratio because the parcel

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11 See DMM Item No. 85, applicant statement of issues (applicant statement).

12 See DMM Item No. 84, GBT petition for full party status and statement of issues for adjudication (GBT petition).

identified for conservation is no longer available for use as part of the NCBP."

4) "All other substantive and significant issues raised in Exhibits A-J of this Petition."[13]

GBT submits ten exhibits in support of the petition. Exhibit A is an assessment of avian impacts and mitigation prepared by the group with the assistance of a consultant and exhibit B are their curricula vitae. Exhibit C is a map "demonstrating the location of the Project", which is discussed in some detail below. Exhibit D is an affirmation from a State Senator, submitted in litigation concerning a different facility, criticizing ORES. Exhibit E is a Department of Environmental Conservation (DEC) press release from 2016. Exhibit F is a letter from the Agricultural Stewardship Association stating its view that the use of land parcels, identified by applicant for mitigation for this facility, violates existing agricultural conservation easements they hold and withholding their consent to use the parcels for mitigation purposes. Exhibit G is "a collection of public comments" made by three "major conservation organizations." Exhibit H is DEC's Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (DEC Strategy). Exhibit I is an Assembly bill with its legislative memorandum. Exhibit J is a proposed stipulation of settlement.[14]

Applicant and ORES Staff Responses

On October 27, 2025, applicant filed its response to the GBT and public comments on the draft permit and ORES staff

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[13] GBT petition at 30, 34, 41, 43.

[14] Id., exhibits a-j.

filed its response.[15] Both applicant and ORES staff state that GBT has not raised a substantive and significant issue for adjudication and have not established an error of Law or abuse of discretion by ORES in issuing the draft siting permit.

American Land Rescue Fund

After the expiration of the time for the filing of petitions for party status, proposed intervenor group American Land Rescue Fund, Inc. (ALRF), filed a petition for party status and a separate motion to accept the late filing.[16] In an email ruling dated November 7, 2025, ALJ Joseph noted that with respect to the motion, 16 NYCRR 1100—8.4(e)(2) mandates inclusion of the contents of the ALRF motion – allegations regarding good cause, absence of delay or prejudice, and material assistance in the determination - within the petition itself, directed the parties to deem the motion and its contents to be part of the petition itself and not a separate motion, and set a deadline for responsive papers.[17] On November 24, 2025, applicant and ORES both filed responses.[18] On November 25, 2025,

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[15] See DMM Item No. 91, applicant response to issues statements, party status requests, and public comments on draft permit and attachments a-c (applicant response); DMM Item No. 90, ORES staff response to petition for party status and statement of issues by applicant (ORES staff response).

[16] See DMM Item No. 94, ALRF petition for party status (ALRF petition), sworn declaration of Alexandra Fasulo (Fasulo declaration) and motion to accept late filing (ALRF motion). I note that the sworn declaration is not signed by Ms. Fasulo. Inasmuch as no responding party objected, I ignore this defect. See CPLR 1001.

[17] See DMM Item No. 95, ALJ email ruling, dated November 7, 2025.

[18] See DMM Item No. 96, applicant response to ALRF petition; DMM Item No. 97, ORES staff response to ALRF petition. As

ALRF filed a request for leave to file a reply.[19] By email correspondence to the parties, ALJ MacKillop-Soller directed the parties to submit responses by December 1, 2025. On November 25, 2025, staff submitted its response to ALRF's request for leave to file a reply.[20]

IV. Issues Determination Procedure

This ruling addresses issues that are raised by the parties or potential parties during the issues determination procedure under 16 NYCRR 1100-8.3(b). To issue a final siting permit pursuant to Public Service Law article VIII, ORES must make a finding that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary site-specific conditions (SSCs), and applicable compliance filings:

1) complies with Public Service Law article VIII and applicable provisions of the Office's regulations at 16 NYCRR part 1100 (Part 1100);

2) complies with substantive provisions of applicable State laws and regulations;

3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the

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the motion was ordered deemed part of the petition, references in the responses to the motion are deemed to be references to the petition, as the motion was subsumed in the petition by the order.

[19] See DMM Item No. 98, ALRF request for leave to file reply with proposed reply and certificate of service.

[20] See DMM Item No. 99, ORES staff response to ALRF reply request.

Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the facility;

4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and

5) achieves a net conservation benefit with respect to any impacted threatened or endangered species.

In making the required finding, the Office is directed to consider the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.[21]

An initial step in the hearing process on an application and draft siting permit pursuant to 16 NYCRR subpart 1100-8 is the issues determination procedure. The purpose of the issues determination procedure is to determine whether substantive and significant issues of fact related to the findings that the Office must make on an application require adjudication and, if not, to resolve legal issues related to those findings. Pursuant to 16 NYCRR 1100-8.3(b)(2), the specific purposes of the issues determination procedure are:

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[21] See Public Service Law (PSL) §§ 138(1), 142(5); Climate Leadership and Community Protection Act (CLCPA), L 2019, ch 106, § 7; see also ORES DMM Matter No. 21-02104, Matter of Bear Ridge Solar, LLC, Decision of the Executive Director, July 31, 2023, at 9-10; ORES DMM Matter No. 21-00976, Matter of Homer Solar Energy Center, LLC, Decision of the Executive Director, Jan. 9, 2023, at 6-7; ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar Energy LLC, Decision of the Executive Director, Dec. 9, 2022, at 7-8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 13, 2022, at 8-9, citing Executive Law former § 94-c(3)(b)-(d), (5)(e).

(i) to narrow or resolve disputed issues of fact without resort to taking testimony;

(ii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues as set forth in 16 NYCRR 800-8.3(c);

(iii) to receive argument on whether party status should be granted to any party-status petitioner to participate in any adjudicatory hearing that is determined to be required;

(iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and

(v) to decide any pending motions.

The procedure under 16 NYCRR 1100-8.3(b) is a form of summary judgment. The initial inquiry is whether a party challenging an application or draft siting permit is seeking to raise a substantive and significant factual issue requiring adjudication. A party seeking to litigate a factual dispute must demonstrate the existence of a triable issue of fact through a sufficient offer of proof, usually through the proffer of expert evidence.[22] Unlike summary judgment, the offer of proof need not be made under oath by a person having personal knowledge of the facts alleged. As discussed further below, however, similar to summary judgment, the offer of proof must raise specific fact issues; conclusory statements and generalized

[22] See 16 NYCRR 1100-8.4(c)(2)(ii); Bear Ridge Solar, Decision at 11; Homer Solar, Decision at 7-8; ORES DMM Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Decision of the Executive Director, July 25, 2022, at 8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 5.

beliefs are insufficient.[23]

If the ALJ determines that a party has raised a triable issue of fact requiring adjudication, the ALJ will define the issue as precisely as possible, set the matter down for an evidentiary hearing, and determine which parties are granted party status for the hearing.[24] If the ALJ determines that no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are reviewed. Legal determinations made by ORES staff as reflected in the draft siting permit are examined for an error of law.[25] Exercises of discretion and policy decisions made by ORES staff are reviewed for an abuse of discretion.[26]

With respect to factual disputes between an applicant and ORES staff, an issue is adjudicable if it relates to a substantive and significant dispute over a proposed term or condition of the draft siting permit, including the USCs, or relates to a matter cited by ORES staff as a basis to deny the

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[23] See 16 NYCRR 1100-8.4(c)(2)(ii); Homer Solar, Decision at 8; Horseshoe Solar, Decision at 9, 12-13; Cider Solar, Decision at 9, 12; Heritage Wind, Interim Decision at 5, 8.

[24] See 16 NYCRR 1100-8.3(b)(5)(i), (ii).

[25] See Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6 (citing Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979]).

[26] See Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 6 (citing Matter of Peckham v Calogero, 12 NY3d 424, 430-431 [2009]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

siting permit and is contested by the applicant.[27]

With respect to a factual issue sought to be raised by a potential party, including municipalities,[28] the issue is adjudicable if it is both substantive and significant.[29] An issue is substantive if it raises sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.[30] An issue is significant if it has the potential to result in the denial of a siting permit, a major modification to the proposed project, or the imposition of significant siting permit conditions in addition to those proposed in the draft siting permit, including uniform standards and conditions.[31]

To participate as a party in any adjudication under 16 NYCRR subpart 1100-8, the potential party seeking full party status, including municipalities,[32] must file a petition in writing that, among other things, identifies an issue for adjudication that meets the criteria of 16 NYCRR 1100-8.3(c), and present an offer of proof specifying the party's witnesses, the nature of the evidence the person expects to present, and grounds upon which the assertion is made with respect to that issue.[33] Where, as here, ORES staff has reviewed an application

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27 See 16 NYCRR 1100-8.3(c)(1)(i), (iii); see Bear Ridge Solar, Decision at 12; Horseshoe Solar, Decision at 10.

28 See 16 NYCRR 1100-8.4(d).

29 See 16 NYCRR 1100-8.3(c)(1)(iv).

30 See 16 NYCRR 1100-8.3(c)(2).

31 See 16 NYCRR 1100-8.3(c)(3).

32 See 16 NYCRR 1100-8.4(d).

33 See 16 NYCRR 1100-8.4(c)(2)(ii).

and finds that the applicant's project, as proposed or as conditioned by the draft siting permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to the application or draft siting permit to demonstrate that it is both substantive and significant.[34] To raise a fact issue for adjudication, a potential party must allege facts that are either (i) contrary to what is in the application materials or draft siting permit, (ii) demonstrate an omission in the application or draft siting permit, or (iii) show that defective information was used in the application or draft siting permit.[35]

As noted above, a potential party carries its burden of persuasion through a sufficient offer of proof by a qualified expert.[36] In determining whether a potential party has demonstrated an issue is substantive and significant, the party's offer of proof is evaluated in light of the application and related documents, the draft permit, including its uniform or site-specific standards and conditions, the content of any petitions for party status, the record of the issues determination procedure, and any subsequent written or oral

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[34] See 16 NYCRR 1100-8.3(c)(4); Bear Ridge Solar, Decision at 13; Homer Solar, Decision at 10; Horseshoe Solar, Decision at 11; Cider Solar, Decision at 27-28. A potential party's burden of persuasion at the issues determination stage of the proceeding is only temporary. If a potential party's issue is joined for adjudication, the burden of proof shifts back to the applicant, who bears the ultimate burden of proof at the hearing. See 16 NYCRR 1100-8.8(b)(1).

[35] See Bear Ridge Solar, Decision at 13-14; Homer Solar, Decision at 10; Horseshoe Solar, Decision at 11-12; Cider Solar, Decision at 10.

[36] See 16 NYCRR 1100-8.4(c)(2)(ii).

arguments authorized by the ALJ.[37] Any assertions a potential party makes in its offer of proof must have a factual or scientific foundation.

Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. Moreover, the qualifications of the expert witness that a petitioner identifies may also be examined at this stage, including the proposed expert's background and expertise with respect to the specific issue area concerned. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft siting permit and proposed conditions, ORES staff's analysis, or the record of the issues determination procedure, among other relevant materials and submissions. In the areas of ORES staff's expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue.[38]

Finally, in addition to issues raised by an applicant or other potential party, public comments, including comments provided by a municipality, on a draft siting permit condition published by the Office may also identify an adjudicable issue provided those comments meet the substantive and significant standard for adjudication.[39]

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[37] See 16 NYCRR 1100-8.3(c)(2).

[38] See Bear Ridge Solar, Decision at 14-15; Homer Solar, Decision at 10-11; Horseshoe Solar, Decision at 12-13; Cider Solar, Decision at 11; Heritage Wind, Interim Decision at 8-9 (citing Matter of Roseton Generating LLC, Decision of the Commissioner, March 29, 2019, at 11-12 [NYSDEC]); see also Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006, at 5-10 (NYSDEC).

[39] See 16 NYCRR 1100-8.3(c)(1)(ii).

V. Issues Rulings

A. Grassland Bird Trust

Issue 1. Wildlife impacts.

GBT argues that the location of the facility is unique and special, and siting the facility there results in unaddressed impacts, warranting a hearing. GBT argues that the avoidance, minimization, and mitigation provisions of the Draft Permit are insufficient because of the sensitivity of the facility's location within DEC's Washington County Grassland Bird Conservation Center (GBCC), the National Audubon Society's Fort Edward Grasslands Important Bird Area (IBA), and the New York National Heritage Program (NYNHP) Raptor Winter Concentration Area (RWCA) (collectively, environmental areas.) GBT further argues that the facility "surrounds" the DEC Grassland Wildlife Management Area (WMA) and that it is located near "other conserved lands[.]"[40] It offers its assessment (exhibit a) as demonstrating "proof" of unaddressed significant impacts to grassland bird species, including habitat loss and collisions with solar panels and other components. GBT also offers the public comment by National Audubon Society (exhibit g) for "additional evidence of the [facility's] major adverse impact" on grassland birds, as well as its view that the facility "undermines" DEC management strategies. Figure 4 of the petition, "Excerpt of Exhibit C", shows a red circle, identified in the legend as "Fort Edward Solar", completely surrounding the WMA.[41]

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[40] GBT petition at 30-31.

[41] Id. at 5.

GBT argues that it satisfies the substantive issue requirement of 1100-8.3(c)(2), in that they offer "scientific evidence" of the failure to "quantify, mitigate, or avoid impacts" due to habitat loss. GBT argues it satisfies the significant issue requirement of 1100-8.3(c)(3) as the location of the facility "demonstrates that the standard mitigation is inadequate."[42]

Applicant characterizes the GBT Assessment as "generalized assertions" and dismisses the applicability of its referenced studies as based on "results observed elsewhere" outside of New York State. It argues GBT is wrong on habitat fragmentation, as the facility was designed to prioritize large continuous fields exceeding 25 acres, the threshold set by DEC and ORES.

Applicant highlights its design changes intended to avoid and minimize significant impacts to grassland birds. No components are sited in the WMA. Applicant removed components adjacent to the WMA. It proposed mitigation that would effectively expand the WMA by 31%. The facility design maintains corridors between the WMA and the GBCC and does not surround the WMA, as GBT claims multiple times. Applicant raises "numerous studies that suggest additional research is necessary to fully understand" the issue of facility impacts to birds.[43] Applicant has committed to conducting post-construction

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[42] Id. at 33.

[43] See applicant response at 13, 15. Those studies would presumably suffer from the same flaw – that the underlying data comes from different geographical areas, rending it unreliable – that applicant claims blights the studies referenced by GBT. Because GBT does not make their case for hearing, the issue is not reached here.

bird surveys to measure impacts, as part of the Net Conservation Benefit Plan (NCBP).

Applicant alleges it has addressed the issue of bird / infrastructure collisions to the maximum extent practicable by using underground components whenever possible and admits that species displacement is "unavoidable[,]" but that displacement and other significant adverse impacts are ameliorated by the NCBP. Applicant selected "property adjacent to the WMA that is known to support the Short-eared Owl and the Northern Harriers"[44] local species of concern to GBT and Audubon, and others.

Applicant completed the required Wildlife Site Characterization Report, Grassland Breeding Bird Survey, and Wintering Grassland Raptor Survey, which were reviewed and ultimately approved by ORES confirming those studies properly characterized site conditions and quantified impacts. After that initial ORES determination, the facility's design was modified to reduce impacts by eliminating three panel array areas and associated infrastructure and relocating the proposed laydown yard significantly reducing impacts to the occupied breeding and wintering habitats for Northern Harrier, the occupied wintering habitat for Short-eared Owl, and eliminating all impacts to the occupied breeding habitat for Sedge Wren.

Applicant argues that the facility occupies only 0.6% of the GBCC, that the GBCC includes hay fields and cultivated croplands, and that facility components were sited primarily in those areas, which are not subject to any DEC or other usage regulations. Applicant argues that it understands the importance of this DEC-managed area as demonstrated by its removal of components from WMA-adjacent parcels. "In response"

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[44] Id. at 14.

to ORES and stakeholder concerns, the distance from the WMA to the closest solar panels was increased from 70 feet to 980 feet and distance from panels to the WMA hiking trail from "approximately 100 feet to more than a ½ mile." Applicant redesigned the facility to remove panels that were 100 feet to the east and southwest of the WMA; the fenceline is now 900 feet away and components are 2,300 and 1,630 feet west and east, respectively.[45]

Applicant claims the facility impacts only 4.4% of the IBA and is expected to impact only two of the species Audubon argues would be impacted, which impacts are addressed by the NCBP. It argues GBT has not submitted any site-specific scientific evidence that the IBA requires additional protections, noting that the lands within the IBA include active agricultural production. Applicant claims the RWCA will benefit in a similar fashion to the IBA from the facility's final design and that an NYNHP RWCA designation is not recognized by any government agency at any level.

The facility design as authorized by the draft siting permit includes further protections for threatened and endangered species, including an environmental monitor, construction windows, and restoration of all temporary land disturbances, all of which meet applicable regulations; GBT, applicant argues, "simply disagrees" with those regulations.

ORES staff argues that the facility achieves a net conservation benefit through the NCBP in fulfillment of PSL § 130(1)(c). It notes applicant's design changes, which reduced impacts from the original design, and that the NCBP proposes mitigation by the establishment of a conservation easement, or

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[45] Id. at 19-20.

alternatively payment of a mitigation fee, either of which satisfy applicable regulations. Staff notes the NCBP, pursuant to ORES procedures, is preliminary, and a final NCBP must be submitted and approved by ORES prior to construction.[46]

ORES staff argues that the location of the facility in designated grassland bird areas "does not create any increased level of scrutiny or heightened mitigation requirements nor invalidate the statutory and regulatory structure under Article VIII."[47] The DEC Strategy, by its own terms "a voluntary rather than regulatory effort[,]" neither prohibits nor addresses the siting of the facility within its boundaries.[48]

ORES staff explains that to meet the DEC Strategy, a GBCC must be comprised of at least 30% grassland habitat, and although the facility would reduce the percentage of the grassland habitat within the GBCC from 38% to 36.6%, it still conforms to the DEC Strategy. Staff states that development within the GBCC or near the WMA is not prohibited by the DEC Strategy and that impacts to both the GBCC and WMA must be, and in this design are, mitigated to regulatory satisfaction. Staff argues that GBT has not provided any authority prohibiting or limiting siting of the facility on the basis of its location within an IBA.[49]

ORES staff points out that while it is true that the NYNHP's RWCA will be impacted by the facility, those impacts were quantified by ORES and addressed by the NCBP. As with the

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46 ORES staff response at 12.

47 Id. at 24.

48 Id., referencing GBT petition, exhibit h, DEC Strategy, at 8.

49 Id. at 27.

other designations, GBT provides no authority that the RWCA designation prohibits, conditions, or limits siting of the facility.[50]

Finally, as regards GBT's offer of proof on unaddressed adverse impacts to grassland birds, ORES staff argues that it does not satisfy the standards for an offer of proof. With respect to habit loss, the opinion of the expert regarding elimination of breeding and wintering habitat has no value, because those impacts are acknowledged in the application and addressed through the NCBP. The remaining opinions of the expert, staff argues, are conjecture, citing the absence of relevant scientific research, GBT's admissions that "ecological effects" and "cumulative impacts" are "difficult to predict[,]" and that there is no research regarding the effects of temperate variations at solar facilities.[51]

Discussion

We have reviewed the record of this matter, including the draft siting permit, GBT's petition and exhibits, and responses by applicant and ORES and determine that no substantive and significant factual issue exists for adjudication and no legal issues exist. GBT, who carries the burden of persuasion at this stage of the proceeding, has not adequately established that applicant did not satisfy its statutory or regulatory requirements, or that ORES staff abused its discretion issuing the draft siting permit, or that the draft siting permit contained errors effecting permit issuance. The assessment by GBT constitutes conjecture and speculation,

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50 Id. at 28.

51 Id. at 29, referring to GBT petition, exhibit A at 11-13.

and lacks any site-specific studies or information contrary to the application such that a reasonable person would inquire further.

Our review persuades us that, as applicant and staff argue, significant adverse impacts to wildlife have been quantified and mitigated according to statute and regulation. Furthermore, this design is a testament to both the efficacy of the ORES process and the significant role of intervenor groups like GBT. Applicant made important modifications from their original design in response to stakeholder and staff input. Although the NCBP includes alternatives, at this stage, same is permissible under Article VIII. The draft siting permit requires finalization of that plan prior to construction. We conclude the NCBP satisfies ORES regulations despite containing alternatives.

GBT has failed to show legal support for the existence of any additional requirements, statutory, regulatory, or otherwise, beyond those of Article VIII, resulting from the location of the facility. The DEC Strategy, which applies to some of the land on which the facility would sit, neither prohibits nor imposes conditions on the siting of the facility.

Applicant never denied impacts. It properly quantified them, and as noted, through the iterative process in which GBT itself had seven meetings with applicant,[52] the redesign has no panels to the north of the WMA and only a smaller array to the west -- changes to the design to accommodate GBT, Audubon, and other stakeholder concerns,

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[52] Meetings occurred on October 2, 2019, January 11, 2022, April 26, 2022, June 15, 2023, April 18, 2024, April 23, 2025, and September 15, 2025. See applicant response at 30.

including relocating panels to 980' from a walking trail. We note that walking trails are a recreational use. Finally, the WMA will be, in effect, significantly expanded by the NCBP if the proposed mitigation parcels prove available.

We concur with applicant and staff that the location of the facility in designated grassland bird areas "does not create any increased level of scrutiny or heightened mitigation requirements nor invalidate the statutory and regulatory structure under Article VIII."[53] Further, as the DEC Strategy is "a voluntary rather than regulatory effort[,]"[54] there can be no doubt, in this regard, about applicant meeting regulatory requirements, such that a reasonable person would have to inquire further.

We are compelled to address what appears to be an attempt to portray the GBCC, IBA, and RWCA as pristine or protected lands, free from human impacts. Beyond the noted recreational co-purposes of these designated areas, our review of the record reveals that these areas contain working farms, roads, highways, railroad tracks, numerous structures, and so on, and are not untouched prairie grasslands.

GBT exhibit C (excerpted as Figure 4 in the body of the petition), "gravely misrepresents the location of the Facility[.]"[55] Applicant describes it so and staff concurs. So do we. The use of the large red circle, completely enclosing the WMA, is, charitably, inaccurate. Applicant's response attachment B shows the actual location of the facility components in relation to the various environmental designated

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[53] See ORES staff response at 24.

[54] See GBT petition, exhibit H, DEC Strategy, at 8.

[55] See applicant response at 17.

areas. If GBT had an objection to attachment B, it failed to make one by motion or otherwise, and we conclude that the facility components occupy significantly less space than exhibit C depicts. Whether GBT's gross overstatement was intentional or not is irrelevant; exhibit c is so misleading as to lack any probative value.

In like vein, GBT's repeated use of "surround" and "surrounding" to describe the spatial relationship of the facility to the WMA is obfuscatory. Although the facility components are inarguably in the general area of the WMA, use of the word "surround" 10 times without qualification is a significant exaggeration. The petition's alternate phrasings "almost completely surrounding" and "in close proximity to" the WMA[56] are more accurate and serve to demonstrate the impropriety of the unqualified use of "surround" and "surrounding" particularly when coupled with the distortions that are exhibit c and figure 4.

In addition to the issues it raises for adjudication, GBT indicates it "would prefer to work collaboratively with ORES and the Applicant to resolve the concerns raised herein." It seeks appointment of a "settlement ALJ" to "mediate settlement discussions[.]" Such an appointment is wholly within the authority of the Office of Hearings and Alternative Dispute Resolution and could further ORES's statutory mandate of expediting the permitting review process by resolving issues without resort to litigation, as such alternative procedures frequently do; however, participation in such mediated negotiations is wholly voluntary under Article VIII. At a video conference held November 6, 2025, applicant and ORES staff

[56] See GBT petition at 34.

indicated to the assigned ALJs that they were unwilling to so participate. Accordingly, GBT's request for appointment of settlement ALJ must be denied.

Attached to GBT's petition in support of its ALJ appointment request is a proposed stipulation of settlement. It is and has been the practice of ALJs presiding over ORES issues determination proceedings to regard evidence of offers of compromise, proposed settlement terms, counterproposals, and the like as inappropriate to reveal or submit to ALJs. Advisement that parties are engaging in negotiations, and the identification of the topics of the negotiation in the most general terms, are proper, so long as done without reference to specific details, offers, proposals, proposed terms, counter-terms, and the like. As such, inclusion of the proposed stipulation of settlement as an exhibit to the petition was improper and we have given it no consideration.

Ruling: GBT has not raised a substantive and significant issue regarding wildlife impacts and a hearing on that issue is DENIED. GBT's request for appointment of a settlement ALJ is DENIED for the reasons stated above.

Issue 2. Adequacy of the mitigation ratio.

GBT argues that the location of the facility relative to the Environmental Areas requires deviating from the applicable regulation. Draft siting permit USC 4.4(o)(3)(ix)[57] requires "0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird

[57] Incorrectly cited in GBT's petition as USC 4.3(o)(3)(ix).

wintering habitat determined to be taken."[58] GBT argues that the underlying basis for these ratios is faulty. GBT and Audubon (as reflected in their public comment submitted by GBT as part of exhibit g) support an enhanced mitigation ratio.

Applicant characterizes GBT's issue as a dispute with the regulations, which dispute they argue is beyond the scope of an issues determination proceeding. It notes that the mitigation ratio regulation was developed in consultation with DEC, DPS (of which ORES was not a part at the time of the development of the regulations), the NYS Department of Agriculture and Markets, and NYS Office of Parks, Recreation and Historic Preservation, and after review of multiple conditions for other energy facilities in New York State. They argue that "[b]y maintaining open, herbaceous cover through scheduled mowing and habitat management, the site preserves critical breeding and wintering grounds for grassland bird species."

Applicant observes that the mitigation ratios proposed by GBT and Audubon significantly exceed the regulatory requirements. It cites to ORES's prior permit issued to the Tracy Solar facility, also located in an IBA and to which the standard regulatory mitigation ratios were applied; GBT, applicant points out, offers no scientific site-specific data to demonstrate that this area is so special or unique as to require enhanced mitigation ratios.

ORES staff, like applicant, argues that this proposed issue is a dispute with the regulations. Staff notes the siting

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[58] This USC allows applicant to implement a grassland bird habitat conservation project in lieu of paying the mitigation fee provided for at subparagraph (viii) of USC 4.3(o)(3). GBT argues, however, the fee option is eliminated by Site Specific Condition (SSC) 6(d)[sic]. The correct SSC is 5(d), not 6(d).

permit conditions relevant to this issue are "verbatim" with the applicable regulation.[59] Staff asserts that GBT has misinterpreted the regulation in that GBT regards the last sentence of USC 6.4(o)(3)(iv) "as a condition precedent or necessary element that must be satisfied" before the standard ratios apply; staff explains that the language merely "provides technical context[.]" Staff points to the use of the mandatory language "shall" within the regulations for the proposition that the ratios must be applied in all cases where an NCBP is submitted.[60] Staff notes that annual mowing is not guaranteed as the farmers "are under no obligation to mow these fields and may seek other options for use of the land" and the GBT assessment does not show why the hayfields in question "would not undergo ordinary ecological succession" -- that is, cease being grassland bird habitat, if not actively managed.

Discussion

Applicant and staff are correct that this issue is beyond the scope of an ORES issues determination proceeding. Section 1100-8.3(b) authorizes adjudicatory hearings upon a finding of a substantive and significant issue. As relevant here, a substantive issue requires "sufficient doubt about the

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[59] See ORES staff response at 31.

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

applicant's ability to meet statutory or regulatory criteria".[61] What can be heard at a hearing is a challenge to the applicant's ability to meet criteria – not the criteria itself.[62]

Ruling: GBT has not raised a substantive and significant issue regarding the mitigation ratios and a hearing on this issue is DENIED.

Issue 3. Availability of proposed NCBP parcels.

GBT argues that the determination by the owner of easements over two parcels proposed for mitigation as part of the NCBP (the Faille parcels) invalidates the entire NCBP, requiring submittal of a new one. It attaches as part of exhibit F a letter from the Agricultural Stewardship Association (ASA), which holds existing conservation easements over the Faille parcels and in which it states it cannot consent to the use of those parcels for applicant's mitigation plan. GBT also states that post-construction monitoring, proposed to be conducted with assistance from Cornell University, might not be funded, as such funding is contingent on the State of New York, and applicant has not made a commitment to cover those costs should the state fail to do so.

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61 See 16 NYCRR 1100-8.3(c)(2).

62 See Heritage Wind, Interim Decision at 8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, July 8, 2021, at 13-15; ORES DMM Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, May 2, 2024, at 112-114; see also 16 NYCRR 1100-8.4(b)(c)(2)(ii); accord Matter of Rockland County Sewer District #1, Decision of the Deputy Commissioner, June 5, 2023, 2023 WL 3956813 (NYSDEC)(Part 624 Issues Conference "not a proper venue . . . to challenge [a] regulatory provision[.]")

Applicant counters that ASA misinterprets the existing conservation easements, and that grassland bird mitigation may still occur on the Faille parcels. Applicant points to site-specific studies that demonstrate that the parcels are suited for mitigation. Applicant notes that only 157 acres of the 357 acres of these parcels are subject to the ASA easements and that the remaining acreage will be managed according to the DEC Strategy.[63]

ORES staff points out that the draft siting permit allows for either "permitee-implemented conservation" or payment of a mitigation fee; thus, if in fact the Faille parcels are not available for conservation, the impacts are addressed and a net conservation benefit achieved by the payment.[64]

Discussion

The arguments of applicant and staff are persuasive. Although GBT argues that site specific condition 6(d) removes applicant's choice of making a mitigation fee payment, other provisions of the draft siting permit specifically allow for it. Thus, if the Faile Properties are not included in the final NCBP, a mitigation fee would be required instead. Either way, staff have rationally concluded that the facility will achieve a net conservation benefit and GBT submits no scientific evidence that ORES's determination in this regard suffers from error or discretion abuse, and we hold there is no error of law or abuse of discretion in that determination.

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[63] See applicant response at 33-34.

[64] See ORES staff response at 36.

Ruling: GBT fails to state a substantive and significant issue regarding the viability of the NCBP and a hearing thereon is DENIED.

Issue 4. "All other" issues raised in GBT's exhibits.

GBT proposes as its final issue for adjudication "all other substantive and significant issues raised in the Grassland Bird Trust report, Fort Edward Solar – Avian Impact and Mitigation Assessment, attached as Exhibit A to this Petition, and/or in any other exhibits to this Petition." Applicant and staff respond by addressing the exhibits individually, or referring to earlier analysis of the exhibits, contained in the responses and discussed above.

Applicant and staff's analyses, while thorough and thoughtful, are unnecessary for our determination here.[65] Section 1100-8.4(c)(1)(v) of 16 NYCRR requires a petitioner seeking party status and a hearing to identify "the precise grounds for opposition" and § 1100-8.4(c)(2)(ii) requires an "offer of proof specifying the . . . evidence the person expects to present and the grounds upon which the assertion is made with respect [to] each issue identified." The operative language

[65] With regard to those analyses, we note only that regarding exhibit d, the affirmation on New York State Senator Patricia Fahy, while we are not searching it for a substantive and significant issue, in response to arguments of applicant and staff, we note that the submission of an affirmation originally submitted in another proceeding does not render it per se irrelevant; it is the wholly different circumstances of this application from the one in which that affirmation was submitted which robs it of probative value. Likewise, regarding exhibit e, a press release concerning the IBA, is not probative because there is no dispute concerning the existence of the IBA or the presence of a viewing platform within it.

here is "precise" and "specifying[.]" These requirements are only satisfied by setting out the issue with precision and linking the proffered evidence to the issue specifically. A proposed issue that purports to require the examining ALJs to search the exhibits looking for an issue, formulate that issue, decide which proffered evidence supports that issue, and how, fails to meet the precision and specificity requirements of § 1100-8.4(c). Without fulfilling those regulatory provisions, the petition is, as regards this proposed issue, facially deficient.

To the extent that GBT claims in this section of the petition that it "wishes to work collaboratively with ORES and the Applicant[,]" but that without party status they "lack any standing to advocate" its position, such is not grounds for party status under Article VIII. Additionally, the record of this case demonstrates that the precise opposite is true. GBT, before seeking party status, met not less than seven times with applicant,[66] which meetings in turn contributed to design changes to address GBT's concerns, belying their assertion that they need party status to successfully advocate their positions.

Ruling: GBT fails to meet the threshold procedural requirements for raising an issue for adjudication. A hearing on "all other substantive and significant issues raised" in their exhibits is DENIED.

B. American Land Rescue Fund, Inc.

ALRF Request for Leave to File Reply

With respect to ALRF's motion for leave to submit a reply, same must be decided prior to reviewing the Petition

[66] See applicant response at 30; see also footnote 52 above.

itself, since, in effect, the reply would constitute a pleading. Replies, while discretionary, are generally not granted, and certainly any request must be well-founded. ALRF's statement that there are "new characterizations of the record[,]" without more, is too general. Blanket statements and unspecified allegations of due process violations are insufficient. ALRF fails to identify even one of these alleged "new characterizations" or why same requires their response. ALRF's legal assertion, that "[w]here an agency and applicant submit aligned oppositions that would eliminate participation entirely, the right to respond is necessary to maintain . . . procedural fairness, transparency, [and] integrity of the issues determination process" is without citation to applicable law and contrary to § 1100-8.4(e)(2). The submission of the opposition by ORES staff and applicant, while "late in the afternoon" on the due date, was timely. Regarding preservation of the issues of "impairment of public participation[,]" "concealment of species-impact data" and "statutory compliance under PSL §§ 136 and 138[,]" those issues were raised and briefed in ALRF's petition, and are thus fully preserved for appellate review. As with all proceedings under State Administrative Procedure Act (SAPA) article 3, applicable to this proceeding by virtue of PSL § 142(4)'s reference to an "adjudicatory hearing," petitioners in issues determination proceedings under Article VIII are entitled to notice, an opportunity to be heard, a complete record, an independent review, and a written decision.[67] ALRF is

[67] See State Administrative Procedures Act (SAPA) §§ 301 (notice and opportunity to be heard), 302 (record), 303 (impartial hearing officer), 307 (written decision); see generally Mathews v Eldridge, 424 US 319 (1976).

being afforded all of those, and SAPA's due process guarantees are satisfied thereby.[68]

Ruling: ALRF's motion to submit a reply is DENIED.

ALRF Late Filed Petition

ALRF, a "not-for-profit organization dedicated to protecting farmland, endangered species habitat, rural communities, and public transparency in environmental permitting[,]" proposes three issues for litigation: "[p]rocedurally unlawful concealment of species/occupied habit defeats PSL §§ 136 and 138 findings and due process"; "[u]navoidable 'take' and fragmentation of occupied habitat in/adjacent to the Washington County Grasslands WMA and associated conservation designations"; and "The Draft Permit's reliance on generic USC's and post-hoc planning cannot satisfy the statutory requirement to ensure a net conservation benefit for T&E species in this setting."[69] As and for an offer of proof on these issues, the petition submits, on the first issue, copies of pages from application exhibit 12, showing redactions, and screenshots of FOIL requests; on the second issue, pictures of DEC signs from the WMA, and the phrase "the facility footprint and array placement" but not a reference to any

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[68] Although designated by the ORES Executive Director to render a decision in this matter, the undersigned, while employees of the Department of Public Service, are assigned to the Office of Hearings and Alternative Dispute Resolution, a "neutral and detached hearing body" within the Department. See Morrissey v Brewer, 408 US 471 (1972). See also PSL § 140(4); SAPA § 303.

[69] See ALRF petition and Fasulo declaration.

[69] See ALRF petition and Fasulo declaration.

exhibit; on the third issue, the same signs offered for the second issue, and a statement arguing that "there is no record competent to demonstrate that any site-specific mitigation could exceed losses."

That portion of ALRF's petition denominated as a motion addresses the requirements for late filing. It alleges that "procedural irregularities and concealment of critical environmental information . . . made timely, informed participation impossible." It alleges that applicant's "endangered species and sensitive habitat filings were made available only in almost entirely blacked-out form, preventing the required public review" and notes that ALRF representatives "traveled to ORES' offices . . . to obtain the unredacted species information" but were "prevented" and "[d]irected to make an appointment[.]" ALRF argues there will be no prejudice to any party as the "proceeding is ongoing" and "no party has relied upon ALRF's absence." It further argues that acceptance of the late filing will "ensure . . . [a] more complete and accurate record[,] [c]onsideration of statutory endangered species protections[, and] [t]ransparent compliance with PSL § 138(1)(c)."

Applicant opposes acceptance of the late filing. It infers that the procedural irregularities ALRF argues constitute good cause for lateness are the redactions, which it argues are mandated by law as they refer to the location and habitat of threatened species, and it further argues ALRF mischaracterizes the extent of the redactions. It states that ORES determined that the redactions are proper and that if there was an improper redaction, ORES requires removal of it, but ORES made no such requirement. It raises the issue of the protective order, which would have given ALRF access to the unredacted records, had ALRF

merely executed the proper documentation, and that ALRF had the opportunity to do so since August 20, 2024.[70]

Applicant argues that ALRF's issues have been submitted for adjudication by GBT, and ALRF cannot inform the record on those issues as they "have already been fully addressed" and that ALRF has not "submitted any new scientific and site-specific information[.]"[71]

Applicant argues that the redactions are lawful, the facility will not fragment habitat, that the design was changed to accommodate wildlife concerns by maintaining large contiguous grassland fields, meeting DEC and ORES requirements, and removed facility components from the area adjacent to the WMA. It argues ORES, being able to view the unredacted wildlife data, was able to properly determine that the facility will achieve a net conservation benefit, unimpeded by the redactions, as ALRF complains.[72]

Staff also opposes acceptance of the late filing. Staff argues that late discovery of the facility and the issues determination phase "without more" does not constitute good cause for lateness. ORES staff raises Public Officers Law § 87, part of the Freedom of Information Law, and Environmental Conservation Law § 3-0301(2)(r), which together exempt "rare, threatened and endangered species locational information" from public disclosure.[73] As applicant did, staff also raises the

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[70] See applicant response to ALRF petition at 9-12; see also DMM Item No. 38, protective order.

[71] Applicant response to ALRF petition at 13-14.

[72] Id. at 17-18.

[73] See ORES staff response to ALRF petition at 4, 6.

protective order, in effect since August of 2024, which would have afforded ALRF access to the unredacted records, which obviates all claims of non-access. Staff argues acceptance of the late filing would be unfair to all other parties, who submitted their petitions timely.[74]

Staff argues that full avoidance of occupied habitat is not required by statute or regulation. Staff argues that ALRF carries the burden of persuasion and have not submitted a sufficient offer of proof, disentitling them to full party status.[75] Staff argues that public access to the redacted species location information does not preclude full review, inasmuch as ORES staff have access to the unredacted application materials. Staff argues that ALRF had access to the redacted information had they followed proper procedure. It points out that GBT, which shares ALRF's concerns for grassland bird species impact by the facility, followed that procedure and had full access to the unredacted materials, and that ALRF's offer of proof fails to allege facts that are either contrary to facts in the application materials or draft siting permit, or demonstrate an omission or show defective information was used therein, as required. The sufficiency of the mitigation ratios, staff argues, is an attack on the regulations, which is not adjudicable in the issues determination proceeding.[76]

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[74] Id. at 7-8.

[75] Id. at 9, 11; see also 16 NYCRR 1100-8.3(c)(4).

[76] See ORES staff response to ALRF petition at 12-15.

Discussion

In deciding to accept the late filed petition or not, the applicable regulation is 16 NYCRR 1100-8.4(e), which provides in full that:

> (1) Petitions filed after the date set in the combined notice provided for in section 1100-8.2(d) of this Part shall not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision.
>
> (2) In addition to the required contents of a petition for party status, a petition filed late shall include the following in order to receive any consideration:
>
> (i) A demonstration that there is good cause for the late filing;
>
> (ii) A demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
>
> (iii) A demonstration that participation will materially assist in the determination of adjudicable issues raised in the proceeding.

The provisions of subsection (2) (hereinafter the "(e)(2) test") are, in effect, procedural prerequisites, which if not met, preclude "any consideration" of the petition. Pursuant to subsection (1), regardless of the merits of late petitions, late petitions "shall not be granted" unless the three requirements of subsection (2) are fulfilled; only upon fulfillment of those requirements are the merits reached.

Taking the second requirement first, we disagree with applicant and staff that granting the petition would work prejudice. When ALRF filed its petition, although the deadline had passed, the issues timely submitted by GBT were still under consideration; even if they had been decided in GBT's favor and

a hearing was granted, that hearing could still proceed as scheduled. While we are cognizant of the issue raised by ORES staff concerning the need to proceed timely, Article VIII contemplates not only expediency, but resolution of late filed petitions as well. This is demonstrated by the existence of § 1100-8.4(e). The proponents of the regulations clearly intended to allow late filings, provided of course that prerequisites are satisfied. Thus, we find no prejudice or significant delay.

With respect to the first and third prongs of the (e)(2) test, we conclude that those are not satisfied. Regarding "good cause[,]" none is apparent. As correctly argued by applicant and ORES staff, ALRF had access to the redacted information; it merely failed to avail itself of the proper channels that would have facilitated such review. There was no deliberate concealment of the confidential information, unless by that term ALRF is referring to applicant's statutory and regulatory compliance with applicable law, namely, Public Officers Law § 87(2)(a) and ECL 3-0301(2)(r), which compliance is mandatory and thus cannot be said to injure ALRF or constitute "deliberate concealment[.]" As noted, ALRF could have obtained access to the redacted information, and done so well before the deadline for submission of petitions for party status. Furthermore, there are no allegations made with respect to any other flaws in the public notices or the public comment phases of the application.

Applicant fully satisfied its notice requirements beginning in 2022, and began engaging the public and stakeholders in meetings prior to that, commencing in 2019.[77]

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[77] See applicant response to ALRF petition at 2; see also DMM Item No. 29, application exhibit 2, at 2-9. Applicant's allegations regarding meetings with the public and

Notably, ALRF was represented at the public comment hearing held in this matter on September 30, 2025, at which hearing ALRF's founder and president, Alexandra Fasulo, offered comments. Given the extensive history of public engagement that includes ALRF's participation, and given that mere recitation of the phrase "procedural irregularity," without more, is a conclusory statement insufficient to show good cause, there is no basis for a finding of good cause for the late filing under § 1100-8.4(e)(2)(i).

Regarding the third prong of the (e)(2) test, material assistance, we also hold this requirement unmet. In the first instance, all of the issues ALRF raises were raised by GBT. Even if there was a duplication of issues, ALRF proffers no new or different site-specific studies or scientific information tending to show an error in the application or that erroneous information is contained therein which would supplement GBT's submission and thus inform the record. To materially assist in the litigation, ALRF must offer studies or information going beyond what is already in the record.

Although obviously concerned about the environment, ALRF offers no credentialed expert to support any of its arguments. Its offer of proof consists of arguments, without reference to empirical support, and photographs of documents and signs which are in the public domain; as mentioned, the offer is devoid of the required site-specific scientific evidence or

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stakeholders was not challenged by ALRF. Applicant's first public meeting was held virtually May 26, 2021, first in-person open house April 18, 2023, and second open house April 18, 2024.

studies.[78] Additionally, there is no statement of "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."[79] Thus, even without regard to whether or not the offer of proof meets the requirements of § 1100-8.4(c)(2)(iii), it manifestly offers nothing which will "materially assist in the determination of adjudicable issues raised in the proceeding."

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[78] Parenthetically, although ALRF exhibit d shows a sign reading "RESTRICTED AREA" and "ENDANGERED SPECIES CRITICAL AREA" that same sign permits unfettered access to the area between April 15 until December 1; furthermore, there is nothing within the confines of the image that demonstrate its location. Exhibit e is only a sign stating that it is in or at the WMA; since that is all it says, and since the existence of the WMA or a sign somewhere on it are not issues, the photo lacks any probative value. Exhibits f, g, and h are photographs of, respectively, two pages of redacted application materials, another redacted page, and someone looking at an image of a redacted page, on a laptop. As there is no dispute that portions of the application materials are redacted, or that there was an attempt to access those records, including by FOIL request, these photographs lack any probative value, as do for those same reasons, exhibits a, b, and c. Exhibit i, offered as noting the purpose of the WMA, states only that "DEC manages this WMA for the benefit of wildlife and wildlife-dependent recreation[,]" and as the purposes of DEC WMA management is also not at issue in this proceeding, this photo also lacks probative value. Exhibit j lacks probative value because the designation of the area by Audubon is not in contest. Finally, exhibit k is a photograph of two signs on a post, one of which, if anything, contemplates continued human impacts to the WMA; further, whether or not the WMA is a sensitive habitat is not in dispute, and thus this exhibit lacks probative value also.

[79] 16 NYCRR 1100-8.4(c)(2)(ii).

This analysis and conclusion are consistent with existing ORES precedent as well as persuasive authority, addressing the (e)(2) test. In Matter of Heritage Wind, LLC, the ALJs determined that the failure to address the § 1100-8.4(e)(2) criteria "fatal" to a late filed petition.[80] Likewise, in a case under DEC's permit hearing procedures at 6 NYCRR part 624, where the language for consideration of late filed petitions is identical to § 1100-8.4(e)(2), Nassau County was denied full party status on a late filed petition where it had "ample notice of the proceedings" and it made no offer of proof.[81] That ruling was affirmed by the Deputy Commissioner, who held that the record was "bereft of any demonstration of good cause for the untimely filing . . . That failure alone justifies denying the County's request for full party status" and also holding that the late party "failed to demonstrate that its participation would materially assist in the determination of the issue . . . On its face, the County's petition does not make an offer of proof."[82] The same holds true here.

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80 See ORES DMM No. 21-00026, Matter of Heritage Wind, LLC, Ruling on Late-Filed Petitions for Amicus Status, October 22, 2021, at 3-5.

81 See Matter of Suffolk County Water Authority, Ruling of the Administrative Law Judge on Issues and Party Status, 2005 WL 3078503, November 9, 2005, at 25 (NYSDEC).

82 See Matter of Suffolk County Water Authority, Interim Decision of the Deputy Commissioner, 2006 WL 165794, January 19, 2006 (NYSDEC); see also Matter of Seneca Meadows, Inc., Rulings of the Administrative Law Judge on Issues and Party Status, 2012 WL 1384772, March 26, 2012 (NYSDEC) (late petition denied for failure to meet first and third prong of test.)

Given that the petition fails the 8.4(e)(2) test, the regulations by their plain meaning preclude review of the merits of the petition: without satisfying 1100-8.4(e)(2), "a petition filed late" shall not receive "any consideration[.]" This creates a bright-line rule, leaving ALJs no discretion. Were we to examine the merits, however, we note that the first proposed issue would likely fail analysis, as it is related to the redactions and not one, but two laws provide that locational information concerning threatened and endangered species must be redacted, and there is no allegation that the redactions obscure any other type of information, nor how the redactions constitute a substantive and significant issue.[83] The second and third issues, as framed, address the regulatory scheme for mitigation ratios and net conservation determinations, which are not adjudicable issues under Article VIII (see section V.A above) and to which the related offer contains no scientific evidence of errors or omissions in the petition. The petition would require a most liberal reading to be deemed to meet the specificity requirements of § 1100-8.4(c)(1)(v), and finally, as discussed, § 1100-8.4(c)(2) requires an offer of proof, at a minimum, to specify "the witness(es), the nature of the evidence the person expect to present and the grounds upon which the assertion is made with respect [to] each issue identified." ALRF's petition contains none of the above.

We have examined the remaining contentions of ALRF and find they would not constitute good cause or material

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[83] I note that the aims of these statutes are protection of threatened and endangered species, which is the very first concern ALRF states as its interest in this proceeding.

assistance, and neither appear to be substantial and significant issues nor supported by an offer of proof.

The record demonstrates that applicant, in response to ORES and stakeholders including GBT, the National Audubon Society, and others, redesigned this facility to eliminate significant adverse impacts to threatened and endangered species, and as to unavoided impacts, satisfied its burden to ensure a net conservation benefit. While there can be little doubt that ALRF is sincere in its mission to protect the environment, that mission must find another path. The CLCPA and the RAPID Act both share ALRF's purpose in protecting the environment from the existential crisis of climate change. Under existing regulations, however, ALRF's petition cannot be considered.

Ruling: ALRF has not met two of three threshold requirements for consideration of its late-filed petition for party status and an adjudicatory hearing, and same is hereby DENIED.

C. Applicant Issues

Applicant raised two issues with the terms of the draft permit, which terms it otherwise accepted. It claims that USCs 4.4(o)(4) and 4.4(o)(6), are inapplicable to the facility as there is no evidence of "nests or roosts" for, respectively, Bald Eagles or Northern Long-eared Bats, species to which those conditions are addressed and, therefore, requests that they be omitted.[84] ORES staff counters that these USCs are present to avoid the necessity of permit modification in the event that

[84] See DMM Item No. 85, applicant statement of issues (applicant statement).

qualifying nests or roosts are found, and therefore those provisions should remain.

We are persuaded by the reasoning of ORES staff. One of the purposes of having these USCs is to avoid the necessity of adding or changing permit conditions in the event of such post-permit wildlife discoveries. Applicant is not prejudiced by their inclusion, as they have no application until such wildlife concerns develop, and in the event of such development, those conditions would have to be imposed if they were not already included, with all the concomitant additional procedures and potential delays.

Ruling: Applicant's request to remove USCs 4.4(o)(4) and 4.4(o)(6) is DENIED.

VI. Rulings on Party Status

Among the purposes of the issues determination procedure is to determine party status for participation in any adjudicatory hearing held on an application.[85] We hold that GBT has not raised a substantive and significant factual issue requiring adjudication, nor has it identified any legal error or abuses of discretion that would require denial of the siting permit, or a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft siting permit, including the USCs. As concluded above, AFLR has not satisfied the requirements for a late filed petition. Accordingly, the petitions of GBT and ALRF for full-party status are DENIED. As there is no adjudicatory

[85] See 16 NYCRR 1100-8.3(b)(5)(i).

hearing ordered herein, their alternate requests for amicus party status are also DENIED.

VII. Conclusion and Order of Disposition

Accordingly, based on our conclusion that no substantive and significant issues are presented, pursuant to 16 NYCRR 1100-8.3(c)(5) and 1100-8.12(b), further proceedings are canceled. Based on the application and the record of the issues determination procedure, we conclude that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary site-specific conditions (SSCs), and applicable compliance filings:

(1) complies with Public Service Law article VIII and applicable provisions of the Office's regulations at Part 1100;

(2) complies with substantive provisions of applicable State laws and regulations;

(3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the facility;

(4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility;

(5) achieves a net conservation benefit with respect to any impacted threatened or endangered species; and

(6) contributes to New York's CLCPA targets and provides the environmental benefits of reducing carbon emissions.

ORES staff are hereby directed to submit to the

undersigned a final written summary and assessment of public comments received during the public comment period not otherwise addressed in this ruling by close of business January 12, 2026. Once the summary and assessment of public comments is submitted, the undersigned will forward the draft siting permit to the Executive Director for execution as the final siting permit.

(SIGNED) HENRY JAMES JOSEPH
Administrative Law Judge
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Dated: December 11, 2025
Albany, New York