

**NEW YORK STATE OFFICE OF
RENEWABLE ENERGY SITING
AND ELECTRIC TRANSMISSION**

**In re the Matter of
Application of CONNECTGEN MONTGOMERY
COUNTY, 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 250-Megawatt (MW) Solar Energy
Facility Located in the Town of GLEN,
MONTGOMERY COUNTY.**

Matter No. 23-02972

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to 16 NYCRR 1100-8.7(d), Montgomery County, the Town of Glen, GlenFARMLand, Inc., and the Glen Conservancy hereby appeal to the Executive Director the Ruling on Issues and Party Status, and Order of Disposition, issued by Administrative Law Judges Henry James Joseph, Dawn MacKillop-Soller, John L. Favreau, and Christopher McEneney Chan on September 8, 2025. A copy of the ruling is attached hereto as Exhibit A.

Dated: September 15, 2025

Respectfully Submitted,

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Exhibit A

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

ORES DMM Matter No. 23-02972¹ - Application of CONNECTGEN MONTGOMERY COUNTY, 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 250-Megawatt (MW) Solar Energy Facility Known As Mill Point Solar I Project, Located in the Town of Glen, Montgomery County.

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

(Issued September 8, 2025)

HENRY JAMES JOSEPH, DAWN MacKILLOP-SOLLER, JOHN L. FAVREAU,
CHRISTOPHER McENENEY CHAN, Administrative Law Judges:²

I. BACKGROUND AND PROCEEDINGS

On February 12, 2024, ConnectGen Montgomery County, LLC (applicant), applied pursuant to Executive Law former § 94-c³

¹ See DMM Item No. 141, Ruling Amending Caption, January 27, 2025. The case number changed from ORES Permit Application No. 23-00034 to ORES DMM Matter No. 23-02972 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 (DMM) system.

² Administrative Law Judges John L. Favreau and Christopher McEneney Chan were assigned to assist in the preparation of this ruling.

³ Effective April 20, 2024, the Renewable Action through Project Interconnection and Deployment (RAPID) Act (L 2024, ch 58, part O) repealed Executive Law § 94-c, repealed the

to the New York State Office of Renewable Energy Siting (Office or ORES) for a permit to construct and operate a 250-megawatt (MW) solar facility (facility or project), known as Mill Point Solar I, in the Town of Glen, Montgomery County.⁴ The facility as proposed would include photovoltaic (PV) solar modules and their rack/support systems; direct current (DC) and communications cables connecting the panels to inverters; the inverters, with

then-current Public Service Law (PSL) article VIII, and enacted a new PSL article VIII entitled "Siting of Renewable Energy and Electric Transmission" (Article VIII) (see RAPID Act §§ 2, 11). The RAPID Act also changed the name of the Office from the Office of Renewable Energy Siting to the Office of Renewable Energy Siting and Electric Transmission (ORES or Office), and transferred the Office from the Department of State to the Department of Public Service, continuing all existing functions, powers, duties, and obligations of the Office under the former Executive Law § 94-c, and adding new functions, powers, duties, and obligations related to major electric transmission siting (see id. §§ 3, 4). Further, all applications pending before ORES on the effective date of the Act are considered and treated as applications filed pursuant to the RAPID Act as of the date of application filing (see id. § 4). Accordingly, the caption is hereby amended to reflect these changes.

With respect to ORES's regulations at 19 NYCRR part 900 (Part 900), the RAPID Act transferred Part 900 to 16 NYCRR chapter XI, and continued Part 900 in full force and effect subject to conforming changes, such as the substitution of numbering, names, titles, citations, and other non-substantive changes to be filed with the Secretary of State (see RAPID Act § 7). The conforming changes were filed with the Secretary of State and became effective July 17, 2024. Accordingly, this ruling uses the numbering of the new 16 NYCRR part 1100 (Part 1100).

Finally, in light of the continuation of ORES, all administrative precedent issued under former Executive Law § 94-c remains applicable to proceedings under Article VIII.

⁴ See DMM Item No. 9, cover letter filing 94-c application.

their support platforms, control electronics, and step-up transformers; buried alternate current (AC) medium voltage collector circuits; fencing and gates around each array of modules; access roads; temporary laydown/construction support areas; a medium voltage-to-transmission voltage substation with associated equipment and fenced areas; a new 3-breaker ring bus point of interconnection switchyard (POI switchyard); two adjacent approximately 305-foot-long 345 kV transmission line segments to interconnect the new POI switchyard to the existing National Grid Marcy – New Scotland 345-kilovolt transmission line; and an operations and maintenance (O&M) building with parking/storage areas. The facility site consists of 2,665.59 acres.⁵

Following a notice of incomplete application issued by the Office on April 12, 2024, applicant filed an application amendment and supplement on August 16, 2024, and an application clarification on October 3, 2024.⁶ Following a second notice of incomplete application issued by the Office on October 15, 2024, applicant further supplemented its application on December 23, 2024.⁷ On January 27, 2025, ORES staff declared the application complete pursuant to 16 NYCRR 1100-4.1(g).⁸

⁵ See DMM Item No. 94, application exhibit 2 (revised): Overview and Public Involvement at ii.

⁶ See DMM Item No. 66, notice of incomplete application; DMM Item No. 97, letter filing response to NOIA no. 1; DMM Item No. 117, letter filing O&M building memorandum.

⁷ See DMM Item No. 119, notice of incomplete application; DMM Item No. 132, letter filing response to NOIA no. 2.

⁸ See DMM Item No. 140, notice of complete application, January 27, 2025. On February 5, 2025, ORES staff issued a corrected notice of complete application, correcting the caption of the January 27, 2025, notice (see DMM Item No. 142).

On March 28, 2025, Office staff issued a draft siting permit for the facility, which was posted for public comment on ORES's website.⁹ Also issued on that same date and posted on the Department of Public Service (DPS) Document and Matter Management (DMM) system was a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of the issues determination procedure (combined notice) for this matter.¹⁰ Applicant published the combined notice in the Amsterdam Recorder, the Leader-Herald in Gloversville and the Daily Gazette in Schenectady on May 6, 2025, and the Busy Beaver of New York and Canada, on April 11, 2025, respectively.¹¹ The Busy Beaver of New York and Canada is a publication specifically intended for the Amish Community. Applicant 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).¹²

The combined notice advised that a public comment hearing on the draft permit would be held at the Fonda-Fultonville Central School District, 112 Old Johnstown Road, Fonda, NY 12068 on Wednesday, May 28, 2025, at 6:00 p.m., with written comments accepted until May 30, 2025. Pursuant to the combined notice, petitions for party status to participate in the issues conference and, if necessary, the adjudicatory hearing, were to be filed on or before June 2, 2025. In addition, the

⁹ See DMM Item No. 144, draft siting permit.

¹⁰ See 16 NYCRR 1100-8.2(d); see also DMM Item No. 145, combined notice.

¹¹ See 16 NYCRR 1100-8.2(a).

¹² See DMM Item No. 150, affidavits of service and affidavits of publication.

combined notice established June 2, 2025, as the date for submission of applicant's issues statement, and the municipal statements of facility compliance with applicable local laws and regulations regarding the environment or public health and safety.¹³

On May 30, 2025, the Administrative Law Judges (ALJs) granted a joint request by prospective intervenors GlenFARMLand, Inc., the Town of Glen (the Town), and Montgomery County (the County) (collectively petitioners) and extended the time for the prospective parties to file their petitions to Friday, June 6, 2025; and granted applicant and Office staff an extension until June 27, 2025, to file responses.¹⁴ Applicant filed its statement of issues on June 2, 2025. On June 6, 2025, the County filed its petition for party status, statement of non-compliance with local laws and issues statement, and the Town filed its petition for party status and statement of issues for adjudication and statement of compliance.¹⁵ GlenFARMLand, joined by the Glen Conservancy (collectively GFL), jointly filed a petition for full party status and statement of issues for adjudication seeking party status for GlenFARMLand.¹⁶

¹³ See 16 NYCRR 1100-8.2(d)(3), 1100-8.4(d), and 1100-8.4(b).

¹⁴ See DMM Item No. 155, ALJ Ruling on Extension Request, May 30, 2025.

¹⁵ See DMM Item No. 160, Montgomery County Petition for Party Status, Statement of Non-Compliance with Local Laws and Issues Statement (County petition); DMM Item No. 173, Town of Glen Petition for Party Status and Statement of Issues for Adjudication and Statement of Compliance (Town petition).

¹⁶ See DMM Item No. 177, GlenFARMLand Inc. and Glen Conservancy Petition for Full Party Status and Statement of Issues for Adjudication (GFL petition). Glen Conservancy does not seek individual party status, but supports the

On June 12, 2025, the ALJs granted extension requests by Office staff and applicant and extended the response deadline to July 3, 2025.¹⁷ Both applicant and Office staff submitted timely responses on July 3, 2025.¹⁸

On July 8, 2025, petitioners filed a joint motion to dismiss the application or adjourn the issues determination procedure pending major revision to application.¹⁹ Responses to the joint motion to dismiss were filed by applicant and Office staff on July 14, 2025.²⁰

On July 9, 2025, the ALJs authorized petitioners to file reply briefs limited to the issue of field preemption raised in applicant's response.²¹ Replies were filed by

award of full-party status to GlenFARMLand. See id. at 3 n 1.

¹⁷ See DMM Item No. 187, Ruling on Motions for Extensions of Time.

¹⁸ See DMM Item No. 190, Applicant Response to Issues Statements, Party Status Requests, Municipal Statements of Compliance and Public Comments on Draft Permit (applicant response); DMM Item No. 191, ORES Staff Response to Petitions for Party Status, Statement of Issues by Applicant, and Statement of Compliance with Local Laws and Regulations (ORES staff response).

¹⁹ See DMM Item No. 194, Joint Motion to Dismiss Application or Adjourn Issues Determination Procedure Pending Major Revision to Application (joint motion to dismiss).

²⁰ See DMM Item No. 202, Applicant' Response in Opposition to Petitioner's Motion to Dismiss or Adjourn Issues Determination Procedure Pending Major Revision to Application (applicant response to motion to dismiss); DMM Item No. 203, ORES staff response to motion to dismiss.

²¹ See DMM Item No. 196, Ruling on Motion for Leave to File Reply Brief.

Montgomery County, and by GFL and the Town of Glen, jointly.²² Finally, on July 17, 2025, the ALJs authorized written submissions by petitioners and Office staff in response to the issue of the applicability of Montgomery County's Cumulative Impacts Law.²³ Response were filed by Office staff on July 23, 2025, and by petitioners, jointly, on July 24, 2025.²⁴

II. PUBLIC COMMENT HEARING; SUMMARY OF PUBLIC COMMENTS

In accordance with the combined notice, the public comment hearing convened as scheduled on May 28, 2025, at 6:02 p.m. at the Fonda-Fultonville Central School District in Fonda. Approximately 150 individuals were in attendance, including staff from ORES. Forty-two individuals provided comments. Government official that provided comments were Tim Reilly, Town of Glen Supervisor; John Thomas, former Town of Glen Supervisor, former member of the Town of Glen Planning Board, and former member of the Montgomery County Planning Board; Tim Morford, Mayor of Fultonville; Susan Whiteman, Town of Glen Town Board Member. Josh Shaul, Business Manager for Laborer's Local 157, also provided a comment. Ten of the commenters were in favor of the facility; 30 were clearly or mostly opposed.²⁵

²² See DMM Item No. 199, GFL and Town of Glen Reply in Opposition; DMM Item No. 200, Montgomery County Reply in Opposition.

²³ See DMM Item No. 204, Ruling Regarding Additional Written Submissions.

²⁴ See DMM Item No. 207, ORES staff response to applications petition on County law applicability; DMM Item No. 208, petitioner joint reply in opposition to applicant's argument.

²⁵ See DMM Item No. 159, public comment hearing transcript.

Commenters expressing opposition to the proposed facility raised concerns primarily with the loss of farmland and the scenic character of the area, particularly in light of the volume of renewable energy projects in the region. Comments were also directed to the inequity of having their community impacted for the generation of electricity that was going to be shipped downstate; impacts to forests and wildlife, including birds; loss of property value; loss of local control over land use by the State; impacts to streams and other water resources from solar panel runoff; impacts to the Amish community, including the possibility that they will leave the area; and other concerns with the technology and its impacts.²⁶

Commenters speaking in favor of the project were farmers who spoke of how this project is an economic lifeline for them; how farming in general, including in this region, is increasing economically unviable; and raising the question of the public's right to force them to operate at a loss, through excruciating labor and tremendous financial burden and debt, for the benefit of those who enjoy "the view."²⁷

By the close of the public comment period on May 30, 2025, ORES received a total of 400 written comments 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.²⁸ The written comments restated those issues raised at the public comment hearing.²⁹

²⁶ Id.

²⁷ Id.

²⁸ ORES received 11 comments posted to the DMM after the close of the public comment period.

²⁹ See DMM Comment Nos. 1-406. Note that due to administrative changes, such as the removal of duplicate

III. PETITIONS FOR PARTY STATUS AND PROPOSED ISSUES FOR ADJUDICATION

Applicant

As noted above, applicant timely filed a statement of issues on June 2, 2025. Applicant states its acceptance of the conditions of the draft siting permit and that it “has not identified any substantive and significant issues requiring litigation in this proceeding.”³⁰

Montgomery County

It its petition, Montgomery County raises ten issues for adjudication:

A. Whether the Montgomery County Cumulative Impacts Law (CIL) is applicable to the facility;

B. Whether, under the CIL, the application constitutes unlawful segmentation, as that term is used in the context of State Environmental Quality Review Act (SEQRA);

C. Whether economic impacts have been avoided, minimized, or mitigated to the maximum extent practicable, either in the context of the application itself, or cumulatively;

D. Whether, under the CIL, the regulations related to minority groups and cultural resources have been violated;

E. Whether the project violates the CIL with respect to environment and wildlife;

F. Whether impacts to active farmland have been avoided, minimized, or mitigated to the extent practicable,

comments, the comment number and the total number of comments do not match.

³⁰ See DMM Item No. 54, applicant statement of issues (applicant statement).

either in the context of the application itself, or under the CIL;

G. Whether visual impacts have been sufficiently avoided, minimized, and mitigated, either in the context of the application itself, or under the CIL;

H. Whether the County's Scenic Byways Law (SBL) applies to the facility;

I. Whether the facility meets the "Environmental Benefits Balancing Test" of the Climate Leadership and Community Protection Act (CLCPA);³¹ and

J. Whether the facility should be considered several smaller facilities, based on the discontinuous composition of the photovoltaic arrays, thus depriving ORES of jurisdiction over the application.

Based on the foregoing, the County seeks full-party status. In the alternative, the County seeks amicus status if full-party status is denied.³²

Town of Glen

In its petition, the Town of Glen raises eight issues for adjudication:

1. Whether ORES exceeded the narrow scope of its delegated power to waive local laws by failing to adhere to the statutory and regulatory standards for waiver;

2. Whether ORES committed errors of fact and law and abused its discretion in holding certain provisions of local law are unreasonable burdensome in light of the CLCPA targets and the environmental benefits of the proposed major renewable

³¹ L 2019, ch 106.

³² See County petition at 10.

energy facility;

3. Whether the project's reduced nameplate capacity approved by the New York State Energy Research and Development Authority (NYSERDA) constitutes an amendment to the application made after issuance of notice of complete application, in violation of 16 NYCRR 1100-7.1(a);

4. Whether the project's reduced nameplate capacity invalidates applicant's statement of justification and ORES's subsequent recommendations of waiver of local laws;

5. Whether the draft permit mitigates or avoids visual impacts as required by local law, or whether additional mitigation measures are required;

6. Whether the draft permit mitigates or avoids adverse impacts associated with stormwater runoff and other adverse hydrogeologic impacts from the project;

7. Whether the draft permit considers impacts on important agricultural resources; and

8. Whether the draft permit sufficiently considers pertinent environmental, social and economic factors, including the potential adverse impacts on the potential environmental justice area (PEJA) and whether the project would disproportionately burden any disadvantaged community (DAC).

Based on the foregoing, the Town seeks full-party status. In the alternative, the Town seeks amicus status if full-party status is denied.³³

GlenFARMLand, Inc. and Glen Conservancy

In its petition, GlenFARMLand, joined by the Glen

³³ See Town petition at 11-12.

Conservancy (collectively GFL), identified the following issues for adjudication:

1. Whether the reduced nameplate capacity approved by NYSERDA invalidates application contents assuming a nameplate capacity of 250 MW when presenting the location of the facility, available alternatives, benefits of the facility, and waiver of local law;

2. Whether applicant acted in bad faith by failing to inform ORES of a 27 MW reduction in nameplate capacity, or make concomitant major amendments to the application, prior to ORES's determination that the application was complete or issuance of a draft permit;

3. Whether all requests for waiver of local law must be denied given applicant's and ORES's failure to consider whether full or partial application of contested local laws would result in a nameplate capacity reduction of 27 MW or less;

4. Whether the record contains sufficient evidence for ORES to determine that the draft/final permit avoids, minimizes, or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the facility to avian species;

5. Whether the record contains sufficient evidence for ORES to determine that the draft/final permit achieves a net conservation benefit with respect to any impacted threatened or endangered avian species;

6. Whether the record contains sufficient evidence for ORES to determine that the draft/final permit complies with Article VIII and applicable provisions of the Office's regulations at 16 NYCRR Part 1100 as they apply to avian species;

7. Whether the record contains sufficient evidence for ORES to determine that the draft/final permit avoids,

minimizes, or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the facility to the Amish community, an environmental justice community, impacted by the project;

8.³⁴ Whether ORES violated the State Constitution, article VIII, and ORES regulations by refusing to apply or waive Montgomery County's Cumulative Impact Law;

9.³⁵ Whether the record contains sufficient evidence for ORES to waive Town and County local laws, or whether such waiver would be arbitrary and capricious, an abuse of discretion, and not permissible under applicable law;

10.³⁶ Whether any adjudicable issues raised in the public comment submitted by GlenFARMLand on May 30, 2025, require modification of the draft permit, or denial or dismissal of the permit application.

11.³⁷ Whether the draft permit minimizes, avoids, or offsets adverse impacts to cultural and archaeological resources in the project area.

Based on the foregoing, GFL seeks full-party status. In the event full-party status is denied, GFL seek amicus status in the alternative.³⁸

³⁴ Denominated "Issue 9" in the petition. See GFL petition at 43.

³⁵ Denominated "Issue 10" in the petition. See id. at 44.

³⁶ Denominated "Issue 12" in the petition. See id.

³⁷ Denominated "Issue 13" in the petition. See id. at 45.

³⁸ See id. at 11.

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 (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 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.³⁹

³⁹ See 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,

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:

- (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;
- (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

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).

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.⁴⁰ 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 beliefs are insufficient.⁴¹

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.⁴² 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.⁴³ Exercises of

⁴⁰ 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.

⁴¹ 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.

⁴² See 16 NYCRR 1100-8.3(b)(5)(i), (ii).

⁴³ 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

discretion and policy decisions made by ORES staff are reviewed for an abuse of discretion.⁴⁴

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 siting permit and is contested by the applicant.⁴⁵

With respect to a factual issue sought to be raised by a potential party, including municipalities,⁴⁶ the issue is adjudicable if it is both substantive and significant.⁴⁷ 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.⁴⁸ 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

of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979]).

⁴⁴ 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 Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974])).

⁴⁵ See 16 NYCRR 1100-8.3(c)(1)(i), (iii); see Bear Ridge Solar, Decision at 12; Horseshoe Solar, Decision at 10.

⁴⁶ See 16 NYCRR 1100-8.4(d).

⁴⁷ See 16 NYCRR 1100-8.3(c)(1)(iv).

⁴⁸ See 16 NYCRR 1100-8.3(c)(2).

and conditions.⁴⁹

To participate as a party in any adjudication under 16 NYCRR subpart 1100-8, the potential party seeking full party status, including municipalities,⁵⁰ 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.⁵¹ Where, as here, ORES staff has reviewed an application 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.⁵² 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

⁴⁹ See 16 NYCRR 1100-8.3(c)(3).

⁵⁰ See 16 NYCRR 1100-8.4(d).

⁵¹ See 16 NYCRR 1100-8.4(c)(2)(ii).

⁵² 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).

information was used in the application or draft siting permit.⁵³

As noted above, a potential party carries its burden of persuasion through a sufficient offer of proof by a qualified expert.⁵⁴ 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 arguments authorized by the ALJ.⁵⁵ 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

⁵³ See Bear Ridge Solar, Decision at 13-14; Homer Solar, Decision at 10; Horseshoe Solar, Decision at 11-12; Cider Solar, Decision at 10.

⁵⁴ See 16 NYCRR 1100-8.4(c)(2)(ii).

⁵⁵ See 16 NYCRR 1100-8.3(c)(2).

adjudicability of an issue.⁵⁶

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.⁵⁷

V. RULINGS ON ISSUES

As noted above, in its statement of issues, applicant indicates that it accepts the conditions of the draft siting permit and does not otherwise identify any substantive and significant issues requiring litigation in this proceeding.⁵⁸ Accordingly, applicant does raise an adjudicable issue.

The remainder of this ruling addresses the issues petitioners propose for adjudication.

A. Applicability of Article VIII

The County argues that ORES lacks jurisdiction over this facility application, and claims that the permitting of renewable energy facilities with a nameplate capacity of 20 MW or less is left to localities. The County argues that

⁵⁶ 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).

⁵⁷ See 16 NYCRR 1100-8.3(c)(1)(ii).

⁵⁸ See applicant statement.

there are fragmented solar panel sites, not connected to the majority, that are under 25MW. These solar energy facilities sit completely alone and are isolated from the other panels. . . . It is visibly apparent from the Mill Point Solar I Facility Locations map that there are several small fragments that should go through the local permitting process. They are not geographically connected to the rest of the facility and are islands of solar panels.⁵⁹

The County further posits that “[t]rying to lump several solar facilities that are under 25MW and geographically separated from the majority in with a larger project exceeds the authority of ORES.”⁶⁰

Applicant argues that Mill Point I is plainly a “major renewable energy facility” under Article VIII and its implementing regulations and that the

jurisdictional threshold . . . is the aggregate nameplate generating capacity of the entire project not each physical cluster of solar panels [emphasis added]. There is no requirement that every panel or group within the system individually meet the 25 MW threshold. . . . The Mill Point Solar I project has a total nameplate capacity of up to 250 MW, all under common ownership and operational control, connected to a shared point of interconnection, and submitted as a single permit application.⁶¹

Finally, applicant points out that if small sections or “islands” of panels require local approval, that would “invite project splitting to avoid state jurisdiction.”⁶²

ORES staff responds that:

⁵⁹ County petition at 85-86.

⁶⁰ Id. at 86.

⁶¹ Applicant response at 36.

⁶² Id. at 37.

[a]ll panel arrays . . . are sited relatively close to one another and are fully interconnected . . . [and] are sited on the Facility Site as dictated by landowner exclusion areas and other siting constraints. The Facility is proposed by a single legal entity [and] the entire Facility will connect to the grid via a single Point of Interconnection (POI) switchyard.⁶³

ORES staff also cites, as persuasive authority, a declaratory ruling of the Public Service Law article 10 (Article 10) Board on Electric Generation Siting and the Environment (Siting Board) in the Matter of Hecate Energy Greene 1 LLC, which, in response to a similar argument, held that a facility which included discontinuous sections of solar arrays “was a single facility because the arrays were geographically located next to each other and will be interconnected by overhead collection lines, were proposed by affiliated limited liability companies that could be treated as a single ‘person’ under the PSL, and were not operationally independent since they shared at least some points of interconnection and were being developed at the same time with one commercial operation date.”⁶⁴

Discussion

The County’s argument is unpersuasive. Mill Point Solar I, like other industrial-scale solar facilities, does contain panel arrays that are not contiguous with other such fields. However, they are all part of one facility. Each “island” of panels is connected to the rest of the panels through collections lines, and all the panels transfer their

⁶³ ORES staff response at 27.

⁶⁴ Id. (citing DPS Case 17-F-0619, Matter of Hecate Energy Greene 1 LLC, Declaratory Ruling Concerning Jurisdiction over Proposed Generating Facility, Dec. 21, 2018 [NYS Siting Board] [Hecate Greene Ruling]).

electricity to the bulk delivery electrical grid system through a common point of interconnection.

The Hecate Greene ruling, while not controlling, is persuasive. There, the Siting Board, based on its own precedent, looked to the "physical, legal and operational separation" of facility components; in that case, two facilities shared a common border, the panels were within 500 feet of each other, and ran parallel to each other. While they did not share a point of interconnection, the interconnection lines for one part ran through and over the other. Those facilities were owned by separate LLCs, however, the Siting Board treated them as one "person" under the PSL. The Board noted that, as a result of that facility's design, "operational independence [was] not as clear-cut." They relied on the facts that both parts of the facility were "being developed at the same time as one Project, would have one commercial operation date, and likely will share the same access roads."⁶⁵

Here, the questions of "legal independence" and "operational independence" are not close calls. There is only one corporate entity seeking a single permit. There is only one point of interconnection. The panel fields share a common set of access roads, share an operations and management building, and have a single proposed commercial operation date.

Furthermore, and as argued by applicant, to follow the County's legal theory could result in fragmentation of projects into multiple reviews by multiple agencies. As the Siting Board held with respect to Article 10 in the Hecate Greene ruling, this fragmentation would "frustrate the intent" of the statute "to provide for one comprehensive review of the potential

⁶⁵ Hecate Greene, Ruling at 11-14.

environmental, health, safety and other impacts resulting from a proposed project.”⁶⁶ We hold this additional reasoning persuasive as well.

Thus, we hold the argument that the facility should be treated as multiple smaller facilities, outside of ORES jurisdiction, unconvincing and conclude that here, the County has failed to meet its burden of raising a substantive and significant factual or legal issue.

Ruling: Montgomery County has not identified a substantive and significant factual or legal issue that the facility falls outside ORES jurisdiction.

B. Nameplate Generating Capacity, Post-Notice of Complete Application Amendments, and Related Issues

In their petitions, the Town and GFL contend that the reduction in nameplate capacity of 223 MW awarded by the New York State Energy Research and Development Authority (NYSERDA) calls for an amendment to the project application. Further, they argue that because such amendment occurred after ORES issued its notice of complete application (NOCA), the amendment is barred by 16 NYCRR 1100-7.1(a), which allows project amendments only “prior to issuance of a notice of complete application.” The Town contends that such a potential violation raises “sufficient doubt that Applicant complied with applicable statutory and regulation procedures” requiring a hearing to determine whether the application and draft siting permit be denied.⁶⁷

⁶⁶ Id. at 14.

⁶⁷ See Town petition at 20-21.

Additionally, the Town and GFL argue that the reduction in nameplate capacity calls into question the granting of local law waiver requests sought by applicant pursuant to 16 NYCRR 1100-2.25(c) by overstating the environmental benefits of the project and raises doubt about whether compliance with the subject local laws remain unduly burdensome to achieve the CLCPA targets. The Town alleges that "ORES may only waive a local law upon a showing that the waiver request cannot be reasonably obviated by design changes to the facility." According to the Town, applicant supported its waiver requests, specifically those concerning setback requirements, claiming that compliance would necessarily result in a reduction of MW generation. According to the Town and GFL, applicant justified its waiver request concerning the Town's setback requirements for wetlands, ponds, and streams claiming that 9.17 MW of panels would be lost if compliance were achieved. This loss in potential generation "is significantly less than the 27 MW that has been eliminated, and therefore ORES cannot conclude that it would be unreasonably burdensome to comply with the Solar Law § 5(2)(b)(iii) and (5)(b) [wetland setback requirements]." The Town contends that applicant's failure to disclose the reduction of nameplate capacity or justify why compliance with local laws resulting in less of a loss of generation is unduly burdensome. The Town alleges that the granting of waiver requests is tainted by both errors of fact and law.⁶⁸

Likewise, GFL states similar arguments along with several other concerns. GFL submits as its offer of proof

⁶⁸ Id. at 21-23.

supporting its proposition that the facility will generate 223 MW of energy a NYSEERDA public release of bid facility information, which shows the facility proposed nameplate capacity to be 223 MW.⁶⁹ Addressing the Town's setback requirements for wetlands, ponds, and streams, GFL states that given the nameplate capacity reduction of 27 MW, compliance with the wetlands setback requirement which reduces the project's generation by 9.17 MW would not place an unreasonable burden on applicant and any waiver of this setback requirement would be more than the minimum necessary, thereby not satisfying the § 1100-2.25(c) standard for the draft siting permit waiver.⁷⁰ Further, the benefits of the facility, including the CO2 emissions off set, is overstated. According to GFL, the reduction to 223 MW of generation capacity "contradicts information available in numerous application exhibits, undermines ORES's impact and avoidance assumptions in the draft permit, and raises significant questions of fact and law as to whether the application and draft permit contain sufficient information for ORES to understand the intended location of the facility, available alternatives, project impacts, the benefits of the facility, and waiver of local law." GFL states that the application's and draft siting permit's overstatement of MW generation is substantive and significant because a "reasonable person would require further inquiry whether the draft siting permit (1) 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

⁶⁹ See DMM Item No. 177, GFL petition, exhibit A.

⁷⁰ GFL petition at 23-24.

unreasonably burdensome; or (2) avoids, minimizes, or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the project.”⁷¹ GFL claims that a reduction in nameplate capacity should have led to further consideration of whether waiver requests were the minimum necessary or could have been obviated by project design. GFL states that “all recommended waivers in the draft permit failed to consider a 27 MW reduction in nameplate capacity when determining waivers were the minimum necessary, and whether ORES’s recommended waivers avoid, minimize, or mitigate the impacts of waiver to the maximum extent practicable.”⁷²

GFL also alleges that applicant’s omission to inform ORES and the parties of the MW generation reduction was intentional or negligent, and requires discovery and cross examination at an adjudicatory hearing to determine whether the application and siting permit should be denied.⁷³

Applicant responds that an amendment to the application is not required because the NYSERDA procurement process and ORES permitting process are two distinct procedures for distinct purposes. The NYSERDA award results in a bilateral, long-term commercial agreement for renewable energy credits and production from the facility and is not part of the regulatory siting process and “has no bearing on the design, scope or layout of the project.” Further, the proposed application nameplate capacity is “up to 250 MW” and applicant is obligated to minimally produce 223 MW, but is

⁷¹ Id. at 26.

⁷² Id. at 29-30.

⁷³ Id. at 27-28.

allowed to produce additional generation to be delivered into the wholesale market on a merchant basis.⁷⁴ Concerning the Town's claim that the 27 MW reduction in potential nameplate capacity undermines applicant's justification for waivers of substantive local laws, applicant states that the "burdens imposed by the Town's local laws do not become more reasonable simply because a Project's nameplate capacity maybe lower . . . and that regardless of size, the project would encounter the same siting conflicts if local laws were enforced as written."⁷⁵ According to applicant, "capacity reduction is just one indicator of burden" and "the Statement of Justification highlights that reducing the Facility from its proposed 250 MW would significantly impair project feasibility, it also demonstrates that the laws are burdensome because they impose disproportionate design constraints, limit the ability to efficiently use land, conflict with other siting priorities (e.g., avoiding wetlands or agricultural impacts), and frustrate CLCPA policy goals." Applicant states that the 27 MW not included in the NYSERDA award does not relieve project constraints, "expand the usable project area, or render compliance with the Town's laws any less burdensome," and that the "limitations imposed by the local laws severely limit where panels can be located on participating parcels, and these limitations are not somehow eliminated due to the NYSERDA award."⁷⁶

Finally, responding to allegations by GFL of applicant's "bad faith" in failing to disclose the 223 MW

⁷⁴ Applicant response at 50-53, 54.

⁷⁵ Applicant response at 53.

⁷⁶ Id. at 54.

NYSERDA award, applicant states this allegation is unsubstantiated and “misrepresents both the nature of the NYSERDA bidding process and the scope of the Applicant’s obligations under the Article VIII process.” According to applicant, Article VIII does not require project applicants to disclose NYSERDA bidding status or outcomes and “virtually all renewable energy projects seek long-term contracts.” Applicant distinguishes the facts and circumstances of this matter from the Shepherd’s Run Solar case cited by GFL, stating that that project involved a change of real property rights and project site control, and in this case “a separate financial arrangement under a state-run procurement process does not directly impact Project scope and design. Seeking such awards is routine and a publicly known aspect of renewable energy development.” Applicant concludes that GFL “has not shown that the NYSERDA contract constitutes a material change to the Article VIII Application, nor that Applicant had any duty to report a contract bid.”⁷⁷

ORES staff responds that the information provided to NYSERDA during the solicitation process does not invalidate the Article VIII application record, does not require an application amendment, and does not invalidate the granting of applicant’s waiver requests and the draft siting permit. According to ORES staff, NYSERDA Tier 1 Renewable Energy Credit (REC) agreements contemplate and allow for changes after projects are awarded REC agreements, and that the REC Cap in REC agreements has a 1.2X multiple allowing projects to produce more energy and sell NYSERDA more RECs.

⁷⁷ Id. at 64, referencing ORES DMM Matter No. 21-02553, Matter of Hecate Energy Columbia County, LLC (Shepherd’s Run Solar).

Also, that the REC agreements do not restrict a developer from constructing a project that generates more energy and have language that recognizes energy greater than the REC Cap may be generated. Further, applicant's interconnection request with the New York Independent System Operator (NYISO) was for a capacity of 250 MW, which implies applicant's intent to participate in the NYSIO market at up to 250 MW. Finally, ORES staff states there is no Article VIII requirement requiring a NYSERDA contract or applicant's provision of information related to the NYSERDA agreements, and therefore, there is no indication of bad faith by applicant.⁷⁸

On July 8, 2025, the Town, GFL, and the County filed a joint motion seeking to dismiss the application based on their "reduction in nameplate capacity" arguments raised in their petitions. In the alternative, petitioners request the issues determination process be adjourned to allow for further discovery of the reduced nameplate capacity issue. Petitioners' grounds for application dismissal are: (1) applicant's NYSERDA bid proposal and contract award is a material change of facts and calls for a permit application amendment which is prohibited by 16 NYCRR 1100-7.1 at this stage in the proceeding, and (2) the NYSERDA bid proposal and contract award invalidate applicant's justifications for local law waivers, and therefore invalidates ORES waiver analysis and prevents ORES from determining that the waivers cannot be obviated by a change of facility design or are the minimum necessary.⁷⁹ On July 14, 2025, both applicant and

⁷⁸ ORES staff response at 28-30.

⁷⁹ See joint motion to dismiss.

ORES staff submitted responses to the joint motion to dismiss.⁸⁰ Applicant and ORES staff again point out that the NYSERDA solicitation process and ORES application process are distinct, that the project has not been amended, that a NYSERDA award for reduced nameplate capacity does not necessitate a modification to the project and application amendment distinguished from the "site control" facts and circumstances of Shepards Run Solar, that there has been no showing that the facility as proposed through the application process cannot be permitted, and that there are no new facts or extraordinary circumstances allowing for discovery under ORES regulations 16 NYCRR 1100-8.6(a) and (c)(1). Applicant submits the affidavit of Andrew Barrett, Development Manager, stating that the facility as proposed and reviewed by ORES remains the same as an "up to 250 MW" project, that the application has not been amended, that "no changes have been made to the design, layout or scope of the project since the issuance of the NOCA," and that the NYSERDA bid submission and award "do not alter the Facility's proposed configuration, site control or design as proposed in the Application."⁸¹

Discussion

Initially, petitioners have not submitted any new or additional arguments, facts, or offers of proof beyond that contained and submitted in their petitions for party status. Therefore, we will decide all issues concerning nameplate capacity raised through the issues determination

⁸⁰ See applicant response to motion to dismiss; ORES staff response to motion to dismiss.

⁸¹ See DMM Item No. 202, applicant response to motion to dismiss, Barrett affidavit at 1.

process and motion to dismiss in this ruling. In their petitions and motion, the Town, GFL, and the County argue that (1) applicant's NYSERDA bid proposal and contract award is a material change of facts and calls for a permit application amendment which is prohibited by 16 NYCRR 1100-7.1 at this stage in the proceeding, and (2) the NYSERDA 223 MW bid proposal and contract award invalidate the applicant's justifications for local law waivers, and therefore invalidates ORES waiver analysis and prevents ORES from determining that the waivers cannot be obviated by a change of facility design or are the minimum necessary. In support of their contentions, petitioners submit the NYSERDA press release indicating that applicant's bid to produce 223 MW through the NYSERDA solicitation process was awarded.

There is no factual dispute that applicant has entered into a bilateral agreement with NYSERDA to generate 223 MW according to the terms and conditions of that agreement. There is no dispute that applicant has not sought a project amendment after the issuance of ORES staff's NOCA. Further, there is no dispute that the application as proposed, reviewed, and addressed in the draft siting permit is for the facility to generate "up to 250 MW."⁸² Applicant and staff further note that the NYSERDA solicitation process, applicant's resulting contact with NYSERDA, or the draft siting permit do not prohibit the facility from generating "up to 250 MW." ORES staff notes applicant's interconnection request with the New York Independent System Operator (NYISO) was for a capacity of up to 250 MW and both ORES staff and applicant state that the NYSERDA process and ORES siting

⁸² Draft siting permit at 3.

application process are distinct and for different purposes. We agree.

The ORES siting process is to ensure that project and facility impacts have been avoided, minimized, and mitigated to the maximum extent practicable resulting in a final siting permit, whereas the NYSERDA solicitation process results in a long-term agreement to generate energy under agreed upon terms and conditions. Further, nothing in Article VIII or ORES regulations mandates that information submitted in or through the NYSERDA process or any results of that process, including agreements or awards, are part of the application record for a siting permit. More importantly, applicant has established that the facility remains the same as an "up to 250 MW" project, and that "no changes have been made to the design, layout or scope of the project since the issuance of the NOCA," and that the NYSERDA bid submission and award "do not alter the Facility's proposed configuration, site control or design as proposed in the Application."⁸³

We also determine that the facts and circumstances of this proceeding are distinguished from Shepherd's Run Solar. In Shepherds Run Solar, applicant lost site control over several facility parcels after the NOCA was issued that would prevent applicant from constructing and operating the generation facility as proposed and reviewed by ORES staff. Also, applicant indicated that it was going to amend its application after issuance of the NOCA in that case. In that case, the Executive Director held that to issue a siting permit the "Office must conclude . . . that all statutory

⁸³ See Barrett aff at 1.

and regulatory requirements, including that applicant has obtained, or is under a binding contract to obtain, title to or a leasehold interest in all properties comprising the facility site.” Since the Town of Copake established that this statutory and regulatory requirement could not be met, the denial of the application without prejudice was warranted.⁸⁴ Here, the project is not prevented from generating up to 250 MW. We agree with ORES staff that the 223 MW NYSERDA award does not require an application amendment and applicant has stated that there has been no amendment. The Town, GFL, and the County present arguments and allegations based on speculation and mistaken conclusions that the facility must now only generate 223 MW and that, therefore, the facility can be modified allowing for even further avoided or minimized impacts or that a revised analysis of impacts and benefits is required. Nothing in this record or provided by the Town, GFL, or the County supports these conclusions. Therefore, we determine that petitioners have failed to establish that an application amendment is required that would lead to a denial of the application at this stage of the proceeding.

Concerning petitioners’ second argument that the NYSERDA 223 MW bid proposal and contract award invalidates the applicant’s justifications for local law waivers, and subsequent ORES waiver analysis is flawed resulting in a defective draft siting permit, we also determine that petitioners have failed to raise a substantive and significant factual issue for adjudication, or otherwise

⁸⁴ ORES DMM Matter Number 21-02553, Hecate Energy Columbia County 1, LLC, Decision of the Executive Director, Feb. 6, 2024, at 27-28.

identified any legal error. The main premise to this argument is that in fact, applicant will construct and operate a facility that can only produce 223 MW, and that the facility site and design will necessarily be different or modified from what was proposed in the application, reviewed by ORES staff, and described in the draft siting permit. No party to this proceeding disputes that applicant was granted a NYSERDA award for 223 MW of nameplate capacity through the NYSERDA solicitation procurement process; however, petitioners have speculated from this fact that applicant will not build the facility as proposed and designed as stated in the application. This conclusion based on speculation has been satisfactorily rebutted by applicant and ORES staff.

In its response to the petitions for party status, applicant states that the 27 MW not included in the NYSERDA award does not relieve project constraints, "expand the usable project area, or render compliance with the Town's laws any less burdensome," and that the "limitations imposed by the local laws severely limit where panels can be located on participating parcels, and these limitations are not somehow eliminated due to the NYSERDA award." More importantly, applicant in its motion response affirms the facility as proposed and reviewed by ORES remains the same as an "up to 250 MW" project, that the application has not been amended, that no changes have been made to the design, layout, or scope of the project since the issuance of the NOCA, and that the NYSERDA bid submission and award "do not alter the Facility's proposed configuration, site control or

design as proposed in the Application.”⁸⁵ In its response to the petitions for party status, ORES staff states that the information provided (i.e. bid of 223 MW of nameplate capacity) does not invalidate the application, including the draft siting permit. ORES staff states, and we agree, that petitioners’ offer of proof, namely the public release of bid information, is not a sufficient offer of proof in accordance with 16 NYCRR 1100-8.4(c)(2)(ii). Petitioners have not satisfied their burden to establish that the application was amended, or that the project will be modified to change the design of the facility to reduce the facility’s generating capacity.

Further, given the undisputed facts, we hold petitioners have not identified an issue that could potentially result in the denial of the siting permit, a major project modification, or imposition of significant project conditions in the draft siting permit.⁸⁶ Therefore, petitioners have not satisfied their burden to raise a substantive and significant issue for adjudication.

Finally, we hold that petitioners have not provided any new information, and that “extraordinary circumstances” do not exist that would allow discovery at this stage of the proceeding.⁸⁷ Petitioners have not provided sufficient reasons, other than allegations based on speculation, to convince us discovery is called for under the facts and circumstances of this matter. Again, it is undisputed that applicant’s bid of 223 MW was awarded through the NYSERDA

⁸⁵ Barrett affidavit at 1.

⁸⁶ See 16 NYCRR 1100-8.3(c)(3).

⁸⁷ See 16 NYCRR 1100-8.6.

solicitation procurement process and that Article VIII or ORES regulations do not mandate that information from that process necessarily be submitted to become part of the record of an Article VIII siting application. The Article VIII application process and the NYSERDA solicitation process are independent, and ORES does not have authority over the NYSERDA process or resulting awards. Therefore, we deny petitioners' alternative request to stay the issues determination procedure pending discovery concerning the nameplate capacity issue. Because we determine that no substantive and significant issue has been raised and that the application continues to be processed through the issues determination and compliance process, the remedy sought by petitioners to deny the application or revoke the draft siting permit is moot. Therefore, we deny the motion to dismiss brought by the Town, GFL, and the County.

Ruling: No substantive or significant issue has been raised by the Town, County, or GFL concerning the NYSERDA solicitation procurement process and applicant's award of 223 MW through that process for the Mill Point Solar I, LLC generation facility. We deny the Town, County, and GFL's motion to dismiss based on these issues.

C. Visual Impacts

1. Montgomery County Petition

The County contends that adjudicable issues exist as to whether "the project avoids, minimizes, or mitigates, to the maximum extent practicable the visual impacts of this project and also the cumulative visual impacts under the Cumulative

Impacts Law.”⁸⁸ In support of its argument, the County proffers a visual impact assessment report prepared on behalf of the County by T.J. Boyle, a landscape and planning firm (County VIA report) that used the U.S. Department of the Interior, Bureau of Land Management (BLM), contrast rating system.⁸⁹ The County contends that the report raises issues related to three key observation points (KOPs) within the County: KOP 1 – Van Epps Road, a designated scenic byway with impacts from the project assessed by the County’s expert as “moderately strong impact rating” and “NOT COMPATIBLE with the perceived visual management objectives at KOP 1;”⁹⁰ KOP 2 – NYS Route 30A, a thoroughfare “known for its scenic landscapes, featuring farmland, rolling terrain, and historic sites” assessed by the County as having a “strong impact rating” which is “NOT COMPATIBLE with the perceived visual management objectives at KOP 2” such that “[m]itigation plantings will not screen visibility of the project and the project will become ‘the prominent visual element in views to the south;’”⁹¹ KOP 3 – Auriesville Road, a Montgomery County designated scenic byway that “winds through a region known for its agricultural heritage, featuring farmland, wooded areas, and historic properties” that is assessed by the County as having a “strong impact rating” from the project significantly altering “the prominent view of the silhouetted horizon,” which is “NOT

⁸⁸ County petition at 56. The issue of cumulative impacts referenced by the County is discussed below in the section of this ruling addressing compliance with the County’s Cumulative Impacts Law. See section V.K.1 below.

⁸⁹ See DMM Item No. 165, County petition, exhibit 4, TJ Boyle Visual Impact Analysis Report (County VIA report).

⁹⁰ County VIA report at 15.

⁹¹ County petition at 60, quoting County VIA report.

COMPATIBLE with the perceived visual management objectives at KOP 2 [sic]." The County VIA report opines that similar impacts would be found at Argersinger Road, Auriesville Road, Egleston Road, Fisher Road, Ingersoll Road, and Mile Level Road.⁹² The County VIA report concludes that landscape mitigation efforts will not effectively screen views of the project because the limited setbacks and proposed plantings "will effectively change the open landscape within the town, significantly changing the overall character within Glen and this portion of Montgomery County" and strongly recommends that "portions of the array be removed or repositioned."⁹³ The County argues that the waiver of local setbacks and slope provisions will also contribute to increased visual impacts.⁹⁴ The County further argues that, in contrast to their expert's findings, applicant's visual impact assessment is dismissive, lacks explanation, and "fails to factually address the true visual impacts of the project."⁹⁵

The County contends that the proposed issues are substantive because they are "(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."⁹⁶ The County argues that the issue is significant because "[i]t is clear that an examination of the

⁹² County VIA report at 16.

⁹³ Id. at 25.

⁹⁴ See County petition at 61. This issue is discussed further in the section of this ruling addressing the waiver of the Town of Glen's local laws. See section V.J below.

⁹⁵ County petition at 63.

⁹⁶ Id. at 71 citing Rock District Solar, Decision at 16.

experts is necessary to determine if permit conditions need to be modified on this project given the identified visual impacts.”⁹⁷ As an offer of proof, the County proposes the testimony of Michael Buscher, BLA, ASLA, PLA, and the County VIA report.⁹⁸

In response, applicant argues that the County fails to meet its burden of raising a substantive and significant issue for adjudication. Applicant argues that County VIA report “effectively functions as an alternative visual impact assessment and criticizes the Applicant’s layout and proposed mitigation strategies, but it does not identify any factual inaccuracies, material omissions, or defective data in the Application.”⁹⁹ Applicant further argues that “[w]here two qualified professionals offer differing judgments based on the same or similar underlying data, without more does not give rise to an adjudicable issue of fact.”¹⁰⁰ Applicant avers that the County’s expert “merely offers a subjective reinterpretation of visual impacts based on a different methodology.”¹⁰¹ Applicant contends that, in contrast, its visual impacts assessment, “which conforms with the Article VIII regulations, included 13 viewpoint simulations, out of 26 viewpoint locations chosen in consultation with ORES, the State Historic Preservation Office

⁹⁷ Id. at 72.

⁹⁸ See id.

⁹⁹ Applicant response at 29.

¹⁰⁰ Id. at 29-30, citing Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, Oct. 26, 2012, at 4 (NYSDEC) (“where such a hearing ‘would dissolve into an academic debate’ is not the intent of the . . . hearing process.”)

¹⁰¹ Id. at 30.

(SHPO) and local stakeholders (including the Town of Glen) includes accurate vegetation mapping, landscaping, both leaf-on and leaf-off conditions, and was accepted by ORES staff as complete” is more robust than the County VIA report, which does not conform to Article VIII standards.¹⁰² Applicant further argues that the County VIA report “included only 3 viewpoint simulations out of 6 viewpoint locations with only leaf-off conditions” and overstates visual impacts associated with the project.¹⁰³ Applicant states that “[v]isual impacts of the proposed Project were appropriately addressed by project design including the Applicant’s proposed visual impact and minimization and mitigation plan (VIMMP) and associated landscape mitigation planting plan.”¹⁰⁴

ORES staff argues that the County has not raised a substantive and significant issue for adjudication as to whether visual impacts have been avoided, minimized, or mitigated to the maximum extent practicable. ORES staff further argues that the County VIA report places “inappropriately high value on the existing landscape character” and the report “includes a flawed analysis and conclusions that are inconsistent with the intent of the BLM Resource Management System and omits key parts of the ORES process.”¹⁰⁵ ORES staff points to several deficiencies in the County VIA report such as the requirements of “copies of instructions used by panelists to complete forms, qualifications of panelists, and copies of all worksheets prepared” and notes that applicant has made several design changes to the facility

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id. at 32.

¹⁰⁵ ORES staff response at 63.

in response to potential visual impacts among other siting constraints.¹⁰⁶ ORES staff also notes that “[a]pplicant is required pursuant to the conditions of the Draft Permit and USCs, to submit a final Visual Impact Minimization and Mitigation Plan (VIMMP), including a Screen Planting and Lighting Plan.”¹⁰⁷

Discussion

We agree with applicant and ORES staff that the County’s petition and expert report is insufficient to raise a substantive and significant fact issue for adjudication. To the extent the County VIA report raises a legal issue, we conclude that the County has not established any error of law or abuse of discretion regarding ORES staff’s determination that the facility avoids, minimizes, and mitigates all potential adverse visual impacts to the maximum extent practicable.

As stated above, where ORES has reviewed an application and finds that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility, 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. 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

¹⁰⁶ See id.

¹⁰⁷ Id. at 63.

application or draft siting permit, or (iii) show that defective information was used in the application or draft siting permit. To raise a legal issue for adjudication, the proposed party must establish an error of law or abuse of discretion that has the potential to result in the denial of the siting permit, a major modification to the proposed project or the imposition of significant permit conditions in the draft permit. Moreover, in resolving questions of law regarding ORES staff's interpretation of ORES regulations, "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."¹⁰⁸

Where, as here, a potential party seeks to adjudicate an issue regarding visual impacts, the party seeking adjudication must demonstrate that the issue 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 and that the proposed issue for adjudication could result in a denial or major modification to the permit. A potential party satisfies their burden by submitting an adequate offer of proof, usually supported by expert testimony or analysis.

Here, the County's petition and offer of proof do not establish that ORES staff's determination that all potential adverse visual impacts are avoided, minimized, and mitigated to the maximum extent practicable by the landscape plan and other measures proposed by applicant in its appendix 8-1 of the application and the proposed VIMMP.¹⁰⁹ We agree with applicant's

¹⁰⁸ See Matter of Howard v Wyman, 28 NY2d 434, 438 (1971).

¹⁰⁹ See applicant response, exhibit A, Visual Memorandum at 5.

contention that the County VIA report does not show that the applicant's ORES-approved visual impact analysis is technically deficient and does not "provide evidence that the Applicant used incorrect inputs, omitted key resources, or misrepresented the visibility of the Facility."¹¹⁰ We also agree with applicant's assertion that zero visibility is not a reasonable or attainable standard for mitigation of visual impacts and landscape mitigation plantings cannot be deemed insufficient "just because the landscaping is also a change in the view."¹¹¹

The record supports ORES staff's determination regarding visual impacts. As stated by staff in its response, the proposed facility has already undergone multiple design changes "in response to constraints including setback requirements, local zoning, sensitive resources, noise and visual impacts and community feedback as well as stormwater design."¹¹² Staff further establishes that the County VIA report assigns higher classifications to the studied viewpoints without a sufficient factual basis or justification, and omits several items required by 16 NYCRR 1100-2.9 and the general application process.¹¹³

The County's offer of proof does not provide any facts or analysis that would refute ORES staff's approval of applicant's visual impacts assessment. The County has not identified any site-specific visual impacts that have not been addressed nor established how applicant's extensive proposed landscape mitigation measures are insufficient to avoid,

¹¹⁰ Applicant response at 30.

¹¹¹ Applicant response at 32.

¹¹² ORES staff response at 63.

¹¹³ Id.

minimize, and mitigate potential significant adverse impacts to the maximum extent practicable. Arguments raised by the County regarding the specific importance of the valley region and effects on the reception of visual impacts from the project have been considered and do not establish an adjudicable issue regarding ORES staff's determination that impacts to this region have been adequately mitigated by project design and screening. Accordingly, the County has not met their burden of identifying a substantive and significant issue through an adequate offer of proof.

Ruling: The County has not established a substantive and significant fact issue for adjudication regarding visual impacts. To the extent a legal issue exists, we conclude that the County has not established an abuse of discretion or error of law regarding visual impacts requiring further adjudication.

2. Town of Glen Petition

The Town seeks adjudication on the issue "[w]hether the Draft Permit mitigates or avoids visual impacts as required by Local law, or whether additional mitigation measures are required."¹¹⁴ The Town argues that the facility will have significant impacts on viewsheds within the Town and surrounding areas and the solar arrays will be "visible from both public and

¹¹⁴ Town petition at 23. The Town's issues related to compliance with its visibility and screening requirements are discussed in the section of this ruling addressing compliance with the Town's local laws and ordinances. See section V.J below. In its Issue 5, discussed here, the Town does not identify any other local law requirements in support of its assertion that the visual impacts of the project do not comply with local law requirements. Accordingly, the Town's Issue 5 is analyzed with respect to the project's compliance with Article VIII requirements.

residential vantage points with a thin layer of sparse landscaping proposed that leaves the Project completely visible during leaf-off seasons.”¹¹⁵ The Town further argues that the proposed 50-foot setback will be insufficient to screen the facility. The Town also states that “even the 5-year build out of the landscaping proposed as mitigation fails to protect viewsheds.”¹¹⁶ The Town raises concerns that impacts to travelers on the public right of way “may negatively affect the local economy by deterring tourism, as visitors have historically been drawn by the rural, agrarian aesthetic while visiting the Auriesville Shrine, the Buddhist Temple, the recently refurbished NYS Empire State Trail and historic sites within the Town.”¹¹⁷ The Town states that the proposed visual screening is insufficient and argues applicant should be required to “fully mitigate impacts to the viewshed given the Town’s reliance on tourism and a rural agricultural aesthetic.”¹¹⁸ The Town proposes mitigation in the form of “the use of berms, sufficient setbacks or even partial berming or ‘burial’” of equipment or facilities, such as the substation.”¹¹⁹ The Town concludes that there is a substantive and significant issue as to whether the applicant and draft permit fail to provide adequate visual impact avoidance or mitigation measures, and that a hearing must be held to “develop additional permit conditions that would meet the requirements of the Town’s local

¹¹⁵ Id.

¹¹⁶ Id. at 23.

¹¹⁷ Id. at 23.

¹¹⁸ Id.

¹¹⁹ Id. at 24-25.

law.”¹²⁰ As an offer of proof, the Town of Glen relies upon the County VIA report, and offers the testimony of the Town’s engineering consultants Douglas P. Cole and James Girona, who will “provide expert evidence and testimony on all substantive and significant issues raised herein, including the adverse impacts of the Project as proposed, the adequacy of the Draft Permit conditions, and the waiver of noncompliance with the Town’s local laws.”¹²¹

In response, applicant argues that the Town’s generalized concerns that the potential visual impacts of the facility may detract from the local economy do not raise a substantive and significant issue for adjudication.¹²² Applicant further states that it has complied with the requirements of 16 NYCRR 1100-2.9 by proposing a comprehensive VIMMP, committing to mitigation through visual screening, and agreeing to installation monitoring.¹²³ Applicant argues that the “Town’s dissatisfaction with the type and extent of proposed mitigation, such as its preference for berms, greater setbacks, or partial burial of infrastructure, does not raise serious doubt as to whether the Applicant can meet statutory or regulatory requirements.”¹²⁴ The applicant further argues that the Town’s criticism of the effectiveness of the proposed screen plantings does not identify any factual inaccuracies or flaws with the applicant’s visual impact analysis.

¹²⁰ Id. at 25.

¹²¹ Id. at 30.

¹²² See applicant response at 55.

¹²³ See id. at 55, citing DMM Item No. 94, application exhibit 2 (revised): Overview and Public Involvement.

¹²⁴ Id. at 55-56.

ORES staff argues that the Town's petition and proposed offer of proof incorporating by reference the County VIA report do not meet the standard for adjudication.¹²⁵

Discussion

We agree with applicant and ORES staff that the County's petition is insufficient to raise a substantive and significant issue for adjudication.

As stated above, where ORES has reviewed and application and finds that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility, 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.

Where, as here, a potential party seeks to adjudicate an issue regarding visual impacts, the party seeking adjudication must demonstrate that the issue 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 and that the proposed issue for adjudication could result in a denial or major modification to the permit. A potential party satisfies their burden by submitting an adequate offer of proof, usually supported by expert testimony or analysis.

Here, the Town's general criticisms of the proposed visual impact mitigation and conclusory statements regarding

¹²⁵ See ORES staff response at 59.

potential impacts are insufficient to raise a substantive and significant issue as to whether all potential adverse visual impacts are avoided, minimized, and mitigated to the maximum extent practicable by the landscape plan and other measure's proposed by applicant in its appendix 8-1 of the application and the proposed VIMMP.¹²⁶ Moreover, we agree with applicant that "[t]he Town's assertions that the landscaping is not sufficient as it does not include the use of berms, sufficient setbacks or dense enough landscaping does not constitute a factual dispute."¹²⁷

The Town's reliance on the County VIA report fails to raise a substantive and significant issue for adjudication for the same reasons stated in our ruling on the Montgomery County petition and will not be repeated here. Accordingly, the Town has not met their burden of identifying a substantive and significant issue through an adequate offer of proof.

Ruling: The Town of Glen has not established a substantive and significant issue for adjudication regarding visual impacts.

D. Cultural Resources

GFL argues that applicant's application exhibit revised¹²⁸ has major "deficiencies" and submits the written public comment of Jon Vidulich and oral comments of Jon and Sarah Vidulich offered at the May 18, 2025, public comment

¹²⁶ See applicant response, exhibit A, Visual Memorandum at 5.

¹²⁷ Applicant response at 47.

¹²⁸ See DMM Item No. 94, application exhibit 9 (revised): Cultural Resources.

hearing as its offer of proof questioning whether the alleged adverse cultural and archaeological impacts of the project have been properly quantified, avoided, or minimized as reflected by the terms and conditions of the draft siting permit. GFL indicates that Sarah Vidulich intends to provide testimony at an adjudicatory hearing, while Mr. Vidulich has not yet so agreed. GFL submits the resume of Sarah Vidulich.¹²⁹

The draft siting permit mandates that pursuant to ORES regulation 16 NYCRR 1100-10.2(g), applicant submit a pre-construction cultural resources avoidance, minimization and mitigation plan that demonstrates the impacts of construction and operation on cultural resources "will be avoided or minimized to the extent practicable by selection of the proposed facility's location, design and/or implementation of identified mitigation measures."¹³⁰

In response to GFL's contentions, applicant submitted a cultural resources memorandum by TRC. Applicant states that the Vidulich comments do not raise a substantive and significant issue and are general criticisms that "do not undermine applicant's conclusions with respect to cultural resources." Applicant states that pursuant to the applicable regulations, it consulted with the Office of Parks, Recreation, and Historic Preservation (OPRHP), which serves as the State Historic Preservation Office (SHPO). As a result, applicant states that it conducted Phase IA and IB surveys in accordance with SHPO guidance, and all required protocols and surveys were reviewed and accepted by SHPO. Further, applicant contends that the

¹²⁹ See DMM Item No. 177, GFL petition at 45 and exhibit E (Vidulich comments).

¹³⁰ Draft siting permit USC 4.4(u) at 42 and compliance requirement 6.1(g) at 55.

comments are inaccurate as they pertain to specific OPRHP sites, that historic maps used included sufficient resource information, and some comments are critiques of field-testing methods for a small number of the more than 10,000 shovel tests excavated during the Phase 1B survey.¹³¹

ORES staff responds that the Vidulich comments are general criticisms and comments on applicant's submissions, and that applicant will submit and implement an approved cultural resources avoidance, minimization and mitigation plan as required by 16 NYCRR 1100-10.2(g) and the draft siting permit. Staff states that applicant will comply with those requirements, and that neither the GFL nor the Vidulich comments support applicant's non-compliance with ORES statutes, regulations, or draft siting permit conditions. Therefore, no substantive and significant issue has been raised for adjudication.¹³²

Discussion

We have reviewed the draft siting permit, applicant's application exhibit 9 revised, GFL's offer of proof, and the TRC rebuttal report to determine that there is no substantive and significant issue requiring adjudication concerning cultural impacts. Applicant's application exhibit 9 revised contains two recommendation letters from OPRHP, one dated December 22, 2023, and the other dated April 22, 2024. Each letter concludes that "[b]ased on our review, it is the opinion of the OPRHP that no properties, including archaeological and/or historic resources, listed in or eligible for the New York State and National Registers of Historic Places will be Adversely Impacted by this

¹³¹ Applicant response at 76-77; attachment d, cultural resources memorandum.

¹³² ORES staff response at 71-72.

project with the condition that the Archaeological Site Avoidance Plan (TRC, December 12, 2023) is adhered to.”¹³³ GFL’s offer of proof, the Vidulich comments, do not directly question these recommendations, nor do they provide any basis questioning applicant’s compliance with ORES regulations, the draft siting permit conditions, and the proposed cultural resources avoidance, minimization and mitigation plan. The Vidulich comments are general criticisms stating “areas of concern” of application exhibit 9 revised and the cultural resources avoidance, minimization and mitigation plan, but fail to offer any viable testing alternatives or provide their own testing results and analysis that support a contrary finding that cultural resources will be adversely impacted or that adherence to the cultural resources avoidance, minimization, and mitigation plan will not sufficiently avoid or minimize any such impacts.¹³⁴ Such criticisms, without more, would not lead a reasonable person to inquire further whether the project as proposed would not avoid, minimize, or mitigate impacts to the maximum extent practicable. Further, GFL has not sufficiently established that applicant would not comply with its statutory or regulatory requirements.

Finally, we note that the author of the Vidulich comments, John Vidulich, has not agreed to provide testimony, which is an inherent flaw in this submission as a proper offer of proof. Also absent are the expert credentials of John Vidulich and the presumed testimony of Sarah Vidulich adopting the Vidulich comments does not cure this flaw. A review of Sarah Vidulich’s resume raises questions about whether she is sufficiently qualified to provide expert testimony on the

¹³³ See application exhibit 9 (revised) at 37 and 38.

¹³⁴ See GFL petition, exhibit E at 1.

project's impacts on cultural resources. The lay-person testimony adopting the positions of a second lay person as an offer of proof fails to satisfy GFL's burden of persuasion to demonstrate its issues are substantive and significant.¹³⁵ The Vidulich comments will be considered as other comments and will be considered and responded to as required by ORES regulations.

Ruling: No substantive and significant issue concerning impacts on cultural resources have been raised requiring adjudication. The Vidulich comments will be treated and considered as comments in accordance with ORES regulations.

E. Impacts to Avian Species

GFL, joined by the Town, requests a hearing to adjudicate the issues whether the record contains sufficient evidence for ORES staff's determination that potential adverse impacts of the facility on avian species have been avoided, minimized, or mitigated to the maximum extent practicable (GFL issue 4); whether a net conservation benefit is achieved with respect to any threatened or endangered avian species (GFL issue 5); and whether the facility complies with Article VIII and Part 1100 as they pertain to avian species (GFL issue 6). As an offer of proof, GFL submits the report of ecologist Kenneth Shawn Smallwood, Ph.D., who is also offered as an expert witness to testify on the results of the report.¹³⁶

¹³⁵ See ORES DMM Matter No. 21-02104, Matter of Bear Ridge Solar, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, and Order of Disposition, Feb. 21, 2023, at 66-67 (requirement of expert testimony as an offer of proof).

¹³⁶ See DMM Item No. 177, GFL petition, exhibit B, Smallwood report; see also Town petition at 29.

GFL argues that a substantive and significant issue for adjudication exists whether the record contains sufficient evidence for ORES staff's determination that potential adverse impacts of the facility on avian species have been avoided, minimized, or mitigated to the maximum extent practicable because "the application contains: (a) an incomplete characterization of the wildlife community and an inaccurate characterization of the affected environment; (b) a grossly inaccurate prediction of collision mortality; and (c) a scientifically indefensible prediction of the effects of the project on grassland bird habitat."¹³⁷

GFL argues that a substantive and significant issue for adjudication exists whether the record contains sufficient evidence for ORES to determine that the draft/final siting permit achieves a net conservation benefit with respect to any impacted threatened or endangered avian species because, according to the Smallwood report, "ORES cannot have understood the species composition of the wildlife community on the project site, due to an inadequate field survey effort and an incomplete desktop review, as well as inappropriate interpretations of the findings of field surveys and desktop review, there exists no sound basis for formulating mitigation measures as part of a net conservation benefits plan."¹³⁸

GFL argues that for the same reasons stated in the Smallwood report, and in its arguments for the issues above, a substantive and significant issue for adjudication exists because the record contains insufficient evidence to support ORES staff's determination that the draft/final siting permit

¹³⁷ GFL petition at 31.

¹³⁸ GFL petition at 38, citing Smallwood report at 2.

complies with Article VIII and applicable provisions of the Office's regulations at Part 1100 as they apply to avian species.¹³⁹

In response, applicant argues that the record contains sufficient evidence for ORES to determine that the draft siting permit avoids, minimizes, or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the facility to avian species.¹⁴⁰ Applicant calls into question GFL's expert's experience as being "largely based on West Coast ecosystems" with questionable applicability "to the ecology and regulatory context of upstate New York."¹⁴¹ Applicant argues that the Smallwood report consists of "generalized observations and criticisms of the Applicant's wildlife and avian impact assessment but ultimately reflects a disagreement with the regulatory standards established by ORES, rather than identifying a factual dispute concerning the Applicant's compliance with those standards."¹⁴² Applicant notes that the main contentions of the Smallwood report, "(1) that the Applicant's data is incomplete or inadequate; (2) that the field surveys were insufficient; and (3) that the mitigation framework is flawed," were previously raised by Dr. Smallwood in the Heritage Wind proceeding and were deemed to be insufficient to raise an issue for adjudication.¹⁴³ Applicant further argues that

¹³⁹ See GFL petition at 39.

¹⁴⁰ See applicant response at 65.

¹⁴¹ Id. at 65.

¹⁴² Id. at 65-66.

¹⁴³ Id. at 66, citing 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 11-29.

many of the assertions made by GFL amount to commentary on the scope of the survey. Applicant summarizes the Smallwood report as a compilation of “generalized concerns about solar development, mortality estimates based on extrapolation from disparate studies, and theoretical habitat modeling, but it lacks documentation of any unmitigated, site-specific impact associated with the Project.”¹⁴⁴ Applicant also contends that the Smallwood report’s estimates of avian mortality deviate from established methodologies such as those outlined by the US Geological Survey (USGS), rely on speculative assumptions, synthesizes data from dissimilar studies, disregards key site-specific factors, and lacks scientific credibility.¹⁴⁵

Applicant further argues that GFL’s assertion that applicant conducted an incomplete desktop review because it failed to make use of data available on “iNaturalist, an unverifiable citizen science database” does not identify a substantive failure or factual dispute because the desktop review was based on “numerous credible and verifiable publicly available data sources, including eBird, a citizen data collection initiative that includes verification, an official species list request from United States Fish and Wildlife Service (“USFWS”), a natural heritage review request from New York’s Natural Heritage Program, a review of NYSDEC’s Environmental Resource Mapper, and direct consultation with both state and federal agencies.”¹⁴⁶

Applicant asserts that, contrary to GFL’s expert opinion, Article VIII does not require “exhaustive biological

¹⁴⁴ Id. at 68.

¹⁴⁵ See id. at 69.

¹⁴⁶ Id. at 66.

inventories or absolute presence/absence surveys” but “rather it requires representative surveys designed in consultation with ORES as part of the pre-application process.”¹⁴⁷ Applicant argues that it has met its regulatory burden under Article VIII because “all surveys were designed and implemented pursuant to regulations and guidance in effect at the time of the surveys and in coordination with ORES and NYSDEC” and “[a]ll study plans were submitted for review and found to be in compliance with protocols and determined by ORES to be sufficient for determining presence and site use by species of concern.”¹⁴⁸

In response to GFL’s critiques on the mitigation measures, applicant asserts that this is a policy objection regarding the use of a 2:1 mitigation ratio as required by Article VIII that does not raise a substantive and significant issue and is not subject to adjudication.¹⁴⁹

In further response to GFL’s assertions, applicant states that “[d]espite Smallwood’s skepticism, the Applicant has incorporated siting measures to avoid and minimize impacts to wildlife habitats, including siting components on contiguous parcels, confining Facility component locations to the smallest area possible and siting the Facility in actively cultivated agricultural fields. This included revising the Facility layout to completely avoid breeding grassland habitat. In addition, Facility components were clustered where possible to maintain contiguous areas of undeveloped habitat and reduce habitat fragmentation. This is demonstrated in Exhibits 11 and 12 and associated appendices and can be seen further in Figure 1,

¹⁴⁷ Id. at 67.

¹⁴⁸ Id.

¹⁴⁹ See id. at 67-68

Appendix 24-5, Total Constraints Map.”¹⁵⁰ Applicant also argues that the changes in study area pointed to by GFL were discussed in collaboration with ORES to ensure that the final facility site of “2,665.59 acres, which encompasses not only the LOD for the Project, but all tax parcels proposed to host facility components, was surveyed at an appropriate level of spatial and temporal coverage to support an assessment of the potential for impacts to avian species of concern.”¹⁵¹

Applicant contends that the Smallwood report’s disagreement with the potential impacts to wildlife posed by utility scale solar amounts to “an academic debate” and does not raise a substantive and significant issue for adjudication.¹⁵² Applicant states that the methodologies and approach used by the applicant to assess impacts to wildlife “are consistent with applicable sections of the Article VIII regulation, scientifically justifiable and supported by peer-reviewed literature.”¹⁵³ Applicant also notes that the Smallwood report does not contain any evidence that the project area has a unique ecological value compared to other regions in New York or other solar sites reviewed by ORES.

In response to GFL’s argument that the facility will not achieve a net conservation benefit, applicant argues that GFL does not meet its burden of demonstrating a substantive and significant issue for adjudication. Applicant explains that the net conservation benefit will be achieved through the facility’s implementation of the regulatory framework already in place

¹⁵⁰ Id. at 69.

¹⁵¹ Id. at 67.

¹⁵² Id. at 68.

¹⁵³ Id. at 68.

under Article VIII, including the approved net conservation benefit plan (NCBP).¹⁵⁴

Applicant refers to its arguments above in opposition to the portion of GFL's petition seeking a hearing on compliance with Article VIII and applicable provisions of the Office's regulations at Part 1100 as they apply to avian species.¹⁵⁵

ORES staff argues that the Smallwood report does not raise a substantive and significant issue for adjudication.¹⁵⁶ ORES staff states that, consistent with 16 NYCRR 1100-2.12, the applicant fulfilled the NYSDEC survey protocol requirements regarding the quantification and impact assessment to listed threatened and endangered grassland bird species, and "provided an analysis of potential impacts and identified avoidance and minimizations measures to unlisted wildlife species and their habitat within the Facility Site."¹⁵⁷ ORES staff explains that, in order to avoid and minimize impacts to affected NYS threatened and endangered (T&E) species, the Office requested that applicant comply with certain USCs for the construction and operation of the facility and provide a NCBP for the affected species in accordance with 16 NYCRR 1100-1.3(g)(6) and (7). ORES staff also states that applicant has agreed to mitigate impacts and provide a net conservation benefit by developing conservation easements for the required 219.52 acres for the impacted T&E species pursuant to PSL § 138(1)(c) and 16 NYCRR

¹⁵⁴ See id. at 70-71.

¹⁵⁵ See id. at 71.

¹⁵⁶ See ORES staff response at 66.

¹⁵⁷ Id. at 67.

1100-1.3(g) (8), 1100-2.13(f) and 1100-6.4(o) (3) (viii)-(ix).¹⁵⁸ ORES staff also notes that a final NCBP will be submitted to the Office for review and approval as a mandatory pre-construction compliance filing, consistent with 16 NYCRR 1100-10.2.¹⁵⁹ ORES staff contends that the required 219.52 acres of mitigation will offset the calculated impact of 1,097.61 acres of wintering habitat of T&E grassland bird species and provide a net conservation benefit, and that "[t]he required mitigation acreage will be managed to provide optimal conditions for both breeding and wintering T&E grassland birds, which comprises a net conservation benefit when compared with the occupied habitat taken which provides limited value for breeding T&E grassland birds."¹⁶⁰

ORES staff argues that the Smallwood report does not provide any information that disputes applicant's ability to comply with the USCs or draft siting permit conditions. According to ORES staff, in order to compose a full picture of the wildlife use of the area, ORES staff and applicant both rely on readily available data from eBird, the New York Natural Heritage Program (NYNHP), Breeding Bird Atlas (BBA), and other sources. ORES staff concludes that no substantive and significant issue has been raised because "the assertions made in the Smallwood Report regarding the wildlife community, affected environment, collision mortality and effects of the project on grassland birds are refuted by the record."¹⁶¹

Discussion

¹⁵⁸ See id.

¹⁵⁹ See id.

¹⁶⁰ Id. at 67-68.

¹⁶¹ Id. at 68.

We agree with applicant and ORES staff that GFL's petition and its offer of proof are insufficient to raise a substantive and significant issue for adjudication.

As stated above, where ORES staff has reviewed an application and finds that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility, 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.

Where, as here, ORES staff and NYSDEC have reviewed and approved the scope and methodologies of the wildlife studies to be undertaken by an applicant and have found the completed studies sufficient for use in drafting the conditions of the draft siting permit, the burden is on the petitioner to demonstrate that additional studies are needed.¹⁶²

GFL does not meet the burden of establishing a substantive and significant issue for adjudication. As correctly noted by applicant, strikingly similar arguments put forth by Dr. Smallwood were addressed in the Heritage Wind issues ruling.¹⁶³ In Heritage Wind, the ALJs ruled that, where ORES and NYSDEC have reviewed and approved the scopes and methodologies of the wildlife studies undertaken by an applicant, the assertion that the resulting survey is "grossly inadequate" and years of additional studies are necessary to

¹⁶² See Heritage Wind, Issues Ruling at 15.

¹⁶³ See id. at 21.

evaluate potential impacts to wildlife is not sufficient to raise a substantive and significant issue for adjudication.¹⁶⁴ With regard to the adequacy of an applicant's field studies, where "ORES and NYSDEC staff have determined that applicant's field studies and analysis regarding the extent of adverse impacts to birds and bats are sufficient to enable staff to evaluate those impacts and to draft appropriate permit conditions," the burden is on the petitioner to demonstrate unanticipated site-specific impacts that would support the need for a site-specific permit condition.¹⁶⁵ Raising uncertainties with the results of the ORES and NYSDEC approved survey is not sufficient to meet this burden.¹⁶⁶ Applicant correctly points out that Article VIII and Part 1100 do not require a perfect and exhaustive inventory of all wildlife in a project area. The field study criticized by Dr. Smallwood is just one factor in the regulatory framework designed to avoid, minimize, and mitigate impacts to wildlife. In the event that a previously unknown presence of T&E species is detected, either through required pre-construction compliance measures, or otherwise, there are safeguards and processes in place to address any unanticipated impacts to wildlife.¹⁶⁷

¹⁶⁴ See id. at 14-15.

¹⁶⁵ See id. at 20.

¹⁶⁶ See id. at 18, citing Seneca Meadows, Interim Decision at 4.

¹⁶⁷ See e.g. DMM Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, May 2, 2024 (adjudicatory hearing set down based upon direct observation of previously undiscovered Bald Eagle nest).

With regard to GFL issue 4, petitioners have not met their burden of establishing a substantive and significant issue for adjudication whether the record contains sufficient evidence for ORES to determine that the draft siting permit avoids, minimizes, or mitigates, to the maximum extent practicable, potential significant adverse environmental impacts of the facility to avian species. ORES and NYSDEC staff have determined that applicant's field studies and analysis regarding the extent of adverse impacts to birds are sufficient to enable staff to evaluate those impacts and to draft appropriate permit conditions. The Smallwood report relied upon by GFL, which offers an alternate expert opinion on the scope and methodology of the required impacts assessment and raises uncertainties regarding specific aspects of the field survey, but does not demonstrate unmitigated site-specific impacts through, for example, an independent field survey demonstrating the presence of T&E species in the project area not accounted for in the application materials, is not sufficient to raise a substantive and significant issue for adjudication on impacts to avian species. Notably, GFL's expert concedes that "[o]n the whole, [applicant's experts] assembled a sound list of potentially occurring species of vertebrate wildlife, but I would not characterize it as an inventory." ¹⁶⁸ As observed in Heritage Wind, "[c]onducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, or where such a hearing would dissolve into an academic debate is not the intent of the Department's hearing process.'" ¹⁶⁹

¹⁶⁸ Smallwood report at 12.

¹⁶⁹ Heritage Wind, Issues Ruling at 18, quoting Seneca Meadows, Interim Decision at 4.

Ruling: GFL issue 4 does not meet the standards for adjudication.

With regard to GFL issue 5, petitioners have not met their burden of establishing a substantive and significant issue for adjudication as to whether a net conservation benefit is achieved with respect to any T&E avian species.

As stated above, GFL argues that due to the alleged failures identified in the Smallwood report regarding the applicant's impact assessment of T&E species, ORES staff could not have formulated the proposed net conservation benefit plan on a sound basis. For the same reasons stated above, we conclude that the Smallwood report is insufficient to raise a substantive and significant issue regarding whether a net conservation benefit will be achieved. As stated above, applicant has submitted a draft NCBP and will be required to submit a final NCBP during the compliance phase.

Ruling: GFL issue 5 does not meet the standards for adjudication.

With regard to GFL issue 6, petitioners have not met their burden of establishing a substantive and significant issue for adjudication as to whether the facility complies with Article VIII and Part 1100 as they pertain to avian species. For the reasons stated above in our ruling on GFL issues 4 and 5, GFL fails to raise a substantive and significant issue for adjudication.

Ruling: GFL issue 6 does not meet the standards for adjudication. To the extent the Town in joining GFL's argument attempts to rely on the Smallwood report, it fails to raise a substantive and significant issue for adjudication on this issue for the reasons stated above.

F. Water Resources

The Town claims applicant failed to meet its burden to provide a final Stormwater Pollution Prevention Plan (SWPPP) as required and that applicant's preliminary SWPPP is missing information required by New York's State Pollution Discharge Elimination System (SPDES) permit program pertaining to "soil disposal," "infiltration trenches," "nature," "stability," "stormwater and erosion control measures," and "capacity of the soils to be disturbed." In its petition and statement of compliance and exhibits B and C attached to the petition from the Town's technical consultants, Douglas P. Cole, P.E. from KB Engineering & Architecture, P.C. and James Girona, P.G. from Hanson Van Veet Hydrogeologic Consultants, PLLC, respectively, the Town also raises concerns involving impacts from "soil erosion and sedimentation," and "stormwater runoff," including from "sediment and silt laden stormwater," and that the draft siting permit fails to include conditions to address these concerns.¹⁷⁰ We conclude that the Town's arguments with respect to these concerns are not persuasive and applicant has sufficiently avoided, minimized, and mitigated potential adverse impacts to the maximum extent practicable.

Applicant points out that it provided information on its stormwater designs and proposed calculations for anticipated stormwater management practices in the application materials, including a preliminary SWPPP, which has already been revised

¹⁷⁰ Town petition at 4, 25-27, 44, 163-166, 171-175, 190, 197-201.

once to address the Town's concerns.¹⁷¹ Applicant explains in its response that it is required to obtain coverage under the New York State Pollution Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity (GP-0-25-001) administered by NYSDEC, and that it will prepare and file a final SWPPP that meets all SPDES general permit requirements prior to construction. Applicant notes that the preliminary SWPPP "is intended to support Article VIII review by identifying potential impacts and demonstrating preliminary compliance with erosion and sediment controls."¹⁷² In its statement of justification for local law waiver requests, applicant explains that the preliminary SWPPP provides information on erosion and sediment control, construction phasing and disturbance limits, waste management and spill prevention, and other stormwater management practices.¹⁷³

Applicant also explains that this preliminary plan will be amended as needed prior to construction "to detail the final proposed stormwater management practices to be installed." Applicant relies on attachment E to its response prepared by TRC to address SWPPP and hydrogeology issues to point out that the final SWPPP will be submitted as a compliance filing prior to construction that must be reviewed and approved by the NYSDEC prior to applicant receiving a notice to proceed for

¹⁷¹ See applicant response at 57; DMM Item No. 94, application exhibit 13 (revised): Water Resources and Aquatic Ecology at 25-26.

¹⁷² Applicant response at 57.

¹⁷³ See DMM Item No. 133, application appendix 24-5 (revised): Statement of Justification for Local Law Waiver Requests (applicant statement of justification), part 1 of 2, at 25; see also application exhibit 13 at 26.

construction from ORES staff.¹⁷⁴ As noted by applicant and explained by TRC in its memorandum, the final SWPPP will provide details pertaining to engineering plans, contractor staging areas, construction sequencing, infiltration feasibility, and soil analysis consistent with SPDES general permit requirements.¹⁷⁵ Applicant also notes that the Town's stormwater concerns will be addressed in the final SWPPP under the SPDES General Permit GP-0-25-001. Based on these procedures, applicant concludes that the Town has failed to meet its burden of raising a substantive or significant issue.¹⁷⁶

In its response, ORES staff echoes applicant's arguments and agrees that all stormwater runoff and hydrogeological impacts will be addressed through compliance with the SPDES General Permit administered by NYSDEC pursuant to its federally-delegated permit program under the federal Clean Water Act.¹⁷⁷ ORES staff further asserts that the Office's regulations and terms of the draft siting permit include sufficient controls to ensure that the design of the facility and any proposed modifications are appropriately reviewed in accordance with federal stormwater requirements. Staff further notes that the Office, in consultation with NYSDEC and other State agencies, will also review the final plans, profiles and drawings submitted by applicant in accordance with 16 NYCRR 1100-10. ORES staff concludes that the Town's offer of proof

¹⁷⁴ DMM Item No. 190, applicant response, attachment E, stormwater and hydrogeology memorandum at 1-3.

¹⁷⁵ Applicant response at 58; applicant response, attachment E, stormwater and hydrogeology memorandum at 1-2.

¹⁷⁶ See applicant response at 58.

¹⁷⁷ See PSL § 144(2).

contains "general criticisms, expressions of concern, speculation, or conclusory statements [that] are insufficient to raise an adjudicable issue."¹⁷⁸

Discussion

Applicant confirms that through the permitting program administered by NYSDEC, the requirements of SPDES General Permit GP-0-25-001 will be used to prepare the final SWPPP and impacts will be minimized and avoided to the greatest extent practicable. Applicant also confirms that the final SWPPP will reflect the analysis of runoff and drainage patterns and hydrology before and after development.¹⁷⁹ Applicant also acknowledges its obligation to provide the final SWPPP as a pre-construction filing consistent with 16 NYCRR 1100-10.2 and condition 6.1(a) of the draft permit.¹⁸⁰

The Town's technical consultants' comments do not raise a substantive and significant issue. We note that the draft permit requires applicant to demonstrate compliance with all federal permitting requirements, including pertaining to applicable stormwater permitting processes, as a compliance requirement.¹⁸¹ In addition, consistent with 16 NYCRR 1100-10.2, the draft permit requires applicant to prepare and submit final plans, profiles and detail drawings that will detail stormwater runoff and erosion issues for the proposed facility as a mandatory pre-construction compliance filing. At that time, ORES staff, in consultation with NYSDEC and other State agency subject matter experts will review the applicant's proposed

¹⁷⁸ ORES staff response at 72-74.

¹⁷⁹ See exhibit 13, water resources and aquatic ecology, at 26.

¹⁸⁰ See applicant response at 57.

¹⁸¹ Draft siting permit at 47.

final plans, profiles and detail drawings, including federal stormwater design and phasing and compliance filing plan details, in compliance with 16 NYCRR 1100-10.1(a), to determine whether the final design meets the standards of the Office's regulations and amended draft siting permit. In compliance with 16 NYCRR 1100-6.1(g), the Office will not issue a notice to proceed with construction until these plans are reviewed and approved, as necessary. We conclude that these requirements, which specifically pertain to stormwater management, will ensure the project complies with applicable federal, State, and local laws.¹⁸²

In addition, we note that TRC's memorandum addresses the Town's stormwater and hydrogeologic concerns raised in its petition and by its technical consultants by confirming that the final SWPPP will include the following in accordance with 16 NYCRR 1100-10.2: (1) a "Phasing Plan and Five-Acre Disturbance Waiver Request" subject to NYSDEC review and approval; (2) spoil disposal procedures; (3) infiltration testing analysis results; and (4) a completed Notice of Intent (NOI) that will be "available on-site during construction." Applicant also notes its pre-construction plans to conduct a "comprehensive well survey" for the purpose of identifying "active wells within proximity to the Facility components," as required by 16 NYCRR 1100-6.4(n) (2).¹⁸³

In addition to addressing these issues raised by the Town, the final SWPPP will confirm water quality treatment

¹⁸² 16 NYCRR 1100-10.1(a); see also applicant response at 57-58.

¹⁸³ Town petition at 25-26, 44, 145, 159, 163-166, 171-175, 190, 197-201; applicant response, attachment E, TRC memorandum, at 2-4.

practices in the context of stormwater runoff management and construction impacts, which we note addresses the Town's water quality concerns regarding impacts to "nearby streams and wetlands" and "wells" from erosion and sedimentation. We also note applicant's commitment to post-construction SWPPP "best management practices (BMPs)" that permanently apply to "vegetative filter strips, infiltration basins and trenches, and detention ponds." Applicant confirms its commitment to ensuring that each of these BMPs are maintained "by the operations and maintenance team contracted for the life of the Facility."¹⁸⁴

Ruling: The issues raised by the Town's technical consultants in exhibits B and C of the Town's petition regarding stormwater runoff and other hydrogeologic impacts do not present any substantive and significant issues requiring adjudication.

G. Agricultural Impacts

The Town and the County question whether the draft siting permit appropriately addresses the impacts of the project on agricultural land. The Town claims the facility will displace 51.81 acres of prime soils, 157.17 acres of mineral soil groups 1-4, and 1,000 acres of farmland, which equals approximately 11.62% of land within the Town and 0.76% of land within the County. According to the Town and the County, the Analysis of Adverse Economic Impacts by MRB Group (MRB report) concludes that the potential lost value of that otherwise active agricultural land is \$2.8 million per year, and that this lost agricultural activity would result in an annual economic loss of 21 jobs, \$786,910 in earnings, and

¹⁸⁴ Town petition at 26; applicant response, attachment E, TRC memorandum, at 2-5.

\$3.3 million in forgone sales. Escalated at 2% per year for the life of the project, this equates to 972 job-years, \$36.9 million in earnings, and \$155 million in sales.¹⁸⁵ The Town alleges applicant's soil sampling and testing does not comply with New York State Department of Agriculture and Markets (NYSAGM) guidelines, requests that the proposed soil sampling and testing plan be provided to the parties for review, and argues that testing should be done pre- and post-construction, and post-decommissioning. The Town contends that there is "a substantive and significant issue as to whether the Application and the Draft Permit fail to provide adequate protections for agricultural resources."¹⁸⁶

The County states that application exhibit 15 identifies 2,509.84 acres of active agricultural land in the designated Montgomery County Agricultural District 3 as the project site, and that the application, specifically application exhibits 3, 8-9, and 13, do not address how impacts to this agricultural land has been "minimized or avoided or explain why this facility is sited on 94% of active farmland," and conflicts with the CLCPA "land use strategy" goal and the Town's comprehensive plan.¹⁸⁷ According to the County, the impact on agricultural land, scenic areas, forests and open space, results in a detrimental economic impact to the County. The County offers the County Soil and Water District Manager, Corey Nellis, Michael N'Dolo, and Christine Depasquale, to provide testimony at an adjudicatory hearing concerning the impacts on

¹⁸⁵ See Town petition at 27-28; see DMM Item No. 162, County petition, exhibit 3, Analysis of Adverse Economic Impacts, May 2025 (MRB report) at 2.

¹⁸⁶ Town petition at 29.

¹⁸⁷ County petition at 49-51.

agricultural and prime soils, the detrimental economic impacts, and impacts on taxes and assessment property values.¹⁸⁸ The County contends that substantive issues exist that raise a question on whether the impacts are properly mitigated, and that a reasonable person would conclude that factual issues exist that require an adjudicatory hearing and testimony of experts pursuant to 16 NYCRR 1100-8.3(c)(2). Further, the County asserts that "[t]he representation by the applicant that any impacts on farmland will be minimal without any significant analysis meets all three of the prongs under Rock District Solar Decision at page 16, as '(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.'"¹⁸⁹

In response, applicant provides a statement and several attachments. Concerning agricultural and economic impacts, applicant provides attachment C, Agricultural Resources Memorandum, and attachment G, Economic Memorandum, both prepared by TRC. Applicant states that the County's report by MRB overstates the impact to be on 2,510 acres of active farmland, and that the limit of disturbance (LOD) is 1,270 acres and cropland within the LOD is 970 acres. Additionally, applicant asserts that MRB overstated the loss of agricultural sales resulting from the facility to be \$2.8 million. According to applicant, the average sales from 2020-

¹⁸⁸ Id. at 53-54; County petition, exhibit 7.

¹⁸⁹ ORES DMM Matter No. 23-02571, Matter of Rock District Solar LLC, Ruling of Administrative Law Judges on Issues and Party Status, and Order of Disposition, Dec. 13, 2024, at 16.

2024 was approximately \$628,011 or \$646 per acre, not \$1,113 per acre as claimed by the County and MRB.¹⁹⁰ Also, applicant states that its application exhibits 15 and 15 version 2 identified mapped active agricultural lands and agricultural districts, included a detailed analysis of current agricultural uses within the facility site, identified prime farmland and soils of statewide significance, and described the measures undertaken to avoid, minimize and mitigate those impacts. According to applicant, the impact to active agricultural land is 1,107.94 acres, and that decommissioning and site restoration will be conducted in accordance with the NYSAGM Guidelines for Solar Energy Projects restoring the facility site to its original condition to be converted back to agricultural use.

Applicant further notes that of the 2,468.91 acres of field verified active agricultural land in an Agricultural District within the project site, 1,390.16 acres (56.31 percent) will be available for continued or new agricultural use outside of the fence line during the life of the facility.¹⁹¹ Additionally, applicant contends that the County's offer of proof on these issues, that being the potential testimony of the County Soil and Water District Manager, expresses general concerns and speculation about agricultural impacts, as well as lacks the expertise regarding the

¹⁹⁰ See DMM Item No. 190, applicant response, attachment G, at 5.

¹⁹¹ See DMM Item No. 94, application exhibit 15 (revised): Agricultural Resources at 13 and 16; DMM Item No. 132, application exhibit 15 (revised): Agricultural Resources at 16.

agricultural impacts of siting, constructing, operating, and decommissioning utility scale solar facilities.¹⁹²

Addressing the Town's concerns that the draft siting permit does not adequately protect agricultural resources, applicant states it will comply with NYSAGM guidelines to the maximum extent practicable and has submitted a detailed Agricultural Plan. Applicant contends "the Town has provided no technical basis or evidence demonstrating that the measures proposed by the Applicant, which again are in accordance with NYSAGM guidelines, would result in unacceptable impacts on agricultural resources or why additional soil sampling is necessary. As such the Town has failed to meet its burden and has failed to raise a substantive and significant issue with respect to agricultural impacts."¹⁹³

ORES staff confirms that applicant describes the soil sampling measures and applicant's intention to comply with the NYSAGM guidelines to the maximum extent practicable. Further, all stormwater runoff and hydrogeological impacts are addressed through compliance with the SPDES permit issued by NYSDEC. Further, applicant will comply with its' submitted Agricultural Plan in accordance with ORES regulations and NYSAGM guidelines to avoid, minimize, and mitigate impacts on active agricultural land to the maximum extent practicable. ORES staff contends that neither the Town nor County have submitted an offer of proof questioning the applicant's ability to comply with ORES regulations or the Agricultural

¹⁹² See applicant response at 27-29.

¹⁹³ Applicant response at 58-59; see also DMM Item No. 104, application appendix 15-3 (revised): Agricultural Plan.

Plan. Therefore, no substantive significant and significant issue has been raised.

Discussion

Generally, the Town and County state arguments questioning whether the draft siting permit appropriately avoids, minimizes, or mitigates the project's impacts on active agricultural land to the maximum extent practicable, and that factual issues exist such that a reasonable person would inquire further through an adjudicatory hearing.¹⁹⁴ The Town and County incorporate the arguments of each other and rely on the reports of MRB, for their claims that the draft siting permit does not adequately address and protect the soil of the active farmlands displaced by the project or the resulting economic impact from losing facility acreage from agricultural production. Additionally, the Town and County argue that the representation by applicant that any impacts on farmland will be minimal without any significant analysis meets the standard for an adjudicatory hearing.

The draft siting permit mandates that the facility be constructed consistent with NYSAGM guidelines to the maximum extent practicable.¹⁹⁵ Further, applicant is required to hire an independent, third-party agricultural monitor to oversee compliance with agricultural conditions and requirements, including the approved Agricultural Plan.¹⁹⁶

After review of the record, in particular application exhibit 15 revision 2, we find that the Town and County have not

¹⁹⁴ See 16 NYCRR 1100-8(c)(2).

¹⁹⁵ See draft siting permit condition 4.4(s)(1)(i) at 41-42; see also 16 NYCRR 1100-15.1(1)(1).

¹⁹⁶ See draft siting permit condition 4.4(s)(1)(ii) at 42; see also 16 NYCRR 1100-2.16(c).

raised a substantive and significant issue for adjudication. There is no dispute that applicant will comply with ORES regulations and NYSAGM guidelines, as well as the approved Agricultural Plan, and that the purpose and intent of these compliance requirements establishes that applicant avoids, minimizes, and mitigates impacts to active agricultural lands to the maximum extent practicable. Further, applicant's soil sampling measures comply with NYSAGM guidelines to the maximum extent practicable and petitioners have not submitted an adequate offer of proof to satisfy their burden that there is an error of fact in the application or draft siting permit. The offer of proof that Corey Nellis, District Manager of Montgomery County Soil and Water, will provide testimony on the impacts on agriculture and prime soils "using maps and data regarding the types of agricultural soils impacted by the project, including how rare some of these soil types are" and "the risks to the agricultural soils over the 35 years this project is proposed" which include compaction and nutrient depletion¹⁹⁷ does not raise an issue of fact or law that compliance with the proposed Agricultural Plan and NYSAGM guidelines does not avoid, minimize, or mitigate impacts on agricultural land to the maximum extent practicable, or that applicant will not satisfy their statutory or regulatory requirements.

Pursuant to ORES regulations 16 NYCRR 1100-8.3(c) (2) and (3), and as stated in Rock District Solar,¹⁹⁸ a factual issue is substantive if it raises sufficient doubt about applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further

¹⁹⁷ See County petition, exhibit 7, at 3-4.

¹⁹⁸ Rock District Solar, Issues Ruling at 16.

inquiry. 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. The County's offer of proof does not satisfy these criteria because the ability of applicant to comply with ORES regulations and NYSAGM guidelines, as well as an approved Agricultural Plan is not questioned, nor has it been established how such proposed testimony would affect the project or terms and conditions of the draft siting permit. Therefore, we determine that the County and Town have not raised a substantive and significant issue for adjudication.

Likewise, we determine that the County's offer of proof concerning the economic impacts on agricultural land do not raise a substantive and significant issue for adjudication. Nothing in Article VIII or the ORES regulations requires an analysis of the economic impacts of a proposed project on agriculture beyond the analyses required in application exhibits 15 (Agricultural Resources)¹⁹⁹ and 18 (Socioeconomic Effects).²⁰⁰ The MRB report does not conclude based on facts and analysis that applicant failed to satisfy its statutory and regulatory requirements, or raise any issues concerning the contents and analyses in application exhibits 15 or 18.²⁰¹ After review of exhibits 15 and 18 and the draft siting permit, we determine that applicant satisfied its statutory and regulatory burden

¹⁹⁹ See 16 NYCRR 1100-2.16.

²⁰⁰ See 16 NYCRR 1100-2.19.

²⁰¹ See application exhibit 15 (revised); DMM Item No. 94, application exhibit 18 (revised): Socioeconomic Effects.

through those exhibits, that the draft siting permit states no error of fact or law and that ORES staff did not abuse its discretion in determining that the application satisfied all statutory and regulatory requirements regarding agricultural impacts, and issuing the draft siting permit. Further, we determine that the Town and County did not satisfy their burden to raise a substantive and significant issue concerning the economic impacts of the project on agriculture as stated in exhibits 15 and 18, but instead provided conclusory and speculative statements not questioning applicant's compliance with applicable statutory or regulatory requirements. Therefore, we determine that a substantive and significant issue for adjudication has not been raised.

Ruling: A substantive and significant issue questioning applicant's compliance with statutory and regulatory requirements concerning the project's siting and impact on agricultural land has not sufficiently been raised requiring adjudication.

H. Socioeconomic Effects

The County proposes as an issue for adjudication that the economic effects of the facility are not avoided, minimized, or mitigated to the maximum extent practicable, whether viewed as an individual project under Article VIII or as part of a cumulative impacts analysis under the CIL;²⁰² moreover, those impacts are erroneously portrayed in the application, in that rather than applicant's claimed net economic benefit, the facility will cause severe economic damage. The County cites purported factual flaws in the application, and alleges its

²⁰² A separate discussion of the cumulative economic impacts in the context of the CIL is found below at section V.K.

expert, economists MRB Group (MRB), sufficiently demonstrate, through detailed modeling and analysis, substantial negative economic impacts for the County as a result of the facility, requiring a hearing on whether the application should be modified or denied.

As the County's offer of proof, MRB submits a report on the adverse economic impacts to be suffered by the County, claiming those impacts will be severe and are "startling and in broad contrast" to those portrayed in the application.²⁰³ The County argues that adverse impacts to jobs, land values and tax rates are "completely unaddressed by the applicant."²⁰⁴ The County contends its assessment of adverse economic impacts reveals facts "'contrary to what is in the application materials or draft siting permit,' meeting the standard for hearing."²⁰⁵

MRB specifically alleges that economic forecasting demonstrates that the facility will cause, solely from the loss of active agricultural land, over the life of the project, the loss of "972 job-years, \$36.9 million in earnings and \$155 million in sales."²⁰⁶ MRB projects a net job loss due to loss of agricultural land of 18 jobs, even accepting as true applicant's claim that the facility will create three.²⁰⁷ The County argues the application's purported benefits of PILOT (payments in lieu

²⁰³ See County petition at 33.

²⁰⁴ Id.

²⁰⁵ County petition at 33, citing Rock District Solar, Decision at 16.

²⁰⁶ DMM Item No. 162, County petition, exhibit 3, MRB Report at 2.

²⁰⁷ Id.

of taxes) agreements are misleading inasmuch as the County refuses to enter into PILOTs.²⁰⁸

The County additionally contends that property value diminution of properties adjacent to the facility will result in a reduction in the tax base, and that impact is currently unmitigated by applicant. The County offers the testimony of the County Real Property Director, who it claims will offer actual, not hypothetical, data, to demonstrate likely property value loss ranging from 6% - 15%, resulting in a loss of up to \$15,179,572.00 in assessed value and \$320,038.00 annually in lost tax revenue as a result from the installation and operation of the facility.²⁰⁹

The County further alleges that the facility will "cause a significant portion of the Town of Glen to be unavailable for other development opportunities."²¹⁰ MRB asserts that "the Project Site could potentially accommodate 8,000 to 10,000 new housing units," and even considering if only 500 were to be built, the property taxes realized over the 35 years of the project would be \$380,085,641.²¹¹ The County contends the failure to account for this "lost opportunity cost" represents "an omission in the application or draft siting permit."

Finally, the County argues it clears its burden under § 1101-8.3(c)(2) with respect to "the applicant's ability to meet statutory or regulatory criteria applicable to the project," by demonstrating the foregoing facts which are omitted from the application or contrary to it. It argues that the §

²⁰⁸ County petition at 36.

²⁰⁹ Id. at 36-37.

²¹⁰ Id. at 38.

²¹¹ MRB Report at 12-13.

1101-8.3(c) (3) standard is met, given the significant adverse economic impacts of the facility.

Application exhibit 18 addresses the socioeconomic impacts of the facility. The County has declined in population over the last twelve years, and has a higher unemployment rate than the State average.²¹² Construction of the facility is forecasted to employ between 60% and 90% local labor with a forecasted payroll over the 18-months construction of \$31,690,000.00.²¹³ Operation of the facility is forecasted to created 3.5 full-time job equivalents with an annual payroll of \$260,000.00.²¹⁴

Through engagement with the local highway department, first responders, and fire department, applicant projects no increased incremental costs to community services. Any increased costs resulting from road use during construction would be mitigated by a road use agreement, as yet not extant, resulting in "no net burden."²¹⁵ Applicant will credit residential utility customers with \$1.25 million over the first ten years of facility operation.²¹⁶

Applicant expects construction to "result in increased spending in the Town and in neighboring area . . . residents working or owning businesses in the region are also anticipated to benefit . . . [T]he facility should result in positive fiscal

²¹² See DMM Item No. 94, application exhibit 18 (revised): Socioeconomic Effects.

²¹³ Id. at 4.

²¹⁴ Id. at 6

²¹⁵ Id. at 8-9.

²¹⁶ Id. at 9.

impacts for the jurisdictions.”²¹⁷ Finally, applicant proposes a 15-year period of PILOT agreements with the County, Town, and the Fonda-Fultonville Central School District, followed by regular property tax payments for the remaining 20 years of the life of the facility.²¹⁸

The draft siting permit states that the facility will “create job opportunities [and] support economic growth,”²¹⁹ ORES “has balanced” the facility’s impacts, and “considered” the applicant’s proposed measures to avoid, minimum, and mitigate those adverse economic impacts to the maximum extent practicable.

In its response, applicant argues that the County has not raised a substantive and significant issue for adjudication. It notes that Article VIII does not require applicant to study or address impacts to tourism or agricultural tourism, does not require the facility to produce superior economic outcomes compared to hypothetical alternatives, and does not require weighing lost opportunity costs. Applicant reiterates the projected economic benefits of the project and disparages the County’s expert’s report as hypothetical and speculative.²²⁰ Applicant characterizes the County’s tax rate and declining property values evidence as “highly speculative, unsupported . . . and fundamentally flawed in its assumptions . . . anecdotal and entirely unsubstantiated.”²²¹ Applicant reiterates the

²¹⁷ Id. at 12-13.

²¹⁸ Id. at 17-18.

²¹⁹ Id. at 3.

²²⁰ Applicant response at 22-25.

²²¹ Id. at 26.

projected purported benefits of the PILOTs, without addressing the County's assertion that it will not enter into one.²²²

Applicant's response includes a memorandum, with projections that differ from MRB's and criticizing MRB for its method of calculating economic losses.²²³ Applicant cites a University of Michigan study of renewable energy facilities showing increased investment in farm and home infrastructure as evidence of the economic benefits of the facility.²²⁴ The memorandum also offers five studies that demonstrate that industrial-scale solar energy facilities do not diminish neighboring property values.²²⁵

In its response, ORES staff argues that the County's expert's report fails to demonstrate "an omission of required information . . . or show that defective information was used in the application or draft siting permit."²²⁶

Discussion

The County has not identified any requirement of application exhibit 18 or any other statutory or regulatory standard to which its offer of proof on economic impacts is relevant and, accordingly, it has provided no basis for concluding that applicant has failed to meet a statutory or regulatory criteria applicable to the project, or a basis for

²²² Id.

²²³ See DMM Item No. 190, applicant response, attachment C, at 2-5.

²²⁴ Id. at 9-10.

²²⁵ Id. at 11-12.

²²⁶ Id. at 44.

permit denial, a major modification to the proposed project, or the imposition of significant permit conditions.²²⁷

The concerns raised by the County are outside the scope of Article VIII. ORES is required to examine "all pertinent" economic factors. Those factors pertinent to Article VIII are encompassed in application exhibit 18. Article VIII itself contains no definition of "pertinent." In contradistinction, the Legislature expressly required ORES to consider benefits to the host community.²²⁸ With respect to other economic considerations, by using the term "pertinent" without further definition, the Legislature left it to ORES through its rulemaking power to further specify those economic consideration that are pertinent to permitting under Article VIII, taking into consideration the CPCLA targets and the environmental benefits of the project.

That is what ORES did when it promulgated application exhibit 18. As noted in the assessment of public comments on the draft regulations for 19 NYCRR former part 900, the original ORES regulations in effect prior to the RAPID Act, commenters requested that "applicants be required to quantify potential socioeconomic costs associated with a facility, including the loss of population, loss of other economic opportunities, and potential impacts to recreation and tourism-related businesses." In response, ORES stated that subsection 900-2.19(e) (now 16 NYCRR 2.19[e]):

requires that the applicant estimate potential costs that would be directly incurred as a result of project construction and operation, with these cost estimates developed following consultation with affected [sic] municipalities, public authorities, and utilities. These

²²⁷ See 16 NYCRR 1100-8.3(c) (2), (3).

²²⁸ See Executive Law former § 94-c(5) (f), now PSL § 142(6).

potential costs include operating and infrastructure costs that will be incurred for police, fire, emergency, water, sewer, solid waste disposal, highway maintenance, and other municipal, public authority, or utility services.

The types of potential impacts identified in the comment are addressed in qualitative terms elsewhere in the regulations. Concerns related to compatibility with existing land use and planning, as well as potential impacts to community character and recreation, are addressed in qualitative terms in §900-234 (see for example, §§900-2.4(g), (h), (k), (l), and (s)). Although there is no requirement to quantify these types of impacts in §900-2.19, that does not lessen their importance to the review process.²²⁹

With respect to comments regarding impacts to adjacent and nearby property values, ORES stated, "Executive Law §94-c [now Article VIII] does not require findings or studies on the effects of major renewable energy facilities on adjacent and nearby property values."²³⁰ Accordingly, the County has not identified a relevant substantive and significant issue regarding the socioeconomic effects of the project.

Ruling: The County has not identified a relevant substantive and significant issue regarding the socioeconomic effects of the project.

I. Environmental Justice and Impacts to Disadvantaged Communities

1. GFL and Town of Glen Petitions

²²⁹ Office of Renewable Energy Siting, Chapter XVIII, Title 19 of NYCRR Part 900, Assessment of Public Comments at 92 (discussing 19 NYCRR former 900-2.19 Exhibit 18: Socioeconomic Effects, now 16 NYCRR 1100-2.19).

²³⁰ Id. at 94.

GFL and the Town (collectively, petitioners) request a hearing to adjudicate the issue whether ORES staff properly determined that all potential adverse impacts to the Amish community, a proposed environmental justice community, have been avoided, minimized, and mitigated to the maximum extent practicable. GFL argues that the application and draft permit fail to address or quantify "potentially major adverse impacts to the Fultonville-Glen Amish community." GFL contends that this community is "is an Environmental Justice community subject to Rule 1100-2.2, and that should have been fully considered in Exhibit 19." GFL also argues that applicant "made no attempt to quantify impacts on the Amish Community, identify disproportionate impacts on the Amish Community, or propose any efforts to avoid, minimize or offset any identified significant and adverse disproportionate impacts on the Amish Community," and does not correctly identify the location of the community. GFL further contends that applicant failed to submit a required study of impacts on the Amish community required by 16 NYCRR 1100-2.20 and 6 NYCRR part 487.10. GFL states that applicant "made no attempt to quantify impacts on the Amish Community, identify disproportionate impacts on the Amish Community, or propose any efforts to avoid, minimize or offset any identified significant and adverse disproportionate impacts on the Amish Community."²³¹

As an offer of proof, GFL submits the report of Dr. Steven M. Nolt, Ph.D., the Director of the Young Center for Anabaptist and Pietist Studies and Professor of History and Anabaptist Studies, at Elizabethtown (PA) College (Nolt

²³¹ GFL petition at 39-43.

Report).²³² The Nolt Report concludes that the facility will cause significant, unmitigated, and potentially irreversible harm to the Fultonville-Glen Amish settlement. The project would occupy over 2,600 acres of land in the midst of the settlement, allegedly eliminating essential agricultural land required for generational expansion and thereby posing an existential threat to the community's continued viability. The report further opines that the anticipated heavy truck traffic during construction presents substantial safety hazards to Amish horse-and-buggy transportation, pedestrians, and children walking to six Amish schools. The project will also allegedly disrupt religious services, alter the rural character, and interfere with wildlife migration -- conditions integral to Amish cultural and religious life. The report claims outreach to the Amish community has been inadequate, with inconsistent responses and failure to account for Amish communication norms and the draft permit contains no meaningful mitigation measures. According to Dr. Nolt, without relocation of the project or substantial permit conditions -- including traffic restrictions, farmland conservation, and third-party communication protocols -- the project will likely result in cultural displacement and the eventual dissolution of the settlement. GFL proposes Dr. Nolt as an expert witness who would testify through evidence and analysis "that the Applicant and ORES have failed to study, mitigate, avoid, or offset major adverse impacts to an Environmental Justice Community -- in this case, Fultonville-Glen Amish community."²³³ GFL requests full party status and "a hearing on all issues raised in Dr. Nolt's report, including

²³² See DMM Item No. 177, GFL petition, exhibit C, Nolt report.

²³³ GFL petition at 41.

whether the record contains analysis of adverse impact to the resident Fultonville-Glen Amish Community, the analysis of the Amish EJ community required by statute and regulations, and whether the Draft Permit offers any mitigation whatsoever for what amounts to an existential threat to the Amish Community.”²³⁴

GFL contends that this issue is substantive because the Nolt report presents scientific evidence indicating that applicant and ORES staff have failed to quantify, mitigate, or avoid impacts to the Amish Community, such that a reasonably person would require further inquiry into whether unique local conditions are mitigated or avoided by Draft Permit,” and the issue is significant because the Nolt report counters assertions in the application and introduces additional evidence of adverse impacts that may require denial or modification of the draft siting permit.²³⁵

The Town of Glen also seeks party status on the issue whether applicant and ORES staff have failed to quantify, avoid, minimize, or mitigate impacts to the local Amish community. The Town argues that the facility “would disrupt that community’s ability to thrive by limiting the settlement’s ability to grow and pushing the community to resettle elsewhere.”²³⁶ The Town relies on GFL’s Nolt report as an offer of proof and proposes the testimony engineering consultants Douglas P. Cole and James Girona.²³⁷

In response, applicant argues that GFL and the Town, who both rely upon GFL’s Nolt report and arguments, fail to

²³⁴ Id. at 43.

²³⁵ See id. at 41.

²³⁶ Town petition at 29-30.

²³⁷ See id. at 29-30.

raise any issue of fact or law for adjudication and the application sufficiently considers pertinent environmental, social and economic factors, including the potential adverse impacts on the Potential Environmental Justice Area (PEJA) and whether the project would disproportionately burden any disadvantaged community (DAC), including the Amish community.²³⁸ Applicant acknowledges that members of the Amish community reside in the PEJA, but argues that it was not required to study the impacts on the Amish community as required by 16 NYCRR 1100-2.20 and 6 NYCRR 487.10, because the Amish are not a minority group as defined by 6 NYCRR 487.3(s) and, therefore, are not a "standalone Environmental Justice community."²³⁹ Applicant also acknowledges the unique cultural practices of the Amish community but argues that the "premise of GFL's argument is simply that the Amish community should be entitled to a perpetual reserve of available farmland within their settlement boundaries for the benefit of future generations."²⁴⁰ Applicant argues that this would "place an unreasonable and inequitable constraint on the freedom of other farmers and rural property owners to decide how to best use or monetize their land, particularly when that land may be part of their own family legacy and financial future."²⁴¹

ORES staff argues that petitioners fail to meet their burden of establishing a substantive and significant issue for adjudication regarding adverse environmental impacts to the local Amish community. ORES staff contends that applicant

²³⁸ See applicant response at 59-60, 71.

²³⁹ Id. at 71-72.

²⁴⁰ Id. at 72.

²⁴¹ Id. at 72-73.

thoroughly addressed the Amish community and PEJA impacts in application exhibit 19.²⁴² Based upon extensive studies conducted by applicant, ORES staff asserts that no disproportionate environmental impacts to the Amish community are expected to occur and, should any arise, all potential adverse impacts to the Amish community will be addressed, and avoided, minimized, or mitigated by applicant to the maximum extent practicable.²⁴³ ORES staff argues that the Nolt Report's broad statement that the facility likely poses a threat to the Amish community "as the location of the Facility is comprised of land that could have been used to support the Amish rural and agricultural way of life and thus the Settlement will be severely limited in its ability to grow" is speculative and amounts to general criticism or concerns that are insufficient to raise an adjudicable issue.²⁴⁴ Based on the outreach applicant conducted with the Amish community and studies on impacts to that community, and applicant's proposed traffic safety measures related to the Amish community outlined in application exhibit 16,²⁴⁵ ORES staff maintains that no adjudicatory hearing is necessary on this issue.

Discussion

We agree with applicant and ORES staff that the petitions submitted by GFL and the Town, both of which rely on the Nolt report submitted by GFL, do not establish the existence

²⁴² See DMM Item No. 94, application exhibit 19 (revised): Environmental Justice.

²⁴³ See ORES staff response at 70.

²⁴⁴ See id. at 70-71.

²⁴⁵ See DMM Item No. 94, application exhibit 16 (revised): Effect on Transportation.

of a substantive and significant issue requiring adjudication regarding potential environmental impacts to sensitive or disadvantaged communities, including the Amish community.

As stated above, where ORES has reviewed and application and finds that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility, 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. 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. To raise a legal issue for adjudication, the proposed party must establish an error of law or abuse of discretion that has the potential to result in the denial of the siting permit, a major modification to the proposed project or the imposition of significant permit conditions in the draft permit.

Where, as here, a potential party seeks to adjudicate an issue regarding impacts to an environmental justice area or other sensitive communities, the party seeking adjudication must demonstrate that the issue 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 and that the proposed issue for adjudication could result in a denial or major modification to the permit. A potential party satisfies their burden by

submitting an adequate offer of proof, usually supported by expert testimony or analysis.

Here, the Nolt Report is insufficient to raise an issue for adjudication. The report's preliminary findings do not establish 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. The report's main conclusion that the Amish community will simply leave is speculative and unsupported by any evidence. The general criticisms and concerns set forth in the report are not sufficient to raise an issue for adjudication in light of the applicant's extensive efforts to identify and avoid, minimize or mitigate any potential adverse environmental impacts to the Amish community and applicant's expressed willingness to engage with the community in a manner that would be acceptable and respectful of the Amish community's cultural and religious beliefs. As noted by ORES staff, applicant has undertaken several efforts to engage with, study impacts on, and avoid, minimize, or mitigate impacts on the Amish community, such as: conduct various in-person meetings from August of 2021 to May of 2023, and provided paper copies of all documents for those who were not able to attend or could not access the project website; evaluate and submit transportation issues and safety in application exhibit 16 as it relates to the Amish community; locate Amish schools in the general area near haul routes and propose safety measures such as chaperone vehicles and planned construction and truck traffic hours, in consultation with local

officials and a leader in the Amish community.²⁴⁶ As correctly stated by ORES staff and applicant, there will be a complaint management system in place, which will be capable of processing complaints in multiple forms apart from electronic that the Amish community could utilize.

Based upon the record before us, we conclude that there is a rational basis for ORES staff's reasonable determination that all adverse environmental impacts to PEJAs and the Amish community have been avoided, minimized, or mitigated to the maximum extent practicable by the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, and the petitioners do not meet their burden of establishing a substantive and significant issue for adjudication. To the extent petitioners seek to raise potential economic impacts to the Amish community, such impacts are beyond the scope of Article VIII.

Ruling: GFL and the Town have not established a substantive and significant fact issue for adjudication regarding environmental impacts to disadvantaged or sensitive communities, including the Amish community.

2. Montgomery County Petition

Montgomery County requests full party status and a hearing to adjudicate issues regarding the "environmental benefits balancing test" and its claim that the facility disproportionately impacts an underserved community, namely the

²⁴⁶ See ORES staff response at 70-71.

PEJA and Amish community in the County.²⁴⁷ The County references the New York State Climate Action Council's Scoping Plan Executive Summary, which states:

A fundamental objective of New York's nation-leading climate and energy agenda is to ensure that the State's transition to a clean energy economy addresses health, environmental, and energy burdens that have disproportionately impacted underrepresented or underserved communities (including people of color, indigenous populations, low-income individuals, and women) and to remedy the structural causes that underpin these burdens.²⁴⁸

The County asserts that the proposed facility "is in direct contradiction of the [CLCPA] goals as it disproportionately impacts an underserved community."²⁴⁹

As an offer of proof, the County proposes the testimony of Alex Kuttesch, a senior planner for the Montgomery County Department of Economic Development who has a master's degree in Urban and Regional Planning and will testify that the Town of Glen is an area that has been designated as a PEJA with a percentage of 25% below poverty level, and a map showing the PEJA zone for the Town of Glen.²⁵⁰ The County contends that landowners within the Glen PEJA will be disproportionately impacted due to loss of home value and will receive no direct benefit from the facility aside from a \$14 per year stipend. The

²⁴⁷ County petition at 77. The County's arguments regarding impacts to the Amish community under the County's Cumulative Impacts Law are addressed in section V.K.1 of this ruling. See County petition at 44-46.

²⁴⁸ New York State Climate Action Council, Scoping Plan at 7 (December 2022) (accessible at <https://climate.ny.gov/Resources/Scoping-Plan>).

²⁴⁹ County petition at 77-78.

²⁵⁰ County petition at 77-78.

County also argues that a sensitive group, the Amish community, who do not use electricity, are hapless victims in the entire process. In support of this assertion, the County relies upon the GFL Nolt report. The County further argues that the benefits of the facility are overstated and the facility does not make use of new technology, such as clear solar panels, that could reduce environmental impacts. The County also asserts that solar power is unreliable and questions how much energy will actually be generated based on the climate in Montgomery County. The County states that it requested energy output testing from applicant but applicant did not comply with the request. The County argues this raises an adjudicable issue whether the facility will use the most efficient solar panels or ones that will minimize impacts. The County concludes that “[a] hard look needs to be given at what projects truly advance the State needs without placing an undue and detrimental mandate on the backs of Montgomery County and the sensitive groups therein.”²⁵¹

In response, applicant argues that no adjudicable issue exists over the “environmental benefits balancing test.” Applicant argues that the County’s submission is speculative, anecdotal, and based on general disagreement with State climate policy, not on violations of applicable permitting criteria.²⁵² Applicant further contends that potential decreases in property value or that other technologies may be more efficient are not grounds for adjudication.²⁵³ Applicant argues that the proposed issue is “a political concern expressing dissatisfaction with

²⁵¹ County petition at 80.

²⁵² Applicant response at 35.

²⁵³ See id.

New York's clean energy siting priorities and the allocation of renewable development across counties."²⁵⁴

ORES staff explains that New York State has provided a clear legislative directive to the Office to reduce greenhouse gas emissions in the State.²⁵⁵ Addressing the County's reference to environmental justice, ORES staff acknowledges that one PEJA is located within the facility impact study area and states that applicant "has conducted a thorough analysis of the Project impacts regarding noise, visual resources, and transportation and has determined that disproportionate impacts are not expected to incur, and the Applicant will avoid and/or minimize any significant and adverse disproportionate environmental impacts to the maximum extent practicable should they arise."²⁵⁶

Discussion

We agree with applicant and ORES staff that the County's petition is insufficient to raise a substantive and significant issue for adjudication. As stated above, where ORES has reviewed an application and finds that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions, and applicable pre-construction and post-construction compliance filings, avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility, the burden of persuasion is on the potential party proposing any issue related to the application or draft siting

²⁵⁴ Id. at 36.

²⁵⁵ See ORES staff response at 42-43, citing CLCPA § 1(4).

²⁵⁶ Id. at 43.

permit to demonstrate that it is both substantive and significant.

Where, as here, a potential party puts forth arguments that do not question the applicant's ability to comply with Article VIII and relevant regulations, but instead attempts to put forth "a collateral attack on the legislative findings and determinations made in the CLCPA," there is no basis for a hearing in the context of a permit proceeding.²⁵⁷ Furthermore, the concerns raised by the County regarding panel technology amount to comments and do not raise an issue for adjudication. Accordingly, the County has not raised a substantive and significant issue for adjudication regarding the environmental benefits balancing test laid out in the Climate Action Council Scoping Plan.

Ruling: The County's proposed issue regarding the environmental benefits balancing test and potential disproportionate impacts to a PEJA does not meet the standards for adjudication.

J. Compliance with Local Laws and Regulations - Town of Glen

In its petition for party status, the Town seeks to adjudicate the issue of the facility's noncompliance with, and ORES staff's recommended waivers of, (1) the Solar Energy Facilities Law of the Town of Glen (Local Law Number 5 of 2022 [Solar Law]) § 5(2)(b)(i) (500-foot non-participating parcel line setbacks); § 5(2)(b)(iii) and (5)(b) (100-foot setbacks for wetlands, ponds, and streams); § 5(2)(c)(a) (20% maximum lot coverage); § 5(4) (limit of 10 acres or 20% agricultural resources occupation); § 5(5)(a) (slope prohibition of 15%); §

²⁵⁷ See Bear Ridge Solar, Decision at 47.

5(5)(c) (9-acre tree clearing cutting limit); § 5(7)(a) and (8) (visibility and screening); and § 5(21)(ii) and § 5(21)(b) (decommissioning related to complete removal and salvage value prohibition); and (2) the Town of Glen Land Use Management Local Law (Local Law Number 1 of 2024 [Land Use Management Law]) (no visible substation equipment).²⁵⁸

As a threshold issue with respect to these local laws, the Town makes a procedural argument that ORES staff failed to follow the statutory and regulatory standards for waiver under 16 NYCRR 1100-2.25(c) because the draft siting permit does not offer “any explanation of how the Applicant met the standard” and “the Applicant offers mere conclusory statements as to why it is entitled to a waiver, unsupported by any facts or analysis” to meet the requirements under 16 NYCRR 1100-2.5(c).²⁵⁹ The Town claims ORES staff committed errors of law, abusing its discretion, “in recommending waiver of the Town’s laws for reasons outside the narrow standard for waiver set forth in statute and regulations.” The Town claims an “adjudicative hearing is therefore necessary to compile the evidentiary record required pursuant to 16 NYCRR 1100-8.8(b)” and that “it will provide evidence from technical experts to help examine the impacts of not applying local laws and balancing competing interests.”²⁶⁰

²⁵⁸ See Town petition at 13-20; see also DMM Item No. 105, application appendix 24-2, Town of Glen, Local Law No. 1 of 2024, Land Use Management Local Law (Land Use Management Law); DMM Item No. 24, application appendix 24-3, Town of Glen, Local Law No. 5 of 2022, Solar Energy Facilities Law of the Town of Glen (Solar Law).

²⁵⁹ Town petition at 14-15.

²⁶⁰ Town petition at 15.

ORES staff argues in response that the draft siting permit "sets forth the text of the local law provision that Applicant requested relief from, states the extent of relief recommended for approval, sets forth any conditions of such relief, and states this determination is based on the Record." In support of this argument, ORES staff relies on case precedent in Matter of Town of Copake v New York State Office of Renewable Energy Siting, where the Appellate Division, Third Department, determined that the requirements for statements of justification stated in 16 NYCRR 1100-2.25(c) "'provide ample guidance on what information ORES will consider when evaluating waiver requests' and are therefore not impermissibly vague either in application or on their face."²⁶¹ Based on this Court precedent and considering applicant's statement of justification here, ORES staff next relies on ORES case precedent in Horseshoe Solar, where the Executive Director concluded that "'[W]here the application materials provide an applicant's written justification for its waiver requests, [Part 1100 does not require] any further detail in the draft siting permit."²⁶² For these reasons, ORES staff concludes that applicant "provided detailed waiver requests and justification in its Application, and 'to the extent those application documents support ORES staff's proposed waiver determinations, staff is entitled to

²⁶¹ ORES staff response at 56-57, citing Matter of Town of Copake v New York State Office of Renewable Energy Siting, 216 AD3d 93, 106-107 [3d Dept 2023], appeal on constitutional grounds dismissed 43 NY3d 990 (2024).

²⁶² ORES staff response at 57, citing Horseshoe Solar, Decision at 24.

rely on them without further elaboration in the draft permit.’”²⁶³

Applicant argues in response consistent with ORES staff that ORES “is not required to provide an explanation in the Draft Permit when granting waivers,” citing the Ruling on Issues and Party Status, and Order of Disposition by the Administrative Law Judges in Horseshoe Solar.²⁶⁴ Applicant also relies on the “extensive record included in Exhibit 24 and the Statement of Justification” to dispute the Town’s claim that it “submitted only conclusory waiver justifications without supporting facts or analysis.” Applicant points out that its waiver requests “cited each local law provision at issue and provided a comprehensive analysis addressing every element of the waiver standard set forth in §1100-2.25(c).” The justifications, applicant notes, explain why the burdens imposed by the local laws are unreasonable and document impacts of lost acreage and generation capacity “with a parcel-by-parcel analysis, Facility maps, string level losses, and site constraint figures.” Applicant also explains that compliance would be “impracticable given the siting constraints within the Project layout,” especially considering the refinements that the facility has already undergone “to avoid environmental impacts on wetlands, Threatened and Endangered (T&E) species habitat, visual resources, agricultural resources, steep slopes and landowner and community requested exclusion zones.”²⁶⁵

²⁶³ ORES staff response at 57, citing Horseshoe Solar, Decision at 23.

²⁶⁴ Applicant response at 37, citing ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar LLC, Ruling on Issues and Party Status, and Order of Disposition, at 53.

²⁶⁵ Applicant response at 38, citing DMM Item No. 132, application exhibit 24 (revised): Local Laws and Ordinances

Discussion

We hold that contrary to the Town's claims, ORES staff adhered to the statutory and regulatory standards for waiver and did not commit an error of law or abuse its discretion in its recommended waiver determinations. ORES staff and applicant correctly rely on Horseshoe Solar²⁶⁶ for the proposition that the record supports ORES staff's waiver determinations, which were "[b]ased on the record in this case,"²⁶⁷ and that no additional analysis or explanation was required. We also note, and ORES staff highlights, that the draft siting permit states the basis of ORES staff's waiver determinations under "3. Required Findings" as follows:

As specified below, the Office hereby elects not to apply, in whole or in part, certain local law or ordinance provisions, which when applied to the proposed Facility, are unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed Facility. In making the determinations herein, the Office has balanced the proposed Facility's competing impacts to multiple resources, and considered the Permittee's proposed measures to avoid, minimize, or mitigate those impacts to the maximum extent practicable, while ensuring protection of the environment and consideration of all pertinent social, economic, and environmental factors.²⁶⁸

at 15-20, 24-25, 28; DMM Item No. 133, application appendix 24-5 (revised): Statement of Justification for Local Law Waiver Requests [applicant statement of justification], part 1 of 2, at 5-59.

²⁶⁶ See Horseshoe Solar, Decision at 23; id., Issues Ruling at 53.

²⁶⁷ Draft siting permit required findings 3(1)-(8) at 4-8.

²⁶⁸ ORES staff response at 56, citing draft siting permit required findings 3 at 4.

The Court in Copake made clear that 16 NYCRR 1100-2.5(c) specifies “what an applicant seeking a waiver must demonstrate, including the degree of burden caused by the local law requirement, that the requested waiver cannot reasonably be obviated by design changes to the facility, that the requested waiver is the minimum necessary and that the adverse impacts of granting the waiver shall be mitigated to the maximum extent practicable.”²⁶⁹ The record supports the conclusion that applicant’s waiver requests met this important standard.²⁷⁰ Applicant’s statement of justification details how impacts from the facility will be avoided, mitigated, and minimized to the maximum extent practicable, as required. With respect to setbacks, for instance, the statement of justification explains that “[i]n rendering 1,114.81 acres of the Facility Site unbuildable for solar panels and eliminating 128.66 MWac of the Project, this 500-foot setback requirements represents, on average a ratio of 8.66 acres lost per 1 MWac lost.” The statement of justification also explains, according to applicant, that the waivers “were the minimum necessary” and discusses how redesigning the facility to comply with the local law requirements would require additional land or shift impacts “to other environmentally sensitive areas.”²⁷¹

We conclude that ORES staff did not commit any error of law or abuse its discretion in its recommended waiver determinations. Applicant provided sufficiently detailed waiver requests based on the justifications in the application as

²⁶⁹ Copake, 216 AD3d at 106-107.

²⁷⁰ See ORES staff response at 56, citing Copake, 216 AD3d at 106; 16 NYCRR 1100-2.25(c).

²⁷¹ Applicant statement of justification, part 1 of 2, at 8, 24, 34; applicant response at 37-38.

required under 16 NYCRR 1100-2.5(c), and ORES staff was entitled to rely on them in support of its waiver determinations without providing information beyond what is stated in the draft siting permit. Accordingly, we address the specific provisions of the local laws the Town challenges as follows.

Ruling: The Town has not identified a substantive and significant factual or legal procedural issue regarding ORES staff not adhering to the statutory and regulatory standards for waiver.

The Town raises as issues for adjudication several claims pertaining to ORES staff's waiver of local law provisions as recommended in the draft siting permit to show "why ORES's determination of waiver is based on errors of fact/or law or was an abuse of discretion, or is otherwise not based on evidence in the administrative record."²⁷² Each of the Town's claims are addressed in turn below. We also note that in addition to these issues, the Town raises several other issues as part of its local law claims that we address separately in this ruling pertaining to a potential reduction in nameplate capacity, and stormwater and hydrogeological issues.²⁷³

In its petition for party status, GLF "expressly incorporated . . . by reference" the Town's statement of issues for adjudication. GFL "requests full party status to adjudicate whether the record contains sufficient evidence for ORES to waive Town . . . local laws, or whether such waiver would be arbitrary and capricious, an abuse of discretion, and not permissible under applicable law. GlenFARMLand would provide additional testimony from its retained experts, or members of

²⁷² Town petition at 15.

²⁷³ See sections V.B and V.F of this ruling.

GFL, to demonstrate the adverse impacts of waiving local laws have not been adequately studied, avoided, or mitigated.”²⁷⁴

Ruling: GFL’s conclusory assertions regarding the facility’s compliance with the Town’s local law requirements and its lack of an offer of proof are insufficient to raise a substantive and significant issue for adjudication or demonstrate that GFL can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party.²⁷⁵ Accordingly, GFL does not raise any adjudicable factual or legal issues regarding the facility’s compliance with the Town’s local laws.

a. Non-participating parcel line setbacks

In its petition for party status, the Town challenges applicant’s justification for non-compliance with Solar Law § 5(2)(b)(i) pertaining to 500-foot non-participating parcel line setbacks as based on “technological limitations” rather than “costs.” The Town also claims applicant failed to comply with the requirements set forth in 16 NYCRR 1100-2.25(c) by not providing a financial analysis and other data relative to complying with the setbacks, including the costs of construction, that the costs of complying would be “borne by consumers” and outweigh the benefits of complying, and the feasibility of leasing additional land as an alternative location for solar arrays, in particular the land for the Mill Point Solar II project.²⁷⁶ In its statement of compliance attached as exhibit A to its petition, the Town restates the

²⁷⁴ GFL petition at 44.

²⁷⁵ See 16 NYCRR 1100-8.4(f)(1)(ii).

²⁷⁶ Town petition at 15-16.

local law, applicant's non-compliance, and ORES staff's setback requirements as stated in the draft siting permit.²⁷⁷

Solar Law § 5(2) provides under "Bulk and area requirements: the following dimensional requirements shall apply to all utility-scale solar collector systems" as follows:²⁷⁸

a. Setback

- i. The following table provides parcel line setback requirements for Large Scale (Utility) solar energy systems.

Zoning District	Front	Side	Rear
Rural Residential	500'	500'	500'

Applicant requested a waiver of the Town's 500-foot setback requirement on the grounds that it is "unnecessarily restrictive and burdensome."²⁷⁹ In justification of its waiver request, applicant submits the degree of burden caused by the Town's setbacks of a minimum of 500 feet from adjacent non-participating parcels, is that it "imposes a technological restriction on the Project, making it impossible to build as proposed." According to applicant, a single string of panels is about "100 feet" long and removal of an entire string is required if any portion "is within this 500-foot setback area," creating "unused space in the buildable area."²⁸⁰ Applicant explains that if panels need to be removed, the facility would

²⁷⁷ Town petition, exhibit A, at 38-39.

²⁷⁸ Solar Law at 8-9. Note that references to the Solar Law refer to the PDF page number.

²⁷⁹ Applicant statement of justification, part 1 of 2, at 15.

²⁸⁰ Applicant statement of justification, part 1 of 2, at 7-8.

lose a total of "198.16 acres" and "9.95 MWac."²⁸¹ Applicant also explains that compliance would result in "over 10,500 strings of panels" lost or "128.66 MWac" and "at least 1,114.81 acres (42%) of the 2,665.59-acre Facility Site unbuildable for solar," as detailed in revised Figure 5 and Table 1 in the statement of justification.²⁸²

Applicant relies on these same reasons to explain why the burden should not reasonably be borne by applicant and also notes that compliance with the setbacks would reduce the size of the facility, which would, among other negative results, "negate the benefits of the existing transmission structure." Avoiding "excessive setbacks," applicant explains, also "aligns with the State's clean energy mandates and allows the Applicant to take advantage of the existing 345 kV transmission line."²⁸³

Applicant also asserts that the request cannot reasonably be obviated by design changes because the facility was designed to avoid and minimize environmental impacts to wetlands, streams, and other water bodies, threatened and endangered species, as well as to visual, cultural, historic, and agricultural resources. According to applicant, further design changes "would be impractical and lead to additional environmental impacts, as more parcels would be needed to achieve the Project's energy production goals."²⁸⁴ Applicant also explains that "[a]reas in the Facility Site within the

²⁸¹ Applicant statement of justification, part 1 of 2, at 20.

²⁸² Applicant statement of justification, part 1 of 2, at 8, 11-12; applicant statement of justification, part 2 of 2, at 4-12.

²⁸³ Applicant statement of justification, part 1 of 2, at 9-10.

²⁸⁴ Applicant statement of justification, part 1 of 2, at 10.

1,114.81 acres of overlap without panels are either areas with other environmental resources (e.g. wetlands; slopes) or are PEAs (collection easement only, the Hamlet District, or areas requested to be excluded by landowners)."²⁸⁵ Adverse impacts are also mitigated to the maximum extent practicable, applicant notes, by the facility's compliance with the ORES setbacks and uniform standards and conditions, requirements that "promote safe siting of solar facilities."²⁸⁶

In response to the Town's claims, ORES staff relies on applicant's statement of justification that the "500' front, side, and rear setback requirements to adjacent non-participating parcel boundaries" would eliminate "1,114.81 acres, or 42%" of the "2,665.59 acre facility site as compared to ORES setbacks."²⁸⁷ The draft siting permit recommends approval of relief limited to the specific parcels in the facility site identified by applicant in application appendix 24-5, Table 1, subject to compliance with the ORES setbacks stated in 16 NYCRR 1100-2.6(d), Table 2.²⁸⁸ ORES staff contends that "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)." ORES staff also asserts that based on the record, its waiver recommendations as set forth in the draft siting permit "are rational and contain no legal error."²⁸⁹

²⁸⁵ Applicant statement of justification, part 1 of 2, at 10-11.

²⁸⁶ Application statement of justification, part 1 of 2, at 9, 12.

²⁸⁷ ORES staff response at 49.

²⁸⁸ See draft siting permit required findings 3(1)(1) at 5.

²⁸⁹ ORES response at 58-59.

Discussion

We hold that the proposed issue of the waiver of the Town's setback requirement of 500 feet from adjacent non-participating parcels does not raise a substantive and significant factual or legal issue for adjudication. Pursuant to PSL § 142(5), "[i]n making a final siting permit determination with respect to a major renewable energy facility, ORES may elect not to apply, in whole or in part, any local law or ordinance that would otherwise be applicable if it makes a finding that, as applied to the proposed facility, it is unreasonably burdensome in view of the CLCPA targets, and the environmental benefits." An applicant seeking partial or complete waiver of a substantive local law requirement bears the burden of establishing that, with respect to the facility, the local law requirement is "unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility."²⁹⁰

Pursuant to 16 NYCRR 1100-2.25, applicants have the burden of identifying all substantive local ordinances, laws, resolutions, regulations, standards, and other requirements applicable to the construction or operation of a major renewable energy facility, and those substantive local law requirements the applicant requests the Office elect not to apply to the facility. For those local law requirements for which an applicant seeks a waiver from ORES, applicant must provide a statement of justification showing with facts and analysis (1) the degree of burden caused by the requirement, (2) why the burden should not reasonably be borne by the applicant, (3) that the request cannot reasonably be obviated by design changes to

²⁹⁰ 16 NYCRR 1100-2.25(c).

the facility, (4) that the request is the minimum necessary, and (5) that the adverse impacts of granting the request would be mitigated to the maximum extent practicable, consistent with the applicable requirement set forth in Part 1100.

Applicant has identified those local laws in this matter, and set forth its justification for its waiver requests, in application exhibit 24.²⁹¹ Where, as here, an applicant's waiver request is grounded in existing technology, the applicant must further demonstrate that there are technological limitations that make compliance technically impossible, impractical, or otherwise unreasonable. Where requests are based on costs or economics, the applicant must further demonstrate that the costs to consumers associated with applying the local law outweigh the benefits of applying the law.²⁹²

ORES may only issue a final siting permit if it makes a determination, among other findings, that the proposed project, together with applicable provisions of the USCs, necessary site-specific conditions (SSCs) and applicable pre-construction and post-construction compliance filings, complies with all applicable substantive local laws and regulations except those local laws the Office elects not apply, in whole or in part, on the ground that the local law or ordinance is unreasonable burdensome. ORES makes waiver determinations on a case-by-case basis in the context of a specific permit application based upon a record containing specific facts and circumstances as well as the CLCPA goals and the environmental benefits of the facility.²⁹³

²⁹¹ Application exhibit 24 at 7-30.

²⁹² 16 NYCRR 1100-2.25(c).

²⁹³ See Bear Ridge Solar, Decision at 33-34.

Based on the record here, ORES staff correctly determined that applicant justified the limited local law waiver pertaining to the 500-foot setback requirement on the ground that it is unreasonably burdensome. ORES staff's reliance on applicant's justification to recommend the waivers, as well as its determination that all potential adverse impacts to agricultural, environmental, and cultural resources have been avoided, minimized, or mitigated to the maximum extent practicable, was reasonable and rational.

As an initial matter regarding the burden of proof applicable to all the local law issues discussed in this Ruling, ORES staff correctly points out that the Town in this matter "misunderstands the various standards of review that it invokes, and their application in the issues determination process" and that "[e]rrors of law or allegations of an abuse of discretion do not require an evidentiary hearing."²⁹⁴ Under 16 NYCRR 1100-8.8(b)(1), applicant has the burden of proof at an adjudicatory hearing "to demonstrate that its proposal shall be in compliance with all applicable laws and regulations administered by the Office." With respect to the issues determination stage of the proceeding, however, 16 NYCRR 1100-8.3(c)(4) states that "where Office Staff has reviewed an application and finds that a component of 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 that component to demonstrate that it is both substantive and significant." ORES staff accurately references the Executive Director's conclusion on this point in Homer Solar as follows:

²⁹⁴ ORES staff response at 54.

If ORES staff determines, based on its review of the application materials and the justification provided by applicant, that the applicant has supported its request with sufficient facts and analysis, ORES staff has the discretion to recommend not to apply, in whole or part, those substantive local law provisions it concludes are unreasonably burdensome in view of the CLCPA targets and the environment [sic] benefits of the proposed facility. Where ORES staff recommends in the draft siting permit that one or more waiver requests be approved, in whole or in part, the burden of persuasion at the issues determination stage of the proceeding rests with petitioners such as [the Town] to raise a substantive and significant issue requiring adjudication.²⁹⁵

As properly stated by ORES staff, the municipality alleging an issue of fact related to waiver or compliance of a local law "must meet the required standards to show a substantive and significant issue."²⁹⁶ To this point, ORES staff highlights the Executive Director's determination stated in Homer Solar that a municipality "must raise its objections in a petition for party status, accompanied by the required offer of proof on factual issues."²⁹⁷

The Town, as a potential party seeking full party status, did not file a petition in writing that presents an offer of proof with respect to each local law issue identified specifying the nature of the evidence each witness is expected to present and the grounds upon which the assertions are made, as required under 16 NYCRR subpart 1100-8. In raising local law issues for adjudication, the Town was required to submit an

²⁹⁵ Homer Solar, Decision at 23-24.

²⁹⁶ See ORES staff response at 55.

²⁹⁷ See ORES staff response at 55, citing Homer Solar, Decision at 19 and 16 NYCRR 1100-8.4(d)).

offer of proof that includes site-specific substantive and significant factual or legal arguments to support the claims raised in the petition itself.²⁹⁸

With respect to the issue of the 500-foot setback raised by the Town, for instance, the Town's offer of proof from James Gironda, P.G., Senior Hydrogeologist at Hanson Van Vleet Hydrogeologic Consultants, PLLC, does not mention the Town's 500-foot setback claim or applicant's waiver and the offer of proof from Douglas P. Cole, P.E., Senior Director of Engineering & Architecture, P.C., merely restates the local law setback requirement, the reduction in setbacks as stated in the draft permit, and how applicant's non-compliance is without sufficient justification. Mr. Cole also comments that "applicant has not justified" the waiver considering the potential to lease land for "phase 2" to comply with setback requirements; "[t]he front setback on some drawings appears to only be shown as 25';" the Town has approved "smaller projects;" and landowner exclusions "have reduced the area available for solar panels." Mr. Cole requests that applicant's "plans be revised" to comply with the Town's local law.²⁹⁹

The Town's attempt to raise an issue regarding the local law by its technical consultant's conclusions and complaints in its petition that applicant should have provided, among other data, an analysis of the feasibility of leasing additional properties and the costs associated with complying to justify its claim of non-compliance based on technological limitations is rejected.³⁰⁰ Such conclusory statements and

²⁹⁸ See 16 NYCRR 1100-8.4(d); 16 NYCRR 1100-8.4(c)(2)(ii).

²⁹⁹ Town petition, exhibit B, at 166-167, 175, 177.

³⁰⁰ See Town petition at 16.

general criticisms are insufficient to meet the Town's burden of raising a substantive and significant issue that would require adjudication or support full party status. We agree with ORES staff that the "[e]xhibits submitted on behalf of the Town consist of general engineering comments on various aspects of the application and as such do not constitute a sufficient offer of proof."³⁰¹ The Town's offer of proof on this issue also does not include any statements that raise disputes with the specific factual assertions in the application to support the Town's local law claim or to demonstrate how the proposed setbacks under 16 NYCRR 1100-2.6(d), Table 2, as stated in the draft permit are insufficient or inadequate to mitigate, to the maximum extent practicable, the impacts associated with granting the waiver request.³⁰²

For the purposes of our discussion of all the local law issues raised by the Town, we also reject the Town's statements that it "will provide evidence from technical experts to help examine the impacts of not applying local laws and balancing competing interests" and that it "will provide additional evidence from technical experts on the potential impacts from not applying the Town's local laws."³⁰³ ORES staff correctly points out that "[a]n offer to provide experts to 'examine' potential impacts falls short of what is necessary to demonstrate an adjudicable issue." ORES staff also accurately highlights the Town's failure to specify "which experts will provide such testimony or the grounds upon which these claims

³⁰¹ ORES staff response at 24.

³⁰² See draft siting permit required findings 3(a)(1) at 5; 16 NYCRR 1100-2.25(c).

³⁰³ Town petition at 15, 20.

are made (which are claims of error of law and abuse of discretion, with no specific factual issues raised)."³⁰⁴ For these reasons, we also reject the Town's claim that the affirmations by its technical consultants, Douglas P. Cole, P.E., and James Gironda, P.G., attached to its petition as "Exhibit B" and "Exhibit C," respectively, are "incorporated by reference, such that all issues raised in Exhibit B shall be considered raised in this Petition, whether or not expressly identified in the Petition itself."³⁰⁵

Along these lines, we also reject the Town's following statements: (1) "The issues statements and offers of proof submitted by Montgomery County and GFL are expressly incorporated herein by reference;" (2) "For any issues raised herein that are not supported by the Town's engineering consultants, the Town respectfully cites to the reports provided by Montgomery County in support of its Petition for Party Status, including the Visual Impact Assessment report prepared by T.J. Boyle Associates (the "Visual Impact Assessment") and MRB Group's Analysis of Adverse Economic Impacts (the "Economic Impact analysis"); and (3) "The Town also cites to reports provided by Glen FARMLand, Inc. and the Glen Conservancy (collectively "GFL"), including the report by ecologist Kenneth Shawn Smallwood, Ph.D., discussing adverse impacts of the Project on the surrounding grassland bird habitat (the "Smallwood Report") and the report by Steven Nolt, Ph.D., discussing adverse impacts to the Fultonville-Glen Amish Community (the "Nolt Report")."³⁰⁶

³⁰⁴ ORES staff response at 59.

³⁰⁵ Town petition at 4.

³⁰⁶ Town petition at 4-6.

These blanket statements made in the introduction to the Town's petition are without reference to offers of proof relevant to the specific issues raised by the Town for adjudication that refute the evidence in the administrative record. Accordingly, they do not meet the required standard to show that the issues raised by the Town are substantive and significant.³⁰⁷

We agree with ORES staff and applicant that revised figures 1 and 5 confirm that compliance with the 500-foot setback requirements under Solar Law § 5(2)(b)(i) is "unreasonably burdensome" and would "effectively prohibit utility scale solar within the Town."³⁰⁸ The record here confirms that compliance with the 500-foot setback would "render the facility unbuildable" by "eliminating 128.66 MWac of the Project" or "on average a ratio of 8.66 acres lost per 1 MWac." This would result in 1,114.81 acres of the facility site as unbuildable for solar panels.³⁰⁹

We note the relevancy of Article 10 precedent issued by the Siting Board in Matter of Flint Mine Solar, LLC to this matter on the issue of unreasonably burdensome in the context of local law provisions, a case applicant also cites.³¹⁰ In Matter

³⁰⁷ See 16 NYCRR 1100-8.4(d); 16 NYCRR 1100-8.4(c)(2)(ii); see also Town petition at 5.

³⁰⁸ See applicant statement of justification, part 1 of 2, at 4; ORES staff response at 17, citing applicant statement of justification, part 1 of 2, at 83-88, 90-96; applicant statement of justification, part 2 of 2, at 4-12.

³⁰⁹ Applicant statement of justification, part 1 of 2, at 8; see also applicant statement of justification, part 1 of 2, at 83-88, 90-96; applicant statement of justification, part 2 of 2, at 4-12.

³¹⁰ See DPS Case 18-F-0087, Matter of Flint Mine Solar, Order Granting Certificate of Environmental Compatibility and

of Flint Mine Solar, LLC, the Siting Board determined that a local law zoning provision was “unreasonably burdensome” in view of technology, costs, and other factors because imposing it would “frustrate the siting of the Project” and “prohibit the Project as proposed.”³¹¹ Applicant also correctly points out ORES case precedent in Bear Ridge Solar to note that “ORES waived” as “unreasonably burdensome” a similar local setback provision.³¹² We note the Executive Director’s conclusion in that case agreeing and affirming the ALJs’ determination “that complying with the substantive local restrictions of the setback requirements of §§ 10.C(3) and 10.c(4) of the Cambria Solar Law would be unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the facility.”³¹³

We disagree, however, with applicant’s reliance on High River Energy Center, LLC for the proposition in this proceeding under PSL Article VIII that “local laws which would prevent a project from being constructed as proposed would be unreasonably burdensome *per se*.” As we recently noted in Matter of Oxbow Hill Solar, LLC, and Hoffman Falls Wind, LLC, ORES case precedent in Horseshoe Solar makes clear that in the context of Article VIII (former Executive Law § 94-c), “a rule limiting a

Public Need, with Conditions, at 64-65, 70 (NYS Siting Board); applicant statement of justification, part 1 of 2, at 9.

³¹¹ Flint Mine Solar, Order at 64-65, 70; applicant statement of justification, part 1 of 2, at 9, citing DPS Case 17-F-0597, Matter of High River Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, March 11, 2021, at 110 (NYS Siting Board).

³¹² Applicant statement of justification, part 1 of 2, at 8-9.

³¹³ Bear Ridge Solar, Decision at 59.

project" is not "per se unreasonable." As the Executive Director determined in the decision on appeal in that case, "ORES makes waiver determinations on a case-by-case basis in the context of a specific permit application based upon a record containing specific facts and circumstances as well as the CLCPA goals and the environmental benefits of the facility."³¹⁴

The record here also establishes that the request is the minimum necessary because the facility's design complies with the Town's 500-foot setback to the maximum extent practicable, as shown by revised figure 2 in applicant's statement of justification.³¹⁵ We agree with applicant that revised figures 1-5 establish that complete compliance with the local law's setback requirements would require additional land for the project to maintain its generating capacity, potentially increasing exposure to other environmental impacts to threatened and endangered species and agricultural, visual, and other resources.³¹⁶ We also conclude that adverse impacts of the waiver have been mitigated to the maximum extent practicable because areas without panels include environmentally sensitive areas such as the wetlands, slopes greater than 15%, and areas that landowners requested be excluded, or include the Hamlet District, which the Town precludes for solar development.³¹⁷

³¹⁴ Hoffman Falls Wind, Issues Ruling at 41, citing Oxbow Hill Solar, Issues Ruling at 63, and High River, Order at 110 n 416; Horseshoe Solar, Decision at 25.

³¹⁵ See applicant statement of justification, part 1 of 2, at 90-96.

³¹⁶ See applicant statement of justification, part 1 of 2, at 10, 83-98; applicant statement of justification, part 2 of 2, at 2, 4-12).

³¹⁷ See application statement of justification, part 1 of 2, at 4-5, 13, 31; ORES staff response at 58; see also Solar Law

To the extent that the Town raises its leasing claims for adjudication, we conclude that they do not raise a substantive or significant issue. We agree with applicant that compliance with local laws under article VIII is not contingent upon applicant leasing additional land when requesting a waiver. We also agree with applicant and ORES staff that there is no requirement under 16 NYCRR 1100-2.25(c) that applicant provide an assessment of the feasibility of lands associated with the proposed Mill Point Solar II project as an alternative location for solar arrays. All that was required for this project was for applicant to properly assess the "buildable land available," which it completed, as demonstrated by its statement of justification. Indeed, applicant's parcel-by-parcel analysis detailed in its statement of justification includes figures and tables identifying "property boundaries, participating parcels, and panel exclusion areas" that more than meet this requirement.³¹⁸

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the limited waiver of the Town of Glen's 500-foot parcel line setbacks to non-participating property lines.

§ 5(1) ("Large scale (utility) solar energy systems are prohibited in the Hamlet District.").

³¹⁸ Applicant response at 39-40; Town petition at 16; ORES staff response at 58.

b. Wetland, ponds and streams setbacks

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law §§ 5(2)(b)(iii) and 5(5)(b) pertaining to 100-foot wetlands, ponds, and streams setbacks. The Town restates that its arguments raised pertaining to the 500-foot non-participating parcel line setbacks discussed above that applicant's justifications are based on "technological limitations" rather than "costs." The Town also restates its claim that applicant failed to comply with the requirements set forth in 16 NYCRR 1100-2.25(c) by not providing "sufficient data" to show "the feasibility of leasing the additional property needed" and "the costs associated with construction to accommodate the setback."³¹⁹ In its statement of compliance, the Town claims that contrary to the setback requirements under the local law, "[t]he POI switchyard is sited 83 feet away from a State-regulated wetland (W-NSD-01)" and "the substation, inverters, and dozens of array panels are sited less than 100 feet away from a federally regulated stream or wetland."³²⁰

Solar Law § 5(2) provides under "Bulk and area requirements: the following dimensional requirements shall apply to all utility-scale solar collector systems":

b. Setback

- iii. The setbacks for wetlands, ponds, and streams are 100 feet except where streams and or wetlands may need to be crossed by access roads or underground or above ground utilities (100 feet).

³¹⁹ Town petition at 16.

³²⁰ Town petition, exhibit A, at 39.

Solar Law § 5(5) states that "Large Scale (Utility) solar energy systems are prohibited in areas as follows:"

- b. Wetlands, streams and ponds with a 100 feet setback. The Planning Board has the discretion, however, to allow applicants to cross the resources and their setbacks with access roads or underground or above ground utilities;³²¹

In its justification for the waiver, applicant relies on Table 1 in its statement of justification to assert with respect to the degree of burden of compliance that "[t]here are certain limited areas where it was not possible to site components 100 feet or more from wetlands, ponds, and streams."³²² Applicant requested a waiver of the Town's 100-foot setback for wetlands, ponds, and streams in certain areas where the facility impacts those regulated areas "and their 100-foot adjacent areas."³²³ Applicant explains that the waiver is necessary because "[f]encing, access roads, stormwater measures, electrical wiring and conduit (both above and below ground) and landscaping may occur within the setback."³²⁴ Applicant points out that according to revised figure 14-3 of application exhibit 14 and Table 2 in its statement of justification, other than the POI switchyard, which is "sited 83 feet away from State-regulated wetland (W-NSD-01)" and the allowable "fencing, access roads, stormwater measures, electrical wiring and conduit and

³²¹ Solar Law at 8-9.

³²² Applicant statement of justification, part 1 of 2, at 11-12, 14.

³²³ Application exhibit 24, at 15.

³²⁴ Applicant statement of justification, part 1 of 2, at 13, citing DMM Item No. 24, application appendix 24-6, Town of Glen Code Interpretation for Wetland Setback.

landscaping," there are no other facility components sited "within 100-feet of a State-regulated wetland."³²⁵

Applicant also submits that the burden should not be borne by applicant because as detailed in revised application exhibits 13 and 14, the facility's thorough design process considered "topographical constraints, land access, and the presence of other sensitive resources" and avoids and minimizes impacts to "environmental resources," including waters and wetlands.³²⁶ To comply with the local law and not increase other environmental impacts, applicant explains that the facility "would have to remove capacity." Applicant also explains that relocation of the facility to comply with the law "could increase impacts on other parcels that will also have environmental considerations, as more parcels will be needed to meet the proposed generation capacity of the Facility."³²⁷

The request is also the minimum necessary, applicant explains, because the facility complies with the local law and has minimized and mitigated impacts to wetlands and streams "to the maximum extent practicable." Applicant confirms that none of the components will be "closer than 50 feet to any

³²⁵ Applicant statement of justification, part 1 of 2, at 14, 16-19, citing DMM Item No. 94, application exhibit 14 (revised): Wetlands at 21-23.

³²⁶ Applicant statement of justification, part 1 of 2, at 20, citing application exhibit 14, at 16, DMM Item No. 94, application exhibit 13 (revised): Water Resources and Aquatic Ecology at 20.

³²⁷ Applicant statement of justification, part 1 of 2, at 20-21.

jurisdictional stream or wetlands.”³²⁸ Applicant also asserts that adverse impacts of the waiver have been mitigated to the maximum extent practicable because it has “avoided, minimized, and mitigated impacts to wetlands and streams to the maximum extent practicable” pursuant to the Article VIII regulations. Applicant also notes that its “Draft Conceptual Wetland Mitigation Plan” detailed in appendix 14-4 of revised exhibit 14 of the application contemplates “permanent impacts to State regulated wetlands and their associated 100-foot adjacent areas.”³²⁹

In response, ORES staff notes its review of applicant’s statement of justification, including that without the waiver, “198.16 acres of buildable land” would be eliminated “while complete avoidance of the setback would result in other impacts.”³³⁰ The draft siting permit recommends approval of relief of Solar Law § 5(2)(b)(iii) and § 5(5)(b) limited to the specific facility components and wetlands, ponds, and streams identified in application appendix 24-5, Table 2 and subject to compliance with the avoidance, minimization, and mitigation measures in conditions 4.4(p) and 4.4(q) of the draft siting permit.³³¹ ORES staff asserts that its waiver recommendation is “rational” and without “legal error” and that “[t]he facts and

³²⁸ Applicant statement of justification, part 1 of 2, at 21, citing application exhibit 13, at 23-26; application exhibit 14, at 25-27.

³²⁹ Applicant statement of justification, part 1 of 2, at 21-22, citing application exhibit 14, at 25-27.

³³⁰ ORES staff response at 49.

³³¹ See draft siting permit required findings 3(a)(2) at 5.

analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."³³²

Discussion

We conclude that the proposed issue of the waiver of the Town's setback requirement for wetlands, streams, and ponds does not meet the standards for adjudication. ORES staff correctly determined that applicant carried its burden of establishing that the local law is unreasonably burdensome. At that point, the Town, as the potential party seeking adjudication of the waiver, was required to meet its burden of persuasion by establishing the existence of a substantive and significant factual issue through an offer proof supported by expert testimony or facts or analysis, or an error of law, which the Town again did not complete pertaining to this setback provision.

For example, the Town's offer of proof from James Girona, P.G. restates applicant's non-compliance, concluding that "in some areas . . . construction comes within 50' of some wetland boundaries."³³³ The offer of proof from Douglas P. Cole, P.E. provides comments that restate the local law requirement and applicant's non-compliance, specifically that (1) applicant has not provided justification for reducing the setback to "50' - 98'" or for costs; (2) the Town has approved "smaller projects;" and (3) landowner exclusions "have reduced the area available for solar panels." Mr. Cole also makes several requests, including that applicant's "plans be revised" to comply with the Town's local law, that applicant provide the Final Wetland Restoration and Mitigation Plan "for review and

³³² ORES response at 58-59.

³³³ Town petition, exhibit C, at 198.

comment prior to ORES approval of the project," and that applicant provide "an evaluation of each wetland area based upon the eleven (11) new NYS criteria for wetland of unusual importance, as several of the criteria" apply to the project.³³⁴ The Town's consultants' statements do not refute the evidence in the record or constitute facts or analysis to establish the existence of a substantive and significant factual issue related to applicant's request for a waiver of the Town's local law. Accordingly, the Town has failed to meet its burden of raising a substantive and significant issue that would require adjudication or support full party status.

We are nonetheless persuaded that applicant's mitigation and minimization measures, none of which the Towns dispute or challenge, will sufficiently compensate for temporary and permanent impacts to State regulated wetlands and their corresponding 100-foot adjacent areas (AAs). Applicant correctly points out that the facility's Draft Conceptual Wetland Mitigation Plan addresses the Town's wetland concerns by avoiding, minimizing, and mitigating impacts to these State-regulated wetlands to the maximum extent practicable. To offset impacts to these wetlands, which total "0.9244 acres," applicant's compensatory mitigation measures include restoring areas temporarily disturbed for construction within the facility site to pre-construction conditions, and providing a "permittee-responsible compensatory mitigation program" and compensatory mitigation plan that provides long-term management and site protection, and proposed mitigation activities and locations.³³⁵

³³⁴ Town petition, exhibit B, at 146, 161, 167, 177.

³³⁵ See ORES staff response at 58; applicant response at 37-38; DMM Item No. 132, application exhibit 14, draft wetland mitigation plan, version 2, at 8-10, 6-7, 11-14, 16.

We also note that the Final Wetland Restoration and Mitigation Plan, which will specify these extensive mitigation measures and others, further confirms that impacts to wetlands and other water sources have been avoided, minimized, and mitigated to the maximum extent practicable.³³⁶

With respect to the Town's leasing claims that it restates here pertaining to this setback provision, we similarly reject them for the same reasons discussed above pertaining to the 500-foot setback provision. As we previously noted, compliance with the Town's local laws is not contingent upon applicant leasing additional land when requesting a waiver, as applicant correctly notes. We agree with applicant that the waiver standard is not evaluated based on "speculative reconfigurations on hypothetical land acquisitions." We also note that there is no support in the record for the Town's claim pertaining to acquiring additional land as an alternative location for solar arrays to comply with setback requirements. As applicant accurately represents, adding land to the project does not necessarily reduce impacts or ensure compliance with local law requirements.³³⁷

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the limited waiver of the Town of Glen's 100-foot setback for wetlands, ponds, and streams.

c. Maximum Lot Coverage

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law §

³³⁶ Application exhibit 14, at 23-24; see also 16 NYCRR 1100-2.15(g).

³³⁷ Town petition at 17; applicant response at 41.

5(2)(c)(a) pertaining to maximum lot coverage. The Town restates its arguments raised pertaining to the setback provisions discussed above that applicant "has not considered ways to comply" with the local law, "such as leasing additional portions of adjacent lands to merge with the two parcels that exceed lot coverage, or demonstrated why the technical or economic difficulties of doing so are impracticable."³³⁸ In its statement of compliance, the Town restates the Town's local law, applicant's non-compliance, and that "ORES has not applied any other alternative lot coverage requirements to the Project."³³⁹

Solar Law § 5(2) provides under "Bulk and area requirements: the following dimensional requirements shall apply to all utility-scale solar collector systems" as follows:

c. Lot coverage

- a. See Lot Coverage for solar only definition. The same Maximum Lot Coverage for Public or Private Utility Facility without buildings (20%) shall apply. By way of example, lot coverage would be calculated as follows:
 - Each Panel = 89.96in Long by 44.61in Wide
 - 89.96in @ 25deg mounting angle = 81.53in
 - 81.53in x 44.61in = 3637in sq = 25.26 SF
 - 25.26 SF x 12,688 modules = 320,499 SF = 7.357 Acres
 - 7.357 Acres / 47.658 acres = 15.44%³⁴⁰

Solar Law § 5 also provides:

F. Definitions

As used in this local law, the following terms shall have the meanings as indicated:

. . . .

LOT COVERAGE-For Solar only

³³⁸ Town petition at 40.

³³⁹ Town petition, exhibit A, at 40.

³⁴⁰ See Solar Law at 9; Town petition at 55.

Solar panels are considered a disconnected impervious surface when water running off a panel is discharged to a pervious surface (e.g. turf, crop, perennial vegetation). Although the surface of solar panels is considered to be impervious, the solar panels as a whole qualify as disconnected impervious when a) there is pervious surface between each panel, and b) there is pervious surface beneath each panel. As rainfall drips off the solar panel's surface, some of it will infiltrate the pervious surfaces before it reaches an impervious surface such as gravel path or road. Since Ground-Mounted Solar Energy Systems generally do not include much impervious surface, and since lot coverage requirements are designed, in large part, to reduce impervious surfaces and the run-off they create, this Solar Law measures lot coverage for a Ground-Mounted Solar Energy System by its actual impervious footprint, which results in a smaller measurement than the square footage of the solar panels.³⁴¹

Applicant requested either "limited relief" or "full relief as the local law is written for a technology that is not being proposed for the Project," specifically tracking panels, on the grounds that the local law requirement is "unnecessarily burdensome and technologically impracticable."³⁴² In its justification for the waiver, applicant submits with respect to the degree of burden that "[t]he mounting angle of tracking panels . . . is not a fixed angle making compliance difficult to calculate given the example provided in the Town of Glen Solar Law (2022)." The local law as written applies to a "fixed-tilt solar panel," applicant notes, as opposed to the "tracking panel" proposed for the facility.³⁴³ Applicant clarifies as an

³⁴¹ Solar Law at 14-16.

³⁴² Applicant response at 43; applicant statement of justification, part 1 of 2, at 22.

³⁴³ Applicant statement of justification, part 1 of 2, at 23.

initial matter that its waiver request pertained to four parcels, not two, as the Town states. Applicant also explains that the burden should not reasonably be borne by applicant because contrary to "[t]he lot coverage requirement in the local law," which assumes that the solar panels will be stationary during the day, "tracking panels are not stationary such that a lot percentage can be reliable and equitably calculated under the law."³⁴⁴

The request cannot reasonably be obviated by design changes, applicant explains, because the facility cannot be designed to comply with the Town's requirements due to its installation of "tracking panels," as opposed to "a stationary mounting angle." The request is also the minimum necessary, applicant notes, because the facility "has been designed to install tracking panels which increase water infiltration, minimizing the impact of stormwater runoff compared with traditional fixed solar panels." Applicant explains that rotating panels supports "better established vegetation" because changing drip lines contribute to "improved water distribution" and the sun more consistently reaches the vegetation "as the panels rotate." Applicant also notes that the tracking panels "will address some of the Town's concerns regarding stormwater runoff."³⁴⁵

Applicant also explains that adverse impacts are mitigated to the maximum extent practicable because "[p]ervious land cover vegetation will be established beneath the solar arrays and within the overall Facility Site, which will allow for continued infiltration of stormwater runoff" and benefit

³⁴⁴ Applicant statement of justification, part 1 of 2, at 23.

³⁴⁵ Applicant statement of justification, part 1 of 2, at 24.

"areas of the Facility Site that are currently used for agricultural purposes." Applicant also notes that it will adhere to the facility's "Stormwater Pollution Prevention Plan (SWPPP) and the Facility will be designed in accordance with the New York State Stormwater Management Design Manual to manage stormwater runoff from the developed Facility," as detailed in revised application exhibit 13.³⁴⁶

In response, ORES staff notes its review of applicant's statement of justification, including that the waiver is necessary because "when the tracking panels are at 0% tilt, using a formula provided by the Town to calculate lot coverage which assumes a fixed tilt, 4 parcels in the Facility site would experience between 20 and 29% lot coverage based upon the dimensions of the lot."³⁴⁷ The draft permit recommends approval of limited relief from Solar Law § 5(2)(c)(a) "for the parcels identified in Appendix 24-5, Table 32."³⁴⁸ ORES staff claims that its waiver recommendation is "rational" and without "legal error" and "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."³⁴⁹

Discussion

We hold that the proposed issue of the waiver of the Town's maximum lot coverage requirement does not meet the standards for adjudication. ORES staff correctly determined

³⁴⁶ Application statement of justification at 25, citing application exhibit 13 at 25-26.

³⁴⁷ ORES staff response at 50.

³⁴⁸ See ORES staff response at 49; draft siting permit required findings 3(a)(3) at 6.

³⁴⁹ See ORES response at 58-59.

that applicant met its burden of establishing that the local law is unreasonably burdensome. As we previously noted pertaining to the local laws discussed above, the Town, as the potential party seeking adjudication of the waiver, was required to meet its burden of persuasion by establishing the existence of a substantive and significant factual issue through an offer proof supported by expert testimony or facts or analysis, or an error of law, which the Town did not complete for this local law provision.

The Town again attempts to raise an issue with waiving the local law by summarizing in their petition ORES staff's determination related to the waiver request as stated in the draft siting permit and its offer of proof, which is not sufficient.³⁵⁰ The Town's technical consultant, James Gironda, P.G., did not address this local law or applicant's waiver request and technical consultant Douglas P. Cole, P.E. restates the local law requirement and applicant's justification for the waiver request as stated by applicant in exhibit 24 and its statement of justification. In addition, Mr. Cole makes general requests for "[u]pdated lot coverage figures" and that applicant "state the lot coverage percentage." Mr. Cole also states that "lot coverage needs to include all other impervious surfaces including access roads, buildings, equipment pads, etc. to count all components of the Ground-Mounted Solar Energy System" and that "applicant should have considered the existing law when choosing to site a solar project of this scale in the proposed location(s)."³⁵¹ Accordingly, the Town has failed to meet its

³⁵⁰ See Town petition at 17.

³⁵¹ Town petition, exhibit B, at 145, 160, 172, 177; id., exhibit C, at 189-191.

burden of raising a substantive and significant issue that would require adjudication or support full party status.

Based on the record, ORES staff correctly determined that applicant justified the limited local law waiver pertaining to the maximum lot coverage requirement on the ground that it is unreasonably burdensome. Applicant has sufficiently demonstrated that compliance with the local law is "technically impossible" due to the challenges in calculating the mounting angle of its tracking throughout the day, which results in fluctuating lot coverage, as detailed in its parcel-by-parcel analysis and Table 3 in the statement of justification.³⁵²

Applicant's parcel-by-parcel analysis shows, for example, that with respect to the four parcels that are the subject of applicant's waiver request (67.-1-11, 67.-1-13.2, 68.-1-22, and 68.-1-26.2), using the Town's calculation, "[a]t maximum tilt (60 degrees), none of the parcels hosting panels would exceed the 20 percent lot coverage. At zero-degree tilt, 4 parcels would be between 20 and 29 percent lot coverage" depending on the dimensions of the lot. If applying the stationary mounting angle of 25 degrees as per the local law, "one parcel (68.-1-26.2) would exceed 20 percent lot coverage" that is "only 2 acres in size," accounting for "the higher percentage of coverage."³⁵³

This parcel-by-parcel analysis confirms applicant's point that even if the facility could be redesigned to "assume a stationary mounting angle, for purposes of calculating the lot coverage," the result could be "unreasonable and inequitable,"

³⁵² Applicant statement of justification, part 1 of 2, 24-25.

³⁵³ Applicant statement of justification, part 1 of 2, at 23, 25.

leading to a “loss of production or an increase in environmental impacts” due to adding parcels to meet production goals. For example, the landowner of the one parcel (68.-1-26.2) highlighted above that is “only 2 acres in size” would be penalized for having a “smaller lot size.”³⁵⁴

For these reasons, we agree with applicant that compliance with the maximum lot coverage restriction is not feasible to accommodate the current tracking panels technology to generate maximum energy production. We further agree with applicant that the installation of tracking panels that are not stationary and that “adjust their orientation and tilt throughout the day” will minimize impacts beneath the solar panels to the maximum extent practicable by promoting vegetation and agriculture.³⁵⁵ Moreover, applicant has demonstrated that the tracking panels and its stormwater management practices that include obtaining coverage under the State’s currently approved General Permit or an effective individual NYS Pollution Discharge Elimination System (SPDES) permit prior to operation of a construction activity will minimize stormwater impacts to the maximum extent practicable.³⁵⁶

The Town does not identify any factual errors or omissions in applicant’s justification for the requested waiver or identify any legal errors or abuses of discretion in ORES staff’s determination to grant the waiver from the maximum lot coverage requirement limited to the specific parcels identified in application appendix 24-5, Table 3. The Town’s petition and

³⁵⁴ Id. at 24.

³⁵⁵ Id. at 23-24.

³⁵⁶ Application exhibit 13 at 25; see also Clean Water Act § 402: National Pollutant Discharge Elimination System; applicant statement of justification, part 1 of 2, at 25.

offer of proof do not raise an adjudicable issue as they are limited to expressions of concern, general criticisms and requests, and conclusory statements.

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the limited waiver of the Town of Glen's maximum lot coverage limit.

d. Agricultural Resources Occupation Limit

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(4) pertaining to the Town's limit on the occupation of 20% or 10 acres of any farmed parcel located within the Town's New York State Certified Agricultural District by large-scale solar energy systems. The Town claims that applicant's "study of the potential for co-location of solar and farming activities" is "mere speculation on the possibility of co-location." The Town also asserts that applicant should "further study whether any farming could be performed under the proposed panels, explore co-location with adjacent farmers to both preserve the agricultural economy and stay within setbacks, and commit to implementing co-location through signed agreements with farming landowners."³⁵⁷ In its statement of compliance, the Town restates the local law requirement and applicant's non-compliance, noting that "[t]he Project will displace 51.81-acres of Prime Soils, 157.17-acres of mineral soil groups 1-4 and 1,000-acres of Farmland, and will exceed the 20% lot coverage requirement."³⁵⁸

³⁵⁷ Town petition at 17.

³⁵⁸ Town petition, exhibit A, at 40.

Solar Law § 5(4) provides under "Large Scale (Utility) solar energy system, (Special Permitted Uses - Public or Private Utility Facility with or without a building)" as follows:

4. Agricultural Resources - for projects located on agricultural lands and in accordance with the Comprehensive Plan, the Town of Glen does not support conversion of productive farmland to support grid-supply facilities. When proposed on an active farm located within the NYS Certified Agricultural District in Glen, a utility-scale solar energy system may occupy up to 20% of any farmed parcel but in no case shall exceed 20 acres. Arrays shall be located on a parcel in such a manner as to avoid, to the maximum extent feasible, soils classified as prime farmland by the USDA, NYS, or NRCS.³⁵⁹

In its justification for the waiver, applicant submits with respect to the degree of burden of compliance that compliance with this local law "would impact every parcel that the Facility is currently sited on and would result in detrimental loss of MW for the Facility with respect to the lot coverage portion of the law," as detailed in exhibit 15 of the application.³⁶⁰ Applicant explains that as shown in Figure 3-6 in application exhibit 3, "[m]uch of the suitable land for solar development in the Town of Glen" and most of the land "within 5 miles of the Facility Site" is in a NYS Certified Agricultural District.³⁶¹ According to applicant, compliance with the local law requirement would result in losing "873.88 acres . . . and

³⁵⁹ Solar Law at 9.

³⁶⁰ Applicant statement of justification, part 1 of 2, at 26; application exhibit 15 (revised) at 18-19.

³⁶¹ Applicant statement of justification, part 1 of 2, at 26-27; DMM Item No. 95, application exhibit 3, appendix 3-6, Town of Glen response to local law clarification, at 1-2.

approximately 207 MW, accounting for 83 percent of the Facility." This result, applicant explains, "would render the Facility unbuildable," as detailed in Table 4 in its statement of justification.³⁶² It would also result in adding acreage, applicant notes, because "more land will be required" to meet the facility's energy production goals.³⁶³ Applicant also explains that "[o]f the 37 parcels within the Facility Site, 34 parcels are located within the Montgomery County Agricultural District 3, and of those, 25 are classified as both a NYS Certified Agricultural District and are field-verified active agricultural land," as defined in 16 NYCRR 1100-2.16(b) (1).³⁶⁴

Applicant also submits that the burden should not reasonably be borne by applicant because compliance with the local law requirement would result in losing "873.88 acres . . . and approximately 207 MW, accounting for 83 percent of the Facility." This result, applicant explains, would make it "infeasible for the Project to meet capacity and design goals." The request cannot reasonably be obviated by design changes, applicant notes, because meeting production and design goals would require "approximately 850+ buildable acres on parcels

³⁶² Applicant statement of justification, part 1 of 2, at 29.

³⁶³ Applicant statement of justification, part 1 of 2, at 26.

³⁶⁴ Applicant statement of justification, part 1 of 2, at 27; DMM Item No. 94, application exhibit 3 (revised): Location of Facility and Surrounding Land Use at 3-4; 16 NYCRR 1100-2.6(b) (1) (this provision defines agricultural lands as "lands involved in the production of crops, livestock, and livestock products for three (3) of the last five (5) years.").

that are not currently participating in the Project," acres that would be "subject to the same lot restrictions."³⁶⁵

The request is the minimum necessary, according to applicant, because the facility has been designed "to avoid and minimize impacts to active farmland, including MSG 1-4 soils, to the maximum extent practicable." Applicant points out that "[o]f the 1,078.75 acres of active agricultural parcels in an Agricultural District within the Facility fenced area, 169.63 acres (15.72 percent) will be impacted during the life of the Facility." Applicant also points out that "[t]he total acreage of active agricultural parcels within an Agricultural District impacted for the development of the Facility represents 0.15 percent of active agricultural land in Montgomery County, and 0.11 percent of agricultural land within the three NYS Agricultural Districts," as detailed in application exhibit 15.³⁶⁶

Applicant also asserts that adverse impacts of granting the request are mitigated to the maximum extent practicable because "the 2,465.91 acres of the Facility Site that is composed of active agricultural land within an Agricultural District" represents "a small fraction of the overall Agricultural District land within the 5-mile Study Area." Compliance with the local law, applicant explains, "would require much greater site control across a much wider area, spreading the Facility across numerous additional parcels," which would increase environmental impacts. These impacts include, applicant notes, "increased wetland impacts,

³⁶⁵ Applicant statement of justification, part 1 of 2, at 29-30.

³⁶⁶ Applicant statement of justification, part 1 of 2, at 30; application exhibit 15 at 4.

more agricultural land removed from production, more trees cleared to accommodate the Project and wider spread visual and noise impacts.”³⁶⁷

In response, ORES staff notes its review of applicant’s statement of justification, including that the local law as applied “would eliminate 873.88 acres from the Facility site and render the Facility unbuildable.”³⁶⁸ The draft permit recommends limited relief from Solar Law § 5(4) “for the parcels identified in Appendix 24-5, Table 4.”³⁶⁹ ORES staff asserts that its waiver recommendation pertaining to this local law in the draft permit is “rational” and without “legal error,” and that “[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c).”³⁷⁰

Discussion

We hold that the proposed issue of the waiver of the Town’s limit on the occupation of 20% or 10 acres of any farmed parcel located within the Town’s New York State Certified Agricultural District does not meet the standards for adjudication. ORES staff correctly determined that applicant met its burden of establishing that the local law is unreasonably burdensome.

We note that exhibit 15 states:

Approximately 149.88 acres of these agricultural MSG 1-4 are within the Facility fenced area and will be limited for agricultural production for the life of

³⁶⁷ Applicant statement of justification, part 1 of 2, at 31; application exhibit 15 at 4.

³⁶⁸ ORES staff response at 50.

³⁶⁹ Draft siting permit required findings 3(a)(4) at 6.

³⁷⁰ See ORES response at 58-59.

the Facility; this accounts for 62.63 percent of the active agricultural MSG 1-4 within the Facility Site. This impact accounts for less than one percent (0.76) of active agricultural lands within MSG 1-4 within Montgomery County.³⁷¹

Here, applicant has demonstrated the facility avoids potential significant adverse impacts to active farmland located within a New York State Certified Agricultural District, including those with MSGs 1-4, to the maximum extent practicable. We agree with applicant that the facility will mitigate agricultural impacts to those lands through an agricultural plan to ensure impacts to agricultural resources are minimized and agricultural lands are properly protected.³⁷² We further agree with applicant that the proposed design of the facility will minimize impacts to all resources to the maximum extent practicable.

We note that pursuant to application exhibit 15, applicant is required to prepare and provide:

An Agricultural Plan, consistent with the New York State Department of Agriculture and Markets Guidelines (see sections 1100-15.1(1)(1)(i) and (ii) of this Part) to the maximum extent practicable, to avoid, minimize, and mitigate agricultural impacts to active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within NYS Agricultural Land Classified Mineral Soil Groups 1 through 4.³⁷³

³⁷¹ See application exhibit 15 at 14-15.

³⁷² See applicant statement of justification, part 1 of 2, at 58; DMM Item No. 104, application appendix 15-3 (revised), agricultural plan at 3, 5-6.

³⁷³ 16 NYCRR 1100-2.16(c) (emphasis added); application exhibit 15 at 19.

In addition, pursuant to the USC at 16 NYCRR 1100-6.4(s) (1), Facility Construction and Maintenance, applicant is required:

[i]n all instances in which the applicant for a solar facility proposes to permanently or temporarily impact active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within NYS Agricultural Land Classified Mineral Soil Groups 1 thorough 4, the permittee shall:

(i) Construct the facility consistent with the NYSAGM "Guidelines for Solar Energy Projects-Construction Mitigation for Agricultural Lands", dated 10/18/2019 (see section 1100-15.1(1) (1) (i) of this Part), to the maximum extent practicable.³⁷⁴

In addition, to further assist with identifying impacts and overseeing construction and restoration activities, revised application exhibit 15 explains how the agricultural plan incorporates the use of a third-party environmental monitor in accordance with 16 NYCRR 1100-6.4(b) (4) and 6.4(s). This exhibit also outlines applicant's plan to work with landowners "to retain portions of land that will continue to be used for agricultural purposes during the Facility's operation."³⁷⁵ These efforts support applicant's point that the proposed layout and design of the facility will minimize impacts to all resources to the maximum extent practicable.³⁷⁶ We also note applicant has sited the facility to meet the second part of the Town's local law to avoid and minimize solar arrays located on soils

³⁷⁴ 16 NYCRR 1100-6.4(s) (1) (emphasis added).

³⁷⁵ Applicant response at 28; applicant statement of justification, part 1 of 2, at 31; application exhibit 15 at 12, 20; see also agricultural plan at 2-3.

³⁷⁶ See application statement of compliance at 32.

classified as prime farmland by the USDA, NYS, or the NRCS to the maximum extent practicable by "avoiding arrays on 276.54 acres or 84.04 percent of prime farmland soils within the Facility Site," which the Town does not dispute.³⁷⁷

Having concluded that applicant has met the requirements of 16 NYCRR 1100-2.25(c) by demonstrating that the local law requirement is "unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility," the burden shifts to the Town to raise a substantive and significant issue for adjudication. The Town, however, summarizes in its petition ORES staff's determination related to the waiver request as stated in the draft siting permit and its offer of proof and requests applicant provide information or complete a study on co-location.³⁷⁸ The Town and Mr. Cole also request "that an Agricultural Plan be specifically referenced in Section 8 of the SWPPP" and that applicant provide "a proposed soil sampling & testing plan for review as required by the NYSAGM Guidelines for Solar Energy Projects."³⁷⁹ Mr. Cole further comments that "[a]pplicant should have considered the existing law when choosing to site a solar project of this scale in the proposed location(s)."³⁸⁰ None of these statements and conclusions are sufficient offers of proof to challenge the factual assertions in the application or identify an error of

³⁷⁷ See application statement of justification, part 1 of 2, at 31; application exhibit 15 at 7.

³⁷⁸ See Town petition at 17.

³⁷⁹ See Town petition at 28, 31; Town petition, exhibit B, at 162-163.

³⁸⁰ Town petition, exhibit B, at 177.

law or abuse of discretion by ORES staff.³⁸¹ The Town has not demonstrated, through an adequate offer of proof, that there are unmitigated adverse impacts associated with the waiver. ORES staff's decision to waive this local requirement is reasonable, not irrational, and consistent with ORES and Siting Board precedent.³⁸²

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding waiver of the Town of Glen's limit on the occupation of 20% or 10 acres of any farmed parcel located within the Town's New York State Certified Agricultural District.

e. Slopes

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(5)(a) pertaining to a prohibition of large-scale energy systems in areas with slopes greater than 15%. The Town claims that applicant "has not provided a sufficient rationale for the Facility's location in general, instead relying on waivers raised in prior cases and ignoring that waivers are issued on a case-by-case basis." The Town also asserts that applicant "fails to explore potential mitigations such as co-location or leasing additional land," again noting the land pertaining to the Mill Point Solar 2 project, and that "it cannot be

³⁸¹ See Town petition at 17; Town petition, exhibit B, at 162-163, 177.

³⁸² See e.g. Horseshoe Solar, Decision at 6 (ORES staff recommended waiver of a town's local law limiting the development of land on a parcel where compliance would result in losing buildable acres).

determined whether the facility could avoid 15% slopes."³⁸³ In its statement of compliance, the Town restates the local law and applicant's non-compliance.³⁸⁴

Solar Law § 5(5) provides that "[l]arge Scale (Utility) solar energy systems are prohibited in areas as follows:

- a. Land that has slope greater than 15%.³⁸⁵

Solar Law § 5 also provides:

F. Definitions

As used in this local law, the following terms shall have the meanings as indicated:

SOLAR ENERGY SYSTEM

A system of components and subcomponents intended for the collection, inversion, distribution of solar energy and the directly or indirectly generates thermal, chemical, electrical or other usable energy. This term includes Solar Panels and Solar Energy Equipment."³⁸⁶

Applicant's request for limited relief from this local law is grounded in "site-specific engineering constraints and environmental considerations."³⁸⁷ In its justification for the waiver, applicant submits with respect to the degree of burden of compliance that "[t]here are areas of the design which need to be in areas with slopes greater than 15 percent," as demonstrated in Table 6 and revised Figure 3 in its statement of

³⁸³ Town petition at 17-18.

³⁸⁴ Town petition, exhibit A, at 40.

³⁸⁵ Solar Law at 9.

³⁸⁶ Solar Law at 14, 18.

³⁸⁷ Applicant statement of justification, part 1 of 2, at 37; applicant response at 45.

compliance.³⁸⁸ Applicant explains that its waiver request is limited because of the "354.13 acres of solar panel arrays" proposed for the facility, "only 8.67 acres (or 2.45 percent of all solar panel arrays) . . . are sited on steep sloped areas." Applicant also submits that the burden should not reasonably be borne by applicant because "[c]omplete avoidance of slopes greater than 15 percent for panel arrays would cause islands of unusable land, causing more than just a 9-acre impact (as described in Table 5) to the buildable area due to the length of the Facility equipment (panel array trackers)."³⁸⁹

Applicant also notes that the request cannot reasonably be obviated by design changes because it took the steps to survey "the topography of the site with 1 meter contour resolution" and used the data to "avoid slopes that exceeded 15 percent." The request is the minimum necessary, according to applicant, as such slopes have been avoided "to the maximum extent practicable," as demonstrated in revised Figure 3.³⁹⁰ Applicant points out that while there are 384.66 acres within the facility with slopes greater than 15 percent, Tables 5 and 6 in the statement of compliance and exhibit 10 show that components are only located on 9.11 of them.³⁹¹ Adverse impacts of granting the request are also mitigated to the maximum extent practicable, applicant notes, because panel arrays have been sited "outside of slopes greater than 15 percent to the maximum

³⁸⁸ Applicant statement of compliance, part 1 of 2, at 36-37, 98.

³⁸⁹ Applicant statement of compliance, part 1 of 2, at 38.

³⁹⁰ Applicant statement of compliance, part 1 of 2, at 35, 98.

³⁹¹ Applicant statement of justification, part 1 of 2, at 34, 26-27, 39; DMM Item No. 17, application figure 10-1, existing slopes, at 1.

extent practicable and Facility components and associated construction areas generally avoid steeper slopes." Applicant confirms its plans to "grade" areas where slopes exceed 15 percent "to achieve a maximum slope of 15 percent," as shown in revised exhibit 5.³⁹² Applicant also confirms its plans detailed in revised exhibit 13 to design the facility in accordance with the New York State Stormwater Management Design Manual "to manage stormwater runoff."³⁹³

In response, ORES staff notes its review of applicant's statement of justification, including that the waiver is necessary to avoid an "additional reduction of buildable area of 8.67 acres."³⁹⁴ The draft permit recommends approval of limited relief from Solar Law § 5(5)(a) "for the components within slopes greater than 15% on the parcels identified in Appendix 24-5, Table 6."³⁹⁵ ORES staff asserts that its waiver recommendation pertaining to this local law in the draft permit is "rational" and without "legal error" and "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."³⁹⁶

Discussion

³⁹² Applicant statement of justification, part 1 of 2, at 37; DMM Item No. 94, application exhibit 5 (revised): Design Drawings at 1.

³⁹³ Application statement of justification, part 1 of 2, at 37; application exhibit 13 at 25.

³⁹⁴ ORES staff response at 50.

³⁹⁵ Draft siting permit required findings 3(a)(5)(a) at 6.

³⁹⁶ See ORES staff response at 58-59.

We hold that the proposed issue of the waiver of the Town's prohibition of large-scale energy systems in areas with slopes greater than 15% does not meet the standards for adjudication. ORES staff correctly determined that applicant met its burden of establishing that the local law is unreasonably burdensome. The Town did not meet its burden of persuasion, however, through an offer proof supported by expert testimony or facts or analysis, or an error of law.³⁹⁷

The Town's technical consultant, James Girona, P.G., does not address this local law or applicant's waiver request and technical consultant Douglas P. Cole, P.E. merely restates the local law requirement and applicant's non-compliance. Mr. Cole also requests that stormwater management in areas with these slopes "be upgraded to provide level spreaders so that rainwater coming off the solar panels does not cut channels in the soil" and that applicant "revise the panel layout to avoid more of the areas with 15% slopes." Additionally, Mr. Cole generally comments that "[i]t is obvious that many areas that contain steep slopes were avoided for solar panel placement, however, it appears that there are more areas that could be avoided, especially where there are less steep grades in adjacent areas that do not have panel coverage."³⁹⁸ The Town's petition and its technical consultant's suggestions, requests, comments, and general conclusions are insufficient to raise an adjudicable factual or legal issue regarding the Town's local law.

Based on the record, ORES staff correctly determined that applicant justified the limited local law waiver pertaining

³⁹⁷ See 16 NYCRR 1100-8.4(d); 16 NYCRR 1100-8.4(c)(2)(ii).

³⁹⁸ Town petition, exhibit B, at 146, 160-161, 172, 179-180.

to prohibiting slopes greater than 15% on the ground that it is unreasonably burdensome. Applicant has sufficiently demonstrated that it designed the facility to avoid steep slopes to the maximum extent practicable. Applicant also points out the increased impacts caused by completely avoiding slopes of creating "isolated unusable pockets of land" that are greater than any impacts from its "limited development on approximately nine acres of steep slopes," which constitutes "a small fraction of the total 384.66 acres in the Facility Site."³⁹⁹ We also note that applicant's compliance with the New York State Stormwater Management Design Manual to manage stormwater and the preliminary SWPPP that incorporates sedimentation control measures such as vegetative cover will further mitigate any impacts to these nine acres caused by water runoff.⁴⁰⁰

To the extent the Town is raising in its petition the issue of leasing land to avoid the waiver, which is without any offer of proof, we conclude that the issue is not substantive or significant.⁴⁰¹ Applicant correctly describes the Town's claim regarding providing alternative options such as leasing and co-location as "based on speculation and belief," which is insufficient to propose a substantive and significant issue for adjudication. In considering the limited nature of applicant's its waiver request, which applicant confirms only applies to "select instances where the end of a tracker overlaps with the start of an area with 15% slopes" or just a "few feet of panel encroachment into a sloped area," we agree with applicant that

³⁹⁹ Applicant response at 44; applicant statement of justification at 36-37.

⁴⁰⁰ Applicant statement of justification at 37; application exhibit 13 at 13, 33.

⁴⁰¹ Town petition at 17.

fully siting the facility in compliance with the local law is "impracticable" and that leasing additional land to comply with the slope requirements could result in increasing impacts "without delivering any benefit."⁴⁰²

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the Town of Glen's prohibition on slopes greater than 15 percent.

f. Clear cutting limit

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(5) (c) prohibiting the clear cutting of more than nine acres of trees that are six inches in diameter at breast height. The Town claims that tree clearing "will affect stormwater infiltration and increase turbidity" and that applicant does not provide any evidence to explain "why it cannot comply with the clear-cutting prohibition." The Town notes that "[s]olar array locations are based on obstacles that are not mapped and are not adequately explained in the Application materials."⁴⁰³ In its statement of compliance, the Town restates the local law and applicant's non-compliance, noting that "[o]f the 100.31 acres that Applicant proposes to clear, 83.19-acres of trees will be permanently removed including 3.45-acres of trees that are a part of the core forest."⁴⁰⁴

⁴⁰² Town petition at 17; applicant response at 44-46; applicant statement of justification, part 1 of 2, at 33.

⁴⁰³ Town petition at 18.

⁴⁰⁴ Town petition, exhibit A, at 40-41.

Solar Law, § 5(5) provides that “[l]arge Scale (Utility) solar energy systems are prohibited in areas as follows:

- c. Clear cutting of more than 9 acres of trees that are six inches diameter at breast height.⁴⁰⁵

Applicant’s request for full relief from this local law is grounded on environmental design constraints that limit its ability to maintain energy production.⁴⁰⁶ In its justification for the waiver, applicant submits with respect to the degree of burden of compliance that the waiver is required because “the Facility as proposed will require more than 9 acres of tree clearing,” as demonstrated in revised figures 1, 4, and 5. Applicant explains that while it is proposing “100.31 acres of tree clearing” within the facility site, not all of those acres “will be trees that are six inches diameter at breast height.” Applicant also explains that this tree clearing amounts to “forest clearing,” which includes “deciduous and mixed deciduous and coniferous forest,” as detailed in revised application exhibit 11(b).⁴⁰⁷

Applicant also submits that the burden should not reasonably be borne by applicant because “the Facility has already been designed to comply with this requirement to the maximum extent practicable while still maintaining generating capacity of 250 MW.” According to applicant, the local law limitation on tree clearing over nine acres would result in “at

⁴⁰⁵ Solar Law at 9.

⁴⁰⁶ Applicant statement of justification, part 1 of 2, at 38.

⁴⁰⁷ Applicant statement of justification, part 1 of 2, at 39, 83-88, 90-96; applicant statement of justification, part 2 of 2, at 2, 4-12; DMM Item No. 94, application exhibit 11 (revised): Terrestrial Ecology at 3-4.

least 91.31 acres . . . of land in the Facility Site unbuildable for solar, eliminating at least 12.5 MW of energy generation capacity of the proposed Facility if not more.” While the facility has been sited “to avoid as much tree clearing as possible, especially to core forest blocks,” applicant explains, some tree clearing is needed “to site Facility components and ensure the safety of equipment and personnel.”⁴⁰⁸

The request cannot reasonably be obviated by design changes, applicant notes, because certain areas of tree clearing are needed for the facility’s design to “maintain capacity and ensure the Facility can be efficiently sited on the parcels hosting components,” as shown in revised figure 4. Revised figure 4 also shows, applicant notes, that the transmission line is located “in an area surrounded by core forest blocks and trees,” which explains why the substation and POI switchyard cannot be relocated.⁴⁰⁹ Applicant also notes that revised figures 1 and 5 show how changing the facility design to comply with the local law “would necessarily increase impacts to other resources which would conflict with other provisions of the Town of Glen Solar Law (2022) (i.e. limits to impacts to agricultural land).”⁴¹⁰

The request is also the minimum necessary, according to applicant, because it “limited tree clearing to only what is necessary for the construction and operation of the Facility and has largely avoided clearing trees in core forest blocks.”

⁴⁰⁸ Applicant statement of justification, part 1 of 2, at 39.

⁴⁰⁹ Applicant statement of justification, part 1 of 2, at 40; applicant statement of justification, part 2 of 2, at 2.

⁴¹⁰ Applicant statement of justification, part 1 of 2, at 39, 83-88; applicant statement of justification, part 2 of 2, at 4-12.

Applicant explains that "425.11 acres of forestland will remain within the Facility Site following construction of the Facility" and complying with the local law would increase impacts because "more land across more parcels in the Town" would be needed.⁴¹¹ Adverse impacts of granting the request are mitigated to the maximum extent practicable, according to applicant, because "[t]he adverse impacts of granting the request are mitigated to the maximum extent practicable." Applicant explains that tree clearing "is focused on the edge of forest blocks to facilitate the siting of solar arrays," which limits "fragmentation of forest habitat" and widespread "impacts to forestland," and existing "hedgerows and vegetative barriers" and "stumps" will remain, if possible, as shown in application exhibits 5 and 8.⁴¹²

In response, ORES staff notes its review of applicant's statement of justification, including that the local law "if applied, would eliminate 91.31 acres proposed to be rendered usable in the Facility Site via clearing of 100.31 acres to accommodate Facility design, and would result in impacts to other resources, including agricultural land."⁴¹³ The draft siting permit recommends approval or relief from Solar Law § 5(5)(c).⁴¹⁴ ORES staff asserts that its waiver recommendation pertaining to this local law in the draft permit is "rational" and without "legal error." ORES staff ORES staff relies on applicant's statement of justification to claim that "[t]he

⁴¹¹ Applicant statement of justification, part 1 of 2, at 40.

⁴¹² Applicant statement of justification at 42; DMM Item No. 132, application appendix 5-1 (revised); DMM Item No. 97, application appendix 8-1 (revised): Visual Impact Assessment (VIA) at 6, 64-65.

⁴¹³ ORES staff response at 50-51.

⁴¹⁴ Draft siting permit required findings, 3(a)(6) at 7.

facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."⁴¹⁵

Discussion

We hold that the Town has not met its burden of establishing a significant and substantive issue requiring adjudication relating to ORES staff's recommendation to grant a waiver of the tree clearing limitation required by Solar Law § 5(5)(c). The Town has not demonstrated, through an adequate offer of proof, that there are unmitigated adverse impacts associated with the waiver of the local limit on the clear cutting of more than nine acres of trees that are six inches in diameter at breast height. ORES staff's decision to waive this local requirement is reasonable, not irrational, and consistent with ORES and Siting Board precedent.

The Town relies on an offer of proof on this issue from its hydrogeologic consultant, James Girona, who observes that "[s]tormwater flows on these lands will likely be turbid and will need to be managed appropriately included where discharges will be directed, and what mitigation will be used to capture and remove sediment."⁴¹⁶ Mr. Girona recommends applicant reconsider "the 2.1972 acres of wetland buffer area to be disturbed by tree clearing and access road construction . . . to avoid impacts to wetland resources" and "provide a plan for mitigating stormwater impacts of 100.31 acres of tree clearing."⁴¹⁷ The Town's engineering consultant, Douglas P. Cole, P.E., also references applicant's SWPPP and states that it

⁴¹⁵ ORES staff response at 58-59.

⁴¹⁶ See Town petition, exhibit C, at 198, 200.

⁴¹⁷ See Town petition, exhibit C, at 198, 200.

"is lacking information and will require major updates to become a final SWPPP."⁴¹⁸

We conclude that the stormwater concerns raised by the Town's consultants are addressed by applicant in the preliminary SWPPP, which "provides information on stormwater management practices, including erosion and sediment control (temporary and permanent vegetative and structural measures), construction phasing and disturbance limits, waste management and spill prevention, and site inspection and maintenance."⁴¹⁹ We also note that as stated in application exhibit 13, the preliminary SWPPP will be finalized to confirm these details "prior to the start of construction."⁴²⁰ Applicant has confirmed its commitment to adhere to the facility's SWPPP, which guide the facility's stormwater management practices, and that stormwater runoff will be managed by the facility's design in accordance with the New York State Stormwater Management Design Manual.⁴²¹

The Town's consultants' remaining statements, suggestions, and comments neither refute ORES staff's approval of applicant's waiver request nor provide any support for the Town's claims that impacts from tree clearing have not been mitigated or that construction of the facility will adversely affect forests. For example, Mr. Cole comments that figures 3 and 4 in applicant's statement of justification show that "there are multiple areas . . . in locations that do not have proposed solar panels. These areas should be removed from clear cutting,

⁴¹⁸ See Town petition, exhibit B, at 145.

⁴¹⁹ Applicant statement of justification, part 1 of 2, at 25.

⁴²⁰ Application exhibit 13 at 27.

⁴²¹ See applicant statement of justification at 29; see also application exhibit 13 at 25-26.

to reduce the environmental impact.”⁴²² Another example is Mr. Cole noting that the “parcel-by-parcel analysis of the proposed acreage of clearing” shows “five (5) parcels each having more than 9 acres of proposed clearing” and requesting that applicant “bring these five parcels into compliance with the local law.” Mr. Cole also requests applicant “replant” the areas of the “14.4 acres of the total 100.31 acres” that “will be temporarily disturbed.”⁴²³

We note that applicant sufficiently addresses the Town’s forestland concerns by demonstrating how the facility’s design will result in “only marginal impacts” to “interior forests, forested wetlands, and early successional forests” and that “core forest blocks in and around the Facility Site” will be left “undisturbed.”⁴²⁴ We also note that revised figure 4 in applicant’s statement of justification, which shows areas required for tree clearing, and applicant’s parcel-by-parcel analysis provide sufficient justification for the designated clear cutting areas to efficiently and safely site the facility and maintain its generating capacity. To this end, applicant explains that while it sited the facility to avoid as much tree clearing as possible, “some clearing is needed to site Facility components and ensure the safety of equipment and personnel.”⁴²⁵

In addition, revised figure 4 in applicant’s statement of justification and revised application exhibit 11 show that

⁴²² Town petition, exhibit B, at 180.

⁴²³ Town petition, exhibit B, at 160.

⁴²⁴ See applicant statement of justification, part 1 of 2, at 43.

⁴²⁵ See applicant statement of justification, part 1 of 2, at 39.

most of the tree clearing is "fragmented" throughout the facility site and is not solely located in heavy forested areas.⁴²⁶ We further note that revised application exhibit 11 confirms applicant's post-construction plans to restore acres affected by temporary disturbance along the forestland, which applicant explains is caused by "clearing for grading and collection line installation during construction."⁴²⁷ Moreover, applicant's design drawings and its Visual Impacts Minimization and Mitigation Plan show that existing hedgerows and vegetative barriers will remain if possible.⁴²⁸

For all these reasons, we disagree with the Town's statement in its letter from its attorneys that "as proposed, mitigation is nonexistent."⁴²⁹ We also disagree with the Town's claim in its petition, which is without an offer of proof, that "eliminating the setback waiver request could have the added benefit of eliminating the waiver necessary for tree clearing." Applicant correctly describes this claim as "speculative" because complying with the setbacks "could just as likely have the opposite effect of pushing arrays further into forested areas."⁴³⁰ We are persuaded that applicant's mitigation and minimization measures, none of which the Town disputes or

⁴²⁶ See applicant statement of justification at 43, citing application exhibit 11 at 13; applicant statement of justification, part 2 of 2, at 2.

⁴²⁷ Applicant statement of justification at 43; application exhibit 11 at 11, 13; Town petition, exhibit B, at 160.

⁴²⁸ See applicant statement of justification at 42, citing application appendix 5-1, sheet MPS-C-101-17 (revised Dec. 2024); VIA at 6, 64-65.

⁴²⁹ Town petition at 137.

⁴³⁰ Applicant response at 45-46; Town petition at 18.

challenges by facts and evidence, are sufficient and address the Town's tree clearing concerns.

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the waiver of the Town of Glen's prohibition on clear cutting of more than nine acres of trees that are six inches in diameter at breast height.

g. Visibility and screening

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(7)(a) and (8) pertaining to visibility and screening requirements. The Town claims applicant has not adequately screened the facility or minimized visual impacts because it is visible from "several locations from public rights of way" and "[f]rom the street, visual renderings show the solar array panels will be visible to the public and adjacent neighbors from multiple vantage points." According to the Town, this impact "is a direct result of the insufficient proposed setbacks, sparse landscaping, and height of the equipment." The Town also claims that applicant's proposed mitigation "does not include the use of berms, sufficient setbacks, or dense or mature enough landscaping to avoid visual impacts from public vantage points and adjacent residential properties, even within five years of construction."⁴³¹ The Town restates these claims in its statement of compliance.⁴³²

Solar Law § 5 provides:

7. Visual

⁴³¹ Town petition at 18-19.

⁴³² Town petition at 41-42.

a. Large Scale (Utility) solar energy systems shall be sited, to the maximum extent practicable, to ensure that the solar array is not visible to surrounding non-participating property owners or those who pass by the array on public rights of way. Solar facilities, including any proposed off-site infrastructure, shall be located & screened to avoid or minimize visual impacts as viewed from:

- Publicly dedicated parkland, roads, highways, and rights of way (e.g. rail trails and public hiking paths)
- Existing non-participating residential dwellings located on adjacent or contiguous parcels, including those on the opposite side of any public rights of way.

Solar Law § 5 also provides:

8. All associated structures shall be screened, placed underground, depressed, earth bermed or sited below the ridgeline to the greatest extent feasible, particularly in areas of high visibility. To the greatest extent possible, all such solar facilities will not be sited in areas of high visibility.⁴³³

In response, applicant asserts that the local law provisions “do not establish an absolute prohibition on visibility.” Applicant notes that it is instead required to only “visually screen the Facility from surrounding non-participating property owners and public rights of way” “to the maximum extent practicable.” Applicant relies on its Visual Impact Assessment (VIA) to assert that “[t]he visual impact of the Facility has been effectively screened” and “the screening proposed . . . is in line with other similar facilities

⁴³³ Solar Law at 11.

permitted by the Office.”⁴³⁴ Applicant also relies on its “Comprehensive Landscape Plan” that “incorporates vegetative screening along with three distinct vegetative types (or modules) and its plan to maintain “existing vegetative screening where possible” to assert that it sited the facility “to minimize and mitigate visual impacts.” Applicant explains that the modules “encompass approximately 91,210 linear feet (approximately 17 miles comprising 2,277 deciduous trees, 4,254 evergreen trees, and 9,240 deciduous shrubs).”⁴³⁵ These efforts, applicant explains, ensure “the Facility Site as a whole has adequate visual screening around every array and the Interconnection Facilities.”⁴³⁶

ORES staff states in response that its review of applicant’s statement of justification, including that “the Facility has been designed to comply with visibility and screening requirements” and that applicant, “out of an ‘abundance of caution,’” sought a “waiver of these requirements which, if read to require invisibility or complete avoidance of visual impacts, would require costly and excessive mitigation measures.”⁴³⁷ The draft siting permit recommends denying applicant’s requests to waive these requirements under the local laws on the grounds that relief is not necessary because the facility already complies. The draft permit requires applicant

⁴³⁴ Applicant response at 47; DMM Item No. 94, application exhibit 8 (revised): Visual Impacts at 1, 88-91.

⁴³⁵ Applicant response at 47-48; DMM Item No. 96, application appendix 5-2 (revised), landscape plans, part 1 of 2, at 1-9; id., part 2 of 2, at 1-61.

⁴³⁶ Applicant response at 48.

⁴³⁷ ORES staff response at 51, citing applicant statement of justification, part 1 of 2, at 51.

to submit a final Visual Impact Minimization and Mitigation Plan (VIMMP) that includes screen planting and lighting plans, as required in subpart 5(c) and implement the VIMMP in accordance with subpart 4.4(1)(2).⁴³⁸ ORES staff asserts that its waiver recommendation pertaining to this local law in the draft permit is "rational" and without "legal error" and that "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."⁴³⁹

Discussion

We hold that ORES staff correctly denied applicant's requested relief from the visibility and screening local law requirements on the grounds that relief is not necessary because the facility complies. We agree with ORES staff and applicant that the Town failed to demonstrate an error in ORES staff's determination to recommend as part of their denial of the waiver on the grounds that it is not necessary, that the facility already complies with the visibility and screening requirements.⁴⁴⁰

The Town's justification for a hearing is due to concerns that the facility's solar arrays will be visible to the public and adjacent neighbors from certain locations and that additional mitigation measures are needed for compliance with the local law requirements. We examined applicant's landscape plan, which includes "vegetative screening along with three distinct vegetation template types (modules)" in the context of the facility's compliance with the Town's local requirements for visual screening. We note that applicant's landscape plan that

⁴³⁸ Draft siting permit required findings 3(a)(7) at 7.

⁴³⁹ ORES staff response at 58-59.

⁴⁴⁰ ORES staff response at 51; applicant response at 47.

incorporates "existing vegetative screening" and "three distinct vegetation template types" or "modules" sufficiently establishes the facility's compliance with local law requirements, as demonstrated in revised application exhibits 5 and 8.

Applicant's Visual Impact Assessment confirms that this plan was developed "as a site-specific solution appropriate to the scale of the Facility and visual character of the existing landscape."⁴⁴¹

For example, applicant's type A module provides "the highest density of plantings" with maximum screening to minimize visual impacts "from non-participating residential dwelling located on adjacent or contiguous parcels, including those on the opposite side of any public rights of way." This module uses "3,283 evergreens trees, 1,000 deciduous trees, and 5,238 deciduous shrubs . . . along 37,285 linear feet of the Facility perimeter." In addition, applicant's type B module provides "medium density" plantings of "approximately 971 evergreens trees, 1,276 deciduous trees, and 4,002 deciduous shrubs" to minimize visual impacts from "roads, highways and rights of way." These plantings will also serve "as a buffer for viewsheds that do not contain a sensitive receptor or any adjacent receptor." Applicant's type C module will provide naturalized screening to minimize visual impacts for areas that do contain non-participating residences, sensitive receptors, or roads.⁴⁴²

⁴⁴¹ Application exhibit 8 at 106; application appendix 5-2, part 1 of 2; id., part 2 of 2.

⁴⁴² Applicant statement of justification, part 1 of 2, at 52-53; application appendix 5-2, part 1 of 2; id., part 2 of 2; VIA, part 1 of 20, at 106.

We also conclude that the Town's claims in its petition that installing berms, planting mature trees, or increasing setbacks will minimize visual impacts do not raise a substantive or significant issue.⁴⁴³ The evidence does not support these additional measures to comply with the local law requirements. Applicant also explains how implanting these mitigation measures would be unreasonably burdensome because they require "constant and costly maintenance to preserve erosion, can increase runoff and soil erosion, and can have the undesired effect of blocking other visually appealing views or vistas from residences." In addition, applicant notes that they could also result in greater impacts if used on slopes of "significant channelization of stormwater runoff" and "erosion and sedimentation off site."⁴⁴⁴ In fact, applicant points out that these proposed measures would require adding additional vegetative screening beyond the 91,210 linear feet," "creating a wider landscape buffer," and "utilizing larger planting sizes," all of which will increase the project's costs by "approximately 2 to 5 million dollars."⁴⁴⁵ The Town does not address these additional costs in the context of its proposed mitigation measures, which would be above and beyond applicant's proposed Landscape Plan costs of \$2,713,000.00.⁴⁴⁶ We note that 16 NYCRR part 1100 does not anticipate compliance with a Town's local law regardless of excessive costs, or as if costs had no limit, particularly when there is no showing of a proven benefit.

⁴⁴³ Town petition at 18-19.

⁴⁴⁴ Applicant statement of justification, part 1 of 2, at 54.

⁴⁴⁵ Applicant statement of justification, part 1 of 2, at 55.

⁴⁴⁶ Applicant statement of justification, part 1 of 2, at 52.

The issue of costs aside, we are persuaded that applicant's proposed mitigation and minimization measures, none of which the Town challenges, are sufficient and address the Town's screening and visibility concerns. The Town's offer of proof from its technical consultants fails to raise any factual dispute relevant to the issues raised by the Town. For example, Mr. Cole simply references "screening" in the context of it not being sufficient for "the proposed substation and other areas" without providing any contrary facts or analysis.⁴⁴⁷ Another example is Mr. Cole's statement in response to applicant's proposed screening modules that "a review of the effectiveness of these measures will be provided under separate cover after review of the Visual Impact Analysis documents."⁴⁴⁸ Additional examples include Mr. Cole's several requests of applicant that include building the substation in a depression or constructing a berm around the building to mitigate the visual impacts, none of which raise a factual dispute.⁴⁴⁹ Moreover, Mr. Cole's suggestions also do not specify how not adding these proposed mitigation measures would necessitate denial or modification of the Permit.

The Town has not met its burden in this issues determination proceeding to specify the basis for its visual screening claims. The Town's burden in this issues determination proceeding is to specify its basis for its allegation and conclusory suggestions and statements, such as those made by Mr. Cole, do not raise an adjudicable issue.

⁴⁴⁷ See Town petition, exhibit B, at 146.

⁴⁴⁸ Town petition, exhibit B, at 178.

⁴⁴⁹ See Town petition, exhibit B, at 178-179.

Ruling: The Town has not identified a substantive and significant factual or legal issue related to applicant's compliance with the Town's local law concerning visibility and screening requirements.

h. Decommissioning removal requirements

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(21)(ii) pertaining to decommissioning and site restoration requirements within 12 months of removal. In its petition, the Town objects to applicant's request to waive the requirement that "all footings, concrete bases, underground / buried utilities and roadways must be removed, and the property restored to preconstruction condition."⁴⁵⁰ In its statement of compliance, the Town notes the requirements under the local law, ORES staff's waiver recommendations as stated in the draft siting permit, and restates applicant's non-compliance. The Town also takes issue with applicant's decommissioning estimates not including removal of the substation and utility towers.⁴⁵¹

Solar Law § 5(21) provides "Decommissioning - The following requirements shall be met for decommissioning:"

- ii. The site shall be restored to as natural a condition as possible within 12 months of removal. Any disturbed area must be reseeded, and all footings, concrete bases, underground/buried utilities and roadways must be removed and the property restored to preconstruction condition. Notwithstanding, the property owner may ask the Planning Board for

⁴⁵⁰ Town petition at 19.

⁴⁵¹ Town petition, exhibit A, at 42.

permission to retain the roadways on the site if they have a use for the roadways.⁴⁵²

Applicant requested partial relief of this local law on the grounds that certain facility components would remain after decommissioning, including "horizontal directional drilled (HDD) collection lines crossing beneath roadways, wetlands, or other sensitive features, as well as the concrete pier foundations located at the Project substation" that are buried "greater than 48 inches in depth."⁴⁵³ In its statement of justification as part of its application, applicant submits the degree of burden caused by the Town's removal of all below-ground components that are buried below 48 inches below grade in agricultural lands and 36 inches in non-agricultural lands would result in significant impacts to resources beneath these components with no notable benefit and prolong the scope and duration of decommissioning activities. Applicant also submits that the burden should not reasonably be borne by applicant because the removal requirements under the local law increases environmental impacts by resulting in "unintended environmental consequences" such as groundwater impacts, soil disturbance, and ecosystem disruption.⁴⁵⁴

The request cannot reasonably be obviated by design changes, according to applicant, because design is not related to removing buried components at such depths and it is not possible to design collection to avoid removal under the local law. Applicant also explains that the request is the minimum necessary because it goes above New York State Department of

⁴⁵² Solar Law at 13.

⁴⁵³ Applicant statement of justification, part 1 of 2, at 43.

⁴⁵⁴ Applicant statement of justification at 45-46.

Agriculture and Markets (NYSAGM) Guidelines, which require removal of underground facilities that are less than 48 inches deep, by removing "all ground components with the exception of the piers at the substation at depths greater than 48 inches" and most buried collection lines.⁴⁵⁵ Adverse impacts are also mitigated to the maximum extent practicable, according to applicant, by not removing the components and by its compliance with the decommission requirements under Part 1100.⁴⁵⁶

In response, ORES staff notes its review of applicant's statement of justification, including that waiver is warranted because "compliance would result in additional impacts and extend the duration of decommissioning activities."⁴⁵⁷ The draft siting permit recommends limited relief from this local law "to allow for the facility components on the parcels identified in Appendix 24-5, Table 8 (Record 133) located greater than four (4) feet below grade in agricultural land to remain in place after decommissioning. The Permittee shall conduct decommissioning consistent with the New York State Department of Agriculture and Markets Guidelines for Solar Energy Projects - Construction Mitigation for Agricultural Lands (Revision 10/19/2019) and shall provide and implement a Final Decommissioning and Site Restoration Plan pursuant to subparts

⁴⁵⁵ Applicant statement of justification at 44; see also New York State Department of Agriculture and Markets, Guidelines for Solar Energy Projects - Construction Mitigation for Agricultural Lands (revised Oct. 18, 2019), at 8.

⁴⁵⁶ Applicant statement of justification, part 1 of 2, at 47-48.

⁴⁵⁷ ORES staff response at 51.

4.6(a) and 6.1(b)(1)."⁴⁵⁸ ORES staff asserts that its waiver recommendation pertaining to this local law in the draft permit is "rational" and without "legal error" and that "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."⁴⁵⁹

Discussion

We conclude that the proposed issue of the waiver of the Town's site restoration for buried utilities requirement for decommissioning does not meet the standards for adjudication. ORES staff correctly determined that applicant carried its burden of establishing that the local law is unreasonably burdensome. At that point, the Town, as the potential party seeking adjudication of the waiver, was required to meet its burden of persuasion by establishing the existence of a substantive and significant factual issue through an offer proof supported by expert testimony or facts or analysis, or an error of law, which the Town did not accomplish.

The Town's offer of proof from James Girona, P.G. does not reference the local law or applicant's waiver and the offer of proof from Douglas P. Cole, P.E. provides comments that restate the local law requirement, applicant's non-compliance, and applicant's plan related to removal of "all above ground equipment and buried components down to a depth of 48 inches below grade." In addition, Mr. Cole's comments include requests that applicant "describe and quantify the anticipated impacts" and "provide a detailed listing and map showing any and all facilities that are planned to be left in the ground, deeper than the 48" removal depth required by the NYS Department of

⁴⁵⁸ Draft siting permit required findings 3(a)(8) at 7-8.

⁴⁵⁹ ORES staff response at 58-59.

Agriculture and Markets Guidelines for Solar Energy Projects, so that the potential future impacts can be assessed.”⁴⁶⁰ Mr. Cole’s statements and requests, however, do not refute the evidence in the record or constitute facts or analysis to establish the existence of a substantive and significant factual issue related to applicant’s justification for its waiver request. They also do not establish how not applying the Town’s local law would lead to denial or modification of the draft siting permit. Accordingly, the Town has failed to meet its burden of raising a substantive and significant issue that would require adjudication or support full party status.

We note that in its statement of justification as part of its application, applicant sufficiently details how it meets its decommissioning obligations under the Article VIII regulations. Applicant also confirms its preparation of a Decommissioning and Site Restoration Plan consistent with the requirements of 16 NYCRR 1100-6.6 and subpart 4.6 of the amended draft permit. Applicant explains that decommissioning will include, among other activities, removing all above-ground structures and removal of all below ground infrastructure including buried collection lines and foundations at a depth of up to 48 inches in agricultural land and 36 inches in non-agricultural land consistent with standard industry practice stated in the New York State Agriculture and Markets Guidelines.⁴⁶¹

Contrary to the Town’s claim that complete removal of footings, concrete bases, underground/buried utilities and

⁴⁶⁰ Town petition, exhibit B, at 181, 185.

⁴⁶¹ See applicant response at 48; application statement of justification, part 1 of 2, at 44.

roadways is required, applicant explains that industry standards only mandate the removal of underground facilities "if less than 48 inches deep." We note that the industry standards specifically allow components to remain buried that are greater than 48 inches in agricultural lands and 36 inches elsewhere.⁴⁶² We agree with applicant that compliance with these standards will prevent impacts to resources pertaining to underground facility components and limit the scope and duration of decommissioning activities along with additional prolonged earth disturbance, traffic, noise, additional road impacts, and other decommissioning activities.⁴⁶³

In response to the Town's concern raised in its statement of compliance that applicant's decommissioning estimates do not include removal of the substation and utility towers, we note that the Town failed to properly raise this issue in its petition for party status or otherwise support it with the required offer of proof. Accordingly, the Town did not meet the requirements of 16 NYCRR 1100-8.4(c)(2)(ii) and, therefore, is not entitled to adjudication of this issue. Instead, the additional claim of noncompliance with the Town's local law not raised in its petition constitutes comments on the application and draft siting permit.⁴⁶⁴ We nonetheless note, however, that even if this issue had been properly raised by the Town, it is insufficient to provide a basis for adjudication.

⁴⁶² Applicant statement of justification, part 1 of 2, at 44; see also New York State Department of Agriculture and Markets, Guidelines for Solar Energy Projects - Construction Mitigation for Agricultural Lands, at 8.

⁴⁶³ See applicant response at 47; applicant statement of justification, part 1 of 2, at 44.

⁴⁶⁴ See Town petition, exhibit A, at 42.

As applicant explains in exhibit 23 to the application, the POI switchyard will not be decommissioned as part of its plan because these interconnection components will be owned and operated by the utility company.⁴⁶⁵

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the limited waiver of the Town's site restoration for buried utilities requirement.

i. Decommissioning surety bond

In its petition for party status, the Town challenges applicant's justification for non-compliance with Solar Law § 5(21)(b) pertaining to the decommissioning surety bond. The Town claims that should it be required to access the surety bond to decommission the project, it lacks experience as a municipality to arrange for the removal or salvage of materials. The Town claims the surety bond should be "incentive for the Applicant or future owner/operator to perform decommissioning, not a penalty against the municipality requiring the municipality to become experts in the removal and salvage of solar equipment."⁴⁶⁶ In its statement of compliance, the Town restates the local law, ORES's waiver determination, and its claim related to its lack of experience to arrange for removal or salvage of materials.⁴⁶⁷

Solar Law § 5(21) provides "[r]emoval of obsolete/unused facilities. Required sureties for construction,

⁴⁶⁵ See Town petition, exhibit A, at 42; DMM Item No. 94, application exhibit 23 (revised): Site Restoration and Decommissioning at 1.

⁴⁶⁶ Town petition at 19.

⁴⁶⁷ Town petition, exhibit A, at 42-43.

maintenance and removal of utility-scaled solar collector systems."

b. Decommissioning Surety Bond

- Prior to the start of construction, a surety bond to cover the full cost of the removal and disposal of the utility-scale solar collector system and any associated accessory structures shall be provided by the owner/operator. The owner/operator shall provide an updated Decommissioning Cost Estimate, account for anticipated rates of inflation, prepared by a Town designated N.Y.S. Licensed Engineer every five (5) years, and the surety bond shall be adjusted, if necessary, to reflect the then current decommissioning cost. Any such surety bond must be provided pursuant to a Decommissioning Agreement with the Town, approved by the Town Board and Town Attorney as to form, sufficiency and manner of execution. All surety bonds must not lapse before decommissioning is complete and must be provided by an A rated, or better, institution.⁴⁶⁸

Applicant requested relief from this local law on the grounds that the local law requirements "place an undue economic burden on the facility."⁴⁶⁹ Applicant submits the degree of burden caused by the Town's the local law is that not accounting for salvage value of materials creates "an unnecessary and unjustified financial hardship" for renewable energy developers. Applicant explains that the local law does not state that "salvage value may not be taken into consideration in determining the estimated cost of decommissioning," a procedure that is consistent with ORES procedures. Applicant also explains that the burden should not be borne by applicant because by not considering salvage value, the facility will

⁴⁶⁸ Solar Law at 13-14.

⁴⁶⁹ Applicant statement of justification at 48.

experience additional financial burdens because it will require more financial security than ORES staff requires under the Article VIII regulations.⁴⁷⁰

The request cannot reasonably be obviated by design changes, according to applicant, because the facility's design is not "dependent on decommissioning costs." Applicant also explains that the request is the minimum necessary because it will adhere to the decommissioning requirements under the Article VIII regulations, which include "a 15 percent contingency, that will be periodically reviewed to adjust for any estimated decommissioning cost increases and/or salvage value decreases." Adverse impacts are also mitigated to the maximum extent practicable, according to applicant, because it will be required "to provide decommissioning financial security to protect the Town in the event that the Facility owner does not conduct decommissioning and site restoration on its own." Should that scenario occur, applicant explains that it would "forfeit its facility equipment," so the Town could use this value "to offset decommissioning costs." Applicant also explains that the Town is further protected by 16 NYCRR 1100-10.2(b)(2) because the security is reviewed by ORES staff after one year of facility operation and updated every fifth year thereafter.⁴⁷¹

In response, ORES staff notes its review of applicant's statement of justification, including that compliance with the local law "would impose additional financial burdens by requiring greater financial security than required

⁴⁷⁰ See applicant statement of justification at 49.

⁴⁷¹ See applicant statement of justification, part 1 of 2, at 50; 16 NYCRR 1100-10.2(b)(2).

pursuant to ORES regulations.”⁴⁷² The draft permit recommends relief “to the extent it prohibits salvage value from being taken into account in the decommissioning security amount. The Permittee shall provide financial security pursuant to subparts 4.6(b) and 6.1(b) of this Permit.”⁴⁷³ ORES staff asserts that its waiver recommendation is “rational” and without “legal error” and that “[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c).”⁴⁷⁴

Discussion

We conclude that the proposed issue of the waiver of the Town’s decommissioning surety bond and salvage value requirement does not meet the standards for adjudication. ORES staff correctly determined based on the record that applicant carried its burden of establishing that the local law is unreasonably burdensome and places an undue economic burden on the facility.⁴⁷⁵ At that point, the Town, as the potential party seeking adjudication of the waiver, was required to meet its burden of persuasion by establishing the existence of a substantive and significant factual issue through an offer proof supported by expert testimony or facts or analysis, or an error of law, which the Town did not establish.

The Town did not provide an offer of proof that refutes the evidence in the record or constitutes facts or analysis to establish the existence of a substantive and significant factual issue related to the Town’s local law. The

⁴⁷² ORES staff response at 51-52.

⁴⁷³ Draft siting permit required findings 3(a)(9) at 8.

⁴⁷⁴ ORES response at 58-59.

⁴⁷⁵ ORES staff response at 58.

Town's offer of proof from James Girona, P.G. does not reference the Town's local law or the Town's claims and Mr. Cole briefly mentions that "a salvage value will be included in the calculations" and that a "waiver" was requested.⁴⁷⁶ These conclusory statements, however, are insufficient to raise and adjudicable issue. Accordingly, the Town has failed to meet its burden of raising a substantive and significant issue that would require adjudication or support full party status.

The Town's claim that it should not need to access financial security that accounts for salvage value because it lacks experience to decommission the facility or arrange for the sale of components is without merit.⁴⁷⁷ We note that the draft permit requires applicant to submit a final decommissioning and site restoration plan for ORES staff's approval, implement that plan, and provide the Town with financial security for decommissioning should applicant fail to decommission the facility.⁴⁷⁸ Applicant confirms that it will coordinate with the Town to provide financial assurance in the form of a surety bond specifically to cover the cost of removal and disposal prior to construction. Applicant explains that the financial assurance is subject to the approval of ORES staff and will cover "the net estimate of decommissioning and restoration activities, plus a fifteen percent contingency cost and will be based on a Professional Engineer's certified estimate of decommissioning cost." According to applicant, the Town would use these funds

⁴⁷⁶ Town petition, exhibit B, at 186.

⁴⁷⁷ See application exhibit 23 at 5; Town petition at 19.

⁴⁷⁸ Draft siting permit required findings at 3(a)(8) at 8, 4.6(b) at 45, pre-construction compliance requirements 6.1(b)(1) and (2) at 47-48; applicant statement of justification, part 1 of 2, at 50.

to retain a qualified contractor with the necessary expertise "to perform decommissioning work."⁴⁷⁹ Applicant explains that in doing so, the Town "will use the financial security that already reflects conservative assumptions regarding decommissioning costs and salvage value."⁴⁸⁰ Applicant explains that the salvage value offset ensures that the decommissioning security will not be artificially inflated, resulting in additional project costs with "no actual provided benefit to the host community."⁴⁸¹

We also note that applicant's Decommissioning and Restoration Plan includes "a protocol for removal of panel arrays in the event of abandonment and a net decommissioning/site restoration based on the estimated costs associated with removal and restoration of facilities within the Town."⁴⁸² Applicant explains that "[i]n the very unlikely event" that it does not complete decommissioning, it would "forfeit its facility equipment and the Town could use this value to offset decommissioning costs."⁴⁸³

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the waiver of the Town's decommissioning surety bond requirement.

j. Land Use Management Law: no visible equipment

In its petition for party status, the Town challenges ORES staff's recommendation to grant a limited waiver from the

⁴⁷⁹ See applicant response at 48; Town petition at 19.

⁴⁸⁰ Applicant statement of justification, part 1 of 2, at 49.

⁴⁸¹ See applicant statement of justification, part 1 of 2, at 48-49; application exhibit 23 at 5.

⁴⁸² Application exhibit 23 at 5-6, 8.

⁴⁸³ Applicant statement of justification, part 1 of 2, at 50.

Town's Land Use Management Law § 7.16(3) pertaining to visual mitigation measures for the proposed facility substation, POI switchyard, and transmission structures.⁴⁸⁴ In its petition for party status, the Town claims that applicant has not established that the mitigation measures stated in Solar Law § 5(7) such as constructing "the substation in a depression, installing berms around the facility and planting more trees around it" are "unreasonably burdensome."⁴⁸⁵ In its statement of compliance, the Town restates the local law and ORES's waiver recommendation. In addition, the Town claims that "the new substation, POI switchyard, and Transmission Structure" are subject to the local law because they meet the definition of "public utility substation" under § 2.02 of the local law. The Town asserts that the substation does not comply with the local law because it is "comprised of structures measuring 135-foot, 70-foot and 60-foot in height."⁴⁸⁶

Land Use Management Law, "Article VII - Supplementary Regulations," "Section 7.16 Public Utility Facility Personal Wireless Service Facility," provides:

Public utility substations and similar structures, shall comply with the following:

1. Facility shall be surrounded by a fence set back from property lines in conformance with district regulations for front, side and rear yards.
2. Landscaped area at least 20 feet wide shall be maintained in front, side and rear yards.
3. There shall be no equipment visible from surrounding property.

⁴⁸⁴ Town petition at 20.

⁴⁸⁵ Town petition at 19.

⁴⁸⁶ Town petition at 20, 43-44.

4. Public Utility Services' line poles and attendant lines will be allowed, as necessary, in all districts.⁴⁸⁷

Applicant claims the Town has "failed to meet their burden of proof and demonstrate that a substantive and significant issue exists" and "ORES properly acted within its discretion based on the substantial record, no error of law or fact has occurred, and no adjudicatory hearing is required." Applicant submits the degree of burden caused by the Town's local law is that the facility will include "a new substation, POI switchyard, and Transmission Structure (defined as transmission poles and wires) Poles," some of which must be "of sufficient height" to "safely and reliably" connect the substation to the POI switchyard and then to "the existing Marcy-New Scotland 345 kV Transmission Line."⁴⁸⁸ Applicant explains, for example, that the proposed "Transmission Structures (135 to 200 feet in height)," which are among the tallest components, must be able to complete these connections "to integrate the Project to the existing high voltage transmission system," as detailed in revised exhibit 8 to the application.⁴⁸⁹ Applicant also explains that the burden should not be borne by applicant because "[i]t is impossible to integrate the Project to the existing high voltage transmission system without these lines."⁴⁹⁰

⁴⁸⁷ Land Use Management Law at 49-50.

⁴⁸⁸ Applicant statement of justification, part 1 of 2, at 57-58; applicant response at 49.

⁴⁸⁹ See application statement of justification at 57-58, citing application exhibit 8 at 15-16.

⁴⁹⁰ Applicant statement of justification, part 1 of 2, at 58.

The request cannot reasonably be obviated by design changes, according to applicant, because "[t]he substation, POI switchyard, and Transmission Structures were sited adjacent to existing transmission right-of-way for immediate interconnection to the electrical grid." Applicant explains that compliance with the local law requirement regarding equipment not being visible from surrounding property would require "underground or very close to the ground" installation of the gen-tie line "between the POI switchyard and Project substation" and the new, proposed interconnection transmission lines "between the existing overhead Marcy-New Scotland 345 kV Transmission Line and the new POI switchyard." This plan for installing equipment would not be feasible, applicant explains, because the new, proposed interconnection transmission lines "cannot be installed underground" considering that the existing Marcy-New Scotland 345 kV Transmission Line is "above ground and overhead." Applicant notes that undergrounding the high voltage gen-tie as opposed to overhead installation would result in increased wetland impacts and excessive costs related to "[m]ore excavating, specialized cables, concrete jackets," and other factors. Applicant also notes that installation "just above the ground," would also present safety risks due to the potential of electrical shock to anyone who accesses the lines.⁴⁹¹

Applicant also explains that the request is the minimum necessary because the substation, POI switchyard, and transmission structures were sited "adjacent to the existing transmission right-of-way for immediate interconnection to the electrical grid," which reduces potential visual impacts. Applicant also notes that adverse impacts are mitigated to the

⁴⁹¹ Applicant statement of justification, part 1 of 2, at 59.

maximum extent practicable because the siting of these structures adjacent to the existing Marcy-New Scotland 345 kV Transmission Line reduces "the number of necessary transmission structures for interconnection purposes." Applicant also points out that its landscaping plan reduces visual impacts, and the location of the POI switchyard and substation minimize impacts "to wetlands and visual and noise impacts to neighboring residents."⁴⁹²

In response, ORES staff notes its review of applicant's statement of justification, including that "given the height of some structures at the POI substation and switchyard, would be impossible to comply with."⁴⁹³ The draft permit recommends limited relief from Land Use Management Law § 7.16(3) "as applied to the tallest structures associated with the new substation, POI switchyard, and Transmission Structure as described in Appendix 24-5."⁴⁹⁴ ORES staff claims its waiver recommendation pertaining to this local law in the draft permit is "rational" and without "legal error." ORES staff relies on applicant's statement of justification to also claim that "[t]he facts and analysis in the statements of justification contained in the Record meet the requirements of 16 NYCRR § 1000-2.25(c)."⁴⁹⁵

Discussion

We hold that the issue of compliance with the no visible equipment under the Town's Land Use Management Law does

⁴⁹² Applicant statement of justification, part 1 of 2, at 60.

⁴⁹³ ORES staff response at 52.

⁴⁹⁴ Draft siting permit required findings 3(a)(10) at 8.

⁴⁹⁵ See ORES staff response at 58-59.

not meet the standards for adjudication. ORES staff correctly determined that applicant carried its burden of establishing that the local law is unreasonably burdensome.⁴⁹⁶ At that point, the Town, as the potential party seeking adjudication of the waiver, was required to meet its burden of persuasion by identifying a substantive and significant issue through an adequate of proof supported by expert testimony or facts or analysis, or an error of law. The Town's offer of proof did not meet this standard. The Town's technical consultant, James Girona P.G. does not reference the local law or the Town's claims, and the comments made by technical consultant Douglas P. Cole, P.E. restate the local law requirement, applicant's non-compliance, and applicant's waiver request. These comments do not refute the evidence in the record or constitute facts or analysis to establish the existence of a substantive and significant factual issue related to the Town's local law.⁴⁹⁷ They also do not establish how not applying the Town's local law would lead to denial or modification of the draft siting permit. Accordingly, the Town has failed to meet its burden of raising a substantive and significant issue that would require adjudication or support full party status.

We are persuaded that applicant's landscape plan and visual impact assessment that analyzed the visibility of the substation, POI switchyard, and associated transmission structures and included several photographic simulations shows visual impacts are sufficiently minimized.⁴⁹⁸ For example,

⁴⁹⁶ ORES staff response at 58.

⁴⁹⁷ See Town petition, exhibit B, at 181.

⁴⁹⁸ See application exhibit 8 at 1, 15-16 (10.1.2, 10.2.1.8, 10.2.1.9); see also 16 NYCRR 1100-2.9(b) (1).

applicant's viewshed visibility analysis shows the portion of the POI switchyard in viewpoint "69" with "several tall existing h-frames that attribute to the existing Marcy-New Scotland 345 kV transmission line" is "softened by proposed vegetation." To this end, applicant's five-year landscaping plan proposes type "A" screening "along the nearest eastern residential properties" and the siting of landscaping near the property line to reduce views to the "substation" and enhance the visual scale of "the plantings against the switchyard." Applicant explains that while part of the POI switchyard from this viewpoint will remain viewable for travelers along Ingersoll Road, this section of the road is "small" and already contains "similar utility characteristics consisting of an existing transmission line."

Another example is viewpoint 70, where one resident is 338 feet from the proposed POI switchyard, and the adjacent residents, applicant's proposed landscaping screening will diminish the visual contrast over time, as plantings grow. In a different example pertaining to viewpoint 68, the foreground solar panels partially intersect the transmission structure that stands above the trees and obstructs the visual sightline of the substation.⁴⁹⁹ The visual impact assessment confirms partial or full screening by "forested vegetation" of many of the POI components, the majority of which "are less than 36 feet in height." The assessment concludes that only the "top sections of substation lightning masts, takeoff structures, and the proposed transmission structures" that are 70 to 200 feet in height will be viewable from other roads within Distance Zone 1. The assessment also concludes that "the resulting visual

⁴⁹⁹ Application exhibit 8 at 16-17, 86.

contrast would be minor in context to the prominence of the existing Marcy-New Scotland 345 kV transmission line.”⁵⁰⁰

The Town has also not identified any site-specific visual impacts that have not been addressed nor established how applicant’s proposed landscape and viewshed mitigation measures are insufficient to avoid, minimize, and mitigate potential significant adverse impacts to the maximum extent practicable. Contrary to the Town’s claim that that applicant has not established that additional mitigation measures of constructing “the substation in a depression, installing berms around the facility and planting more trees around it” are “unreasonably burdensome,” applicant correctly states that “it is the Town’s burden not the Applicant’s to demonstrate at this stage that a substantive and significant issue exists.”⁵⁰¹ Moreover, Mr. Cole’s comments do not provide any support for the Town’s claims that significant visual impacts have not been mitigated or that any additional mitigation measures are needed, a point also made by applicant.⁵⁰²

To the extent that the Town’s objection to ORES’s staff’s waiver recommendation also includes that the facility must be “surrounded by a fence set back from property lines in conformance with district regulations for front, side and rear yards” and “landscaped” with an area “at least 20 feet wide . . . in front, side and rear yards,” we conclude that these issues are not significant or substantive. While portions of some of these components will be visible from surrounding properties due to their height, applicant confirms its compliance with these

⁵⁰⁰ Application exhibit 8 at 17-18, 25.

⁵⁰¹ Town petition at 19; applicant response at 50.

⁵⁰² Applicant response at 50.

requirements to the maximum extent practicable as the substation and POI switchyard "will be surrounded by a fence set back from property lines in conformance with zoning district regulations" and "landscaped with an area at least 20 feet in the front, side, and rear yards."⁵⁰³

Ruling: The Town has not identified a substantive and significant factual or legal issue regarding the recommended limited waiver of the Town's Land Use Management Local pertaining to no visible equipment.

k. Other local law provisions

In its statement of compliance, the Town alleges that the facility should have sought a waiver, and does not comply, with three additional local laws not raised in their petition, specifically: (1) Solar Law § 5(3) (tree removal); (2) Solar Law § 5(6)(g) (erosion and sediment control plans); and (3) Solar Law § 5(17) (erosion).⁵⁰⁴ The Town claims that the facility does not comply with Solar Law § 5(3) because "[t]he Project proposes to clear 100.31 acres of trees, 83.19-acres of which will be permanently removed and includes 3.454-acres of core forest." The Town also claims that "the draft SWPPP is deficient" and applicant "has not prepared a final SWPPP for the Project that is in compliance with NYSDEC guidelines, in compliance with Solar Law §5(6)(g) and §5(17)."⁵⁰⁵

Solar Law § 5(3) provides:

Tree removal shall be minimized and replanting, to the extent practicable, at the discretion of the Planning Board, should be considered on parcels where a large number of mature trees (over six inches diameter at

⁵⁰³ Application statement of justification, part 1 of 2, at 58.

⁵⁰⁴ Town petition, exhibit A, at 44.

⁵⁰⁵ Town petition, exhibit A, at 44-45.

breast height) are being removed in order to install solar arrays.⁵⁰⁶

Sola Law § 5(6)(g) also provides:

Erosion and Sediment Control Plans - Prepared to the New York State Department of Environmental Conservation standards for construction and operation of facilities which may result in the discharge of stormwater - all large scale (utility) solar energy systems must submit a full Stormwater Pollution Prevention Plan.

In addition, Solar Law § 5(17) provides:

Erosion - Solar field developer(s), owner(s) and/or leaser of utility scale solar projects are responsible for erosion caused by the placement of the solar arrays, all other equipment and the associated drainage system. Solar field developer(s)/owner(s) and/or leaser are responsible for mitigation and repair associated with said erosion on the leased property/parcels and any surrounding properties/parcels caused by the solar project. All applicants shall prepare and submit for review to the Planning Board a stormwater pollution prevention plan that meets the requirements of the NYSDEC as set forth in the SPDES general stormwater permit then in effect for discharges associated with construction.⁵⁰⁷

Applicant addresses the Town's tree and vegetation clearing claims by noting that "[t]he Facility has been designed to comply with these requirements to the maximum extent practicable. Tree and vegetation removal will be limited to the minimum necessary for Facility construction and operation." Applicant also notes its plan to "implement a landscape screening planting plan which will include the planting of new trees and shrubs" as part of its landscaping plan included in

⁵⁰⁶ Solar Law at 9.

⁵⁰⁷ Solar Law at 14, 18.

revised exhibit 5 of the application.⁵⁰⁸ Applicant also addresses in its statement of justification that the requirements under Solar Law § 5(6)(g) and (17) that applicant submit a SWPPP for review to the planning board “are expressly preempted” by PSL Article VIII. In addition, applicant addresses the issue of erosion in its statement of justification by noting that the SWPPP is “developed in accordance with the applicable New York State Pollution Discharge Elimination Systems (SPDES) General Permit for Stormwater Discharges from Construction Activity and the New York State Standards and Specifications for Erosion and Sediment Control” and is contained in revised exhibit 13 of the application.⁵⁰⁹

ORES staff concludes that based on the draft permit, which requires that “[t]ree and vegetation clearing shall be limited to the minimum necessary for facility construction and operation, and as detailed on final construction plans,”⁵¹⁰ waiver from the Town’s tree and vegetation clearing local law provision “is not necessary.” ORES staff also concludes that waivers from the Town’s erosion and sediment control provisions are not necessary. ORES staff makes the same point as applicant that the requirement under Solar Law § 5(6)(g) to submit a SWPPP for review to the planning board is a “procedural requirement” that is “preempted pursuant to PSL § 144(2).” ORES staff also contends that the Town’s “additional claims regarding stormwater

⁵⁰⁸ See applicant statement of justification at 16.

⁵⁰⁹ See applicant response at 60-62; applicant statement of justification at 23.

⁵¹⁰ See draft siting permit uniform standards and conditions, facility construction and maintenance, 4.4(m)(7) at 22.

and hydrogeological issues” are addressed in a different section of its responsive brief.⁵¹¹

Discussion

We hold that the issues raised in the Town’s statement not raised in its petition regarding compliance with Solar Law § 5(3), (6)(g), and (17) do not present any substantive and significant issue. Under 16 NYCRR 1100-8.4(d), a municipality seeking to adjudicate any issues associated with a facility’s compliance with local laws and regulations is required to formally propose those issues in its petition for party status. The Town did not raise noncompliance with these additional local laws in its petition for party status, or otherwise support them with an offer of proof detailing the witnesses, the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to each issue identified, as required under 16 NYCRR 1100-8.4(c)(2)(ii).⁵¹²

We conclude that consistent with ORES case precedent in Matter of Prattsburgh Wind, LLC, and Matter of Rock District Solar, LLC, where the Administrative Law Judges held that the subject towns did not meet the requirements of 16 NYCRR 1100-8.4(c)(2)(ii) and, therefore, were not entitled to adjudication of certain issues because they failed to properly raise those issues in their petitions for party status, or otherwise support them with the required offer of proof.⁵¹³ Similarly here, the

⁵¹¹ See ORES staff response at 46-47.

⁵¹² See ORES staff response at 19-20; applicant response at 48.

⁵¹³ DMM Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, at 97; DMM Matter No. 23-02971, Matter of Rock District Solar, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, at 90-91.

Town's statement of local law compliance does not satisfy the requirements of section 1100-8.4(c)(2)(ii). Accordingly, consistent with ORES regulations and precedent, the Town is not formally seeking adjudication of these issues. Instead, the additional claims of noncompliance with the Town's local laws not raised in its petition constitute comments on the application and draft siting permit that do not provide a basis for adjudication.

To the extent the Town raises an issue in their statement of local law compliance with respect to the facility not preparing a final SWPPP in compliance with Solar Law § 5(6)(g) and (17), which require, in relevant part, that applicant "submit" a SWPPP that it prepared for review to the planning board, we agree with ORES staff and applicant that this mandate is a "procedural requirement" that is "preempted pursuant to PSL § 144(2)."⁵¹⁴ As we recently explained in Matter of Hoffman Falls Wind, LLC, in response to the Towns' challenges in that case to ORES staff's determinations to hold various town laws preempted by PSL § 144(2), PSL § 144(2), "provides that 'no other state agency, department or authority, or any municipality or political subdivision or any agency thereof may. . . . require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility or major transmission facility.'"⁵¹⁵

⁵¹⁴ Applicant statement of justification, part 1 of 2, at 23; ORES staff response at 47.

⁵¹⁵ See DMM Matter No. 23-02976, Matter of Hoffman Falls Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status, at 19-20.

In sum, the issues raised in the Town's statement of compliance not raised in the petition itself pertaining to Local Law Number 5 of 2022, Solar Law, §§ 5(3) and 5(6)(g) and 5(6)(17) do not present any substantive and significant issue. These proposed issues are accepted as comments on the application and draft siting permit, and to the extent not responded to by ORES staff in its response to the petition or addressed in this ruling, will be addressed in the summary and assessment of public comments issued in this proceeding.

K. Compliance with Local Laws and Regulations - Montgomery County

1. Montgomery County Cumulative Impacts Law
a. Applicability

A threshold issue proposed for adjudication by the County, and joined by GFL,⁵¹⁶ is the applicability to the facility of Local Law No. 5 of 2024, entitled A Local Law Requiring Avoidance or Adequate Mitigation of Cumulative Impacts of Industrial Solar Arrays (Cumulative Impacts Law or CIL).⁵¹⁷

The CIL defines "industrial solar array" as any solar energy facility with a nameplate capacity greater than 20 MW,⁵¹⁸ and requires developers to avoid, minimize, or mitigate to the

⁵¹⁶ See GFL petition at 43-44.

⁵¹⁷ See DMM Item No. 162, County petition, exhibit 2, Cumulative Impacts Law (CIL). The draft siting permit refers to "Montgomery County Local Law 3 of 2024." Draft siting permit required findings 3(b)(2) at 9. The version of the CIL submitted by the County and stamped "filed" by the Department of State (DOS), however, references Local Law No. 5 of 2024. The draft siting permit should be modified to conform to the numbering on file with DOS.

⁵¹⁸ CIL § 1.

maximum extent practicable the cumulative adverse impacts to health and human safety, tourism, agriculture, economic development, minority groups, cultural resources, and the environment. The cumulative impact of "all existing and proposed industrial solar arrays" must be considered;⁵¹⁹ each individual project's "contribution to the cumulative adverse impacts of all existing and proposed industrial solar arrays . . . shall be avoided, minimized or mitigated to the maximum extent practicable";⁵²⁰ where there are two or more phases for a facility, the developer must provide the County "and any other relevant permitting agency with analysis of the cumulative adverse impact";⁵²¹ where there are two or more segmented phases of an industrial solar arrays, cumulative adverse impacts "as a whole shall be avoided, minimized or mitigated."⁵²² Underlying the County's argument regarding cumulative impacts is a proposed facility known as Mill Point Solar II. Mill Point Solar II has a developer's website with a projected operation date, but no application pending.

The County alleges the CIL was adopted by the Montgomery County Legislature on October 22, 2024, and became effective upon filing with the Secretary of State by the Clerk

⁵¹⁹ CIL § 4(1).

⁵²⁰ CIL § 4(2).

⁵²¹ CIL § 4(3).

⁵²² CIL § 4(4). Both subsections 4(1) and 4(4) contain an apparent omission. Both contain the phrase "within of industrial solar arrays within Montgomery County." While it appears that the drafters may have intended there to a proximity limitation "within [some distance] of solar panels" to the standards to be applied, as none appears where it would be expected, we regard the CIL as applying to impacts throughout the county.

of the Legislature on November 7, 2024.⁵²³ It demonstrates this by attaching to its petition a copy of the local law stamped “filed” by the Department of State on that date. The County alleges that the law was duly passed and in effect on or before the date of the notice of complete application, the “cut-off” date for local law applicability.

The County argues that applicability of the CIL is both substantive and significant within the meaning of Article VIII and thus proper for adjudication. It argues that the law is substantive by nature, being a list of standards, and that “identifying and minimizing impacts” is substantive pursuant to case law. Assuming the CIL is applicable to this facility application, its substantive provisions raise several other issues for adjudication, as discussed further below.

The County further argues that the issue is significant within the meaning of 16 NYCRR 1100-8.3(c)(3) in that the failure to follow the directive provisions of the CIL “has the potential to result in the denial” of the permit. ORES, as noted, cannot issue a permit unless it finds that applicant has followed all the substantive provisions of local laws or justified their waiver.⁵²⁴

Applicant and ORES staff argue the law is inapplicable for several reasons.

i. Effective Date

Applicant’s response argues that the CIL was not in effect on the date the application was submitted. The application itself is inconclusive regarding effective date of the CIL, acknowledging the passage of the resolution while noting it “has been unable to verify if this law was properly

⁵²³ See County petition at 16.

⁵²⁴ See PSL § 142(5).

and formally adopted by the County Executive.”⁵²⁵

The draft siting permit states only that this local law “was not in effect as of the date that the application was deemed complete (February 5, 2025) and is otherwise preempted.” Although as of October 31, 2024, ORES was in possession of a copy of the resolution indicating it had passed, it was not stamped by the Secretary of State, and staff could not find the law on the Department of State website.⁵²⁶ ORES staff argues that the first time a copy of the law “stamped as filed” was placed in the record was when it was appended to the County’s petition. Staff acknowledges that a copy of the law, not stamped as filed with the Department of State, was posted by GLF as part of a public comment on October 31, 2024, but that on the date of completeness, the law could not be found on the Department of State Local Law Search website, and thus it was rational for staff to conclude it was not in effect.⁵²⁷

Discussion

With respect to the findings of the draft siting permit and the argument of applicant that the CIL was “not in effect” on the relevant date, Municipal Home Rule Law (MHRL) § 27 provides, in relevant part, that

1. Within twenty days after a local law shall finally have been adopted, the clerk . . . shall file one certified copy in the office of the secretary of state.

⁵²⁵ DMM Item No. 133, application appendix 24-5 (revised) part 1 of 2: Statement of Justification for Local Law Waiver Requests (applicant statement of justification) at 64.

⁵²⁶ Draft siting permit footnote 4 indicates that the CIL “was not available with the Department of State at: <https://locallaws.dos.ny.gov/> as of the date that the application was deemed complete.”

⁵²⁷ ORES staff response at 32.

. . . .

3. Notwithstanding the effective date of any local law, a local law shall not become effective before it is filed in the office of the secretary of state.

The argument that the law was not in effect because it was not available by searching the Secretary of State's website is unpersuasive. A law's presence on that website is irrelevant. The Secretary of State is only required to publish local laws "annually," allowing for a delay in publication. Regardless, publication does not trigger effectiveness; unless a local law, by its own terms, becomes effective on a date occurring after filing, the filing date is the effective date.⁵²⁸

ii. Post Application Enactment

In its response to petitions, applicant raises for the first time the argument that the CIL should not apply to the facility because its effective date is after the filing of the application. It claims that Article VIII "establishes a comprehensive framework" requiring *pre*-application consultation with communities, but not *post*-application consultation, thereby "clearly" demonstrating the legislative intent to cut off local law applicability as of the date of application, and makes

⁵²⁸ MHRL § 27(3); Chet's Garage, Inc. v Village of Goshen, 161 AD3d 727, 732 (2d Dept 2018); Kester v Nolan, 48 AD3d 1113 (4th Dept 2008); Preble Aggregate Inc. v Town of Preble, 247 AD2d 697 (3d Dept 1998), citing Sterling Concerned Citizens v Pell, 204 AD2d 730 (2d Dept 1994) (effective date of local law is date of filing with the Secretary of State, notwithstanding a nearly five year delay since passage).

policy arguments, without reference to any case law, in support of their proposition.

Because this issue was raised for the first time in applicant's response, on July 17, 2025, the ALJs directed the parties to submit briefing on the issue by July 24, 2025. ORES staff submitted a brief, relying, as did applicant, on the statute's requirement of *pre-*, but not *post-*, application consultation, and citing Article 10 decisional law from the Siting Board in further support.

The County, Town, and GFL submitted a joint response. They cite the combined notice in this matter, which states that:

Any municipality, political subdivision or an agency thereof . . . must file a statement indicating whether the proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations in effect as of January 27, 2025, if any, concerning the environment, or public health and safety.⁵²⁹

They argue that the combined notice constitutes the law of the case and to now refuse to consider an otherwise-applicable local law filed after the date of application filing would be arbitrary and capricious. They argue that to accept applicant and staff's position would represent "a drastic departure from rulings, precedent, and past practice," lacking a "sound basis," and contrary to prior ORES and Siting Board decisions as well as applicable Appellate Division holdings. They further rely on five previous applications in which the cut-off date for consideration of local laws was the date of the notice of complete application (NOCA).

Discussion

⁵²⁹ Combined notice at 3-4.

Applicant's and staff's arguments are unpersuasive. In the first instance, as correctly argued by the petitioners, the combined notice, without referring to the NOCA, utilizes the issuance date of the NOCA as the cut-off date for applicability of local laws. Although this deadline is set in the context of the municipalities' statements of compliance, a separate filing due simultaneously with their petitions for party status, in practice they are frequently submitted as one combined document, and there is no other date provided as a cut-off.

With respect to the text of the statute, we agree that Article VIII is indeed a "comprehensive framework" - one which is silent on this issue. We are supplied with no compelling argument, precedent, or documents evincing legislative intent on which we could rely to supply this "missing" provision of the statute. The case law supplied by ORES staff actually militates the opposite result of what they seek - the Siting Board held that laws passed after the close of the administrative record should not be considered. In the matter under review, the record is still very much open.

Given that the date in the combined notice acted as a deadline for the applicability of local laws, controlling the submissions of the County and Town, it is, in effect, "the law of the case," and to change course now, without strong rationale or controlling legal precedent, would be arbitrary. While an agency is free to depart from established procedure, it must do so consistent with the law, adopt new policies "in a coherent and consistent manner with appropriate regard for those previously taken,"⁵³⁰ and cannot "simply overlook[] or ignore[]

⁵³⁰ Matter of Liquidation of Union Indem. Ins. Co. of New York, 92 NY2d 107 (1998).

its prior decision[s]".⁵³¹ The interpretation and administration of agency mechanisms must be done in "a consistent and predictable manner which will provide guidance to litigants and promote stability in the law."⁵³²

The petitioners are also correct that in at least the five prior ORES matters to which they refer, the NOCA date was the cut-off date for local law consideration. To hold otherwise now, particularly in this matter, where the combined notice utilizes the NOCA date as the cut-off date, would run afoul of the rule that "that in administrative, as in judicial, proceedings justice demands that cases with like antecedents should breed like consequences."⁵³³ We hold that the CIL is applicable to the facility, as it was in effect prior to the notice of complete application.

iii. County's Municipal Home Rule Power

Applicant and ORES staff argue that the CIL is a zoning law, and counties lack authority to promulgate zoning laws.

Discussion

Applicant is correct that political subdivisions of the State have no inherent power absent conferral by the Constitution or the Legislature. The State Legislature has authorized zoning power for cities (General City Law § 20[24],

⁵³¹ Richardson v Commissioner of New York City Dept. of Social Services, 88 NY2d 35 (1996).

⁵³² Hartnett v New York City Transit Authority, 86 NY2d 438 (1995).

⁵³³ Leggio v Devine, 34 NY3d 448 (2020), quoting Matter of Charles A. Field Delivery Serv., 66 NY2d 516 (1985) and Matter of Howard Johnson Co. v State Tax Commn., 65 NY2d 726 (1985).

[25]), towns (Town Law § 261; MHRL § 10) and villages (Village Law § 7-700). No enabling legislation had been adopted that delegates zoning power to counties.⁵³⁴

However, in addition to statutory authorizations not relevant here (planning boards, comprehensive plans, land use designations),⁵³⁵ MHRL § 10 provides, in relevant part:

1. In addition to powers granted in the constitution, the statute of local governments or in any other law,

. . .

(ii) every local government . . . shall have power to adopt and amend local laws . . . relating to the following subjects:

a. A county, city, town or village:

(11) The protection and enhancement of its physical and visual environment.

(12) The . . . protection, order, conduct, safety, health and well-being of persons or property therein.

b. A county:

(8) The control of floods or the conservation of soil.

While the CIL embodies use restrictions on private property, its provisions are not the type of "Euclidian zoning"⁵³⁶ devolved only to cities, towns, and villages. It is not the designation of specific areas, bounded by spatial definitions, within which certain uses are generally proscribed

⁵³⁴ 12 NY Jur 2d, Buildings, Zoning, and Land Controls § 142.

⁵³⁵ See County Law § 220, and Articles 5-A and 5-B generally; General Municipal Law (GML) Article 12-B, § 239-c(3)(a), (b), § 239-e, § 239-m(5).

⁵³⁶ The term derives from Village of Euclid, Ohio v Ambler Realty Co., 272 US 365 (1926); for usage, see e.g. Asian Americans for Equality v Koch, 72 NY2d 121 (1988); Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro.

for all properties within the polygon boundaries. Rather, this is a law of county-wide application related to the protection and enhancement of Montgomery County's physical and visual environment, the safety, health and well-being of people within the County, and the conservation of soil. The County seeks to serve those legitimate ends by imposing substantive requirements applicable to any permit sought in any town or village within the County. Thus, while applicant is correct that counties lack zoning authority, counties nonetheless enjoy powers over certain affairs within their territory as provided for in the MHRL, and the CIL falls squarely into that power.

iv. PSL § 144(2) Preemption⁵³⁷

Applicant argues the CIL is procedural and thus preempted by Article VIII. ORES staff also argues that the law is "preempted" by Article VIII and further that it "would impose . . . conditions" which are also "preempted" by Article VIII.

Public Service Law § 144(2) provides that no municipality may require "any approval, consent, permit, . . . or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy

⁵³⁷ We note that in Matter of Town of Copake v New York State Office of Renewable Energy Siting, 216 AD3d 93 (3d Dept 2023), appeal dismissed 41 NY3d 990 (2024), wherein the Third Department sustained ORES regulations, the Court appears to use the word "preemption" interchangeably to refer to local permitting laws procedures preempted by PSL § 144(2) and the waiver of local laws as unduly burdensome pursuant to PSL § 142(5), Copake at 104-108, a conflation that is continued in the petitions. As has been agency practice and to avoid confusion we continue to adhere to the distinction and refer to "preemption" only in the context of local permitting procedures (PSL § 144[2]) and refer to the substantive provisions of local laws as being "waived" pursuant to PSL § 142(5).

facility [for which] an application for a siting permit has been filed." Article VIII designates ORES as the sole permitting authority for facilities such as Mill Point Solar I.

Discussion

As correctly argued by County, the CIL is not a permitting statute; rather, without designating the county itself as the permitting authority, it creates county-wide standards and requirements which any locality reviewing a permitting application would have to apply. It follows that it is not, in fact, a permitting statute of the class contemplated by § 144(2). As such, it is not preempted.

Absent Article VIII, the CIL - a general statute applicable to the facility by its own terms made within the municipal home rule power of the county⁵³⁸ - would apply to "any solar energy facility with a nameplate capacity greater than 20 megawatts"⁵³⁹ and a permit applicant would be bound by it when seeking a permit from a town or village within the county. Thus, the substantive provisions of the CIL apply to the facility and the facility must be designed, constructed, operated, and decommissioned in accordance with those provisions, unless they are found unreasonably burdensome.

The County conflates the regulatory definition of "substantive" under 16 NYCRR 1100-8.3(c)(2) with "substantive" as refers to the non-procedural contents of local laws. An issue is "substantive" within the meaning of section 1100-8.3(c)(2) 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

⁵³⁸ See subsection V.K.1.a.iii above.

⁵³⁹ CIL § 1.

inquiry.⁵⁴⁰ The County argues correctly, however, that the requirements of avoidance, minimization, and mitigation embodied in the CIL are “substantive” in the context of PSL § 144(2), relying properly on Matter of Town of Dryden v Tompkins County Bd. of Representatives⁵⁴¹ and Matter of Bergami v Town Bd. of Town of Rotterdam,⁵⁴² and thus those provisions are applicable to the facility.

The CIL contains statutory criteria, with which County alleges noncompliance. Doubt as to whether applicant has met statutory criteria would constitute a substantive issue. Here, County seeks to raise sufficient doubt as to applicant’s compliance with so much of the CIL as requires avoidance, minimization, or mitigation of cumulative impacts throughout the County; applicant acknowledges that it examined an area extending five miles from the facility, which is less than the entire County.

The County argues that Copake requires denial of the permit for failure to state in the draft siting permit why the CIL was preempted; however, when a local law is deemed preempted by a draft siting permit, that can only be done so pursuant to PSL § 144(2), and there is no need for a draft siting permit to elaborate further. With respect to local laws that are waived, however, an applicant must make a waiver request pursuant to section 1100-2.25(c) and the draft siting permit must reflect the Office’s finding that applicant has met the section 1100-2.25(c) burden.

Article VIII designates ORES as the sole permitting

⁵⁴⁰ See 16 NYCRR 1100-8.3(c)(2).

⁵⁴¹ 157 AD2d 316 (3d Dept 1990), affd 78 NY2d 331 (1991).

⁵⁴² 97 AD3d 1018 (3d Dept 2012).

authority for facilities such as Mill Point Solar I, but requires ORES to apply the substantive provisions of local laws such as the CIL (or waive them based on a finding that they are “unduly burdensome in view of the CLCPA targets, and the environmental benefits”).⁵⁴³ Thus, the argument made by ORES staff and applicant that Article VIII preempts local laws which impose “conditions” on the facility misses the mark; a local permitting authority cannot impose conditions in the context of a permit issued by the local authority, however, substantive provisions of those local laws, including conditions required as a consequence of local substantive permitting requirements, are applied by ORES in an Article VIII permit, or waived if appropriate.

Thus, Office and applicant’s argument that the CIL is “procedural and supplanted by Article VIII” is unpersuasive; the CIL is not a requirement for a permit or condition issued by the County or other local permitting authority. Instead, it is substantive standards applicable in all permitting procedures within the County. As also noted, ORES must apply the substantive provisions of local law, or consent to a waiver pursuant to 16 NYCRR 1100-2.25(c), which, here, the Office did not do.

v. Vagueness

Applicant argues that the CIL is overly broad and vague, and compliance is impossible, conditions which violate applicant’s due process rights. Applicant points to the failure to “specify clear standards or criteria for developers to follow,” the broad mandate extending to all “adverse impacts of all existing and proposed industrial solar arrays,” the absence

⁵⁴³ PSL § 142(5).

of “detailed guidelines or benchmarks,” and the failure to specify the criteria for assessment of impacts. Applicant claims that compliance is “impossible” as future planned projects typically lack sufficiently detailed information upon which an applicant could rely, making any assessment unreliable, and further that critical and relevant data regarding threatened and endangered species remains confidential even after application submittal. Applicant claims that due process “requires that laws provide fair notice of what is required and that laws are not so vague that they can be arbitrarily enforced.”⁵⁴⁴

Discussion

Applicant correctly argues that due process requires “fair notice of what is required” and that laws be not so vague as to allow arbitrarily enforcement. We note at the outset that the second of those two objections is not at play here; the CIL has no enforcement mechanism. A central concern of a due process vagueness claim is enforcement “on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application” is the evil proscribed.⁵⁴⁵

Here, the absence of an enforcement mechanism weighs against a finding of unconstitutional vagueness.⁵⁴⁶ To the extent applicant argues that the CIL “would subject developers

⁵⁴⁴ Applicant cites one trial court decision from 1991 for this proposition. Matter of Genesis of Mt. Vernon, Inc. v Zoning Bd. of Appeals, 152 Misc2d 997, 1004 (Sup Ct, Westchester County 1991).

⁵⁴⁵ Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs., 39 NY3d 56 (2022) citing People v. Stephens, 28 NY3d at 312 (2016), quoting People v Stuart, 100 NY2d 412, 420-421 (2003).

⁵⁴⁶ See applicant statement of justification at 67.

to arbitrary enforcement," applicant misreads the statute; no one has the authority to enforce it.

The controlling standards for a constitutional vagueness analysis are well-developed. "There is no requirement that every term in a statute . . . be precisely defined, and [laws] will pass constitutional muster so long as it provides persons of ordinary intellect reasonable notice of the proscribed conduct[.]"⁵⁴⁷ Oakwood held the designation "Schools and Cemeteries" on a zoning map did not require "guesswork," applying a "person of ordinary intelligence" standard.

In Flow, the Third Department sustained, against a vagueness claim, Workers' Compensation Law § 114-a, despite its failure to define "material fact," invoking the "person of ordinary intelligence" standard and noting that "material fact" has a "common understanding and is used, without definition, in many other statutory schemes," citing five.⁵⁴⁸

The term "cumulative impacts" is found both in 6 NYCRR part 617 (State Environmental Quality Review) and 16 NYCRR part 1100 (ORES Regulations).⁵⁴⁹ Public Service Law article 10 §

⁵⁴⁷ Oakwood Property Management, LLC v Town of Brunswick, 103 AD3d 1067 (3d Dept 2013), quoting Matter of Flow v Mark IV Constr. Co., 288 AD2d 779 (3d Dept 2001).

⁵⁴⁸ Flow at 780, 752. See also Addei v State Bd. for Professional Medical Conduct, 278 AD2d 551 (3d Dept 2000) (in disciplinary proceeding for patient rape, employee sexual harassment, and lying on applications, medical conduct statute not vague despite no definition of "moral unfitness"); Ulster Home Care, Inc. v Vacco, 96 NY2d 505 (2001) (undefined terms "general public" and "rate" understandable by "person of ordinary intelligence," have common meanings, are used in other state Medicaid and Medicare programs).

⁵⁴⁹ See 6 NYCRR 617.7(c)(2), 617.9(b)(5)(a), 617.10(e), 617.20; 16 NYCRR 1100-2.8(c), 1100-2.8(q), 1100-2.9(a).

164(g) requires "a cumulative impact analysis . . . that considers . . . facilities that have been proposed under this article and have submitted an application"⁵⁵⁰ and prohibits certification absent explicit findings regarding "probable environmental impacts . . . including the cumulative environmental impacts."⁵⁵¹

Here, we are satisfied that the average developer, experienced with the history of Article 10 proceedings, recent ORES proceedings, and decades of local siting and permitting procedures pursuant to the State Environmental Quality Review Act (SEQRA) should be able to grasp the meaning of the terms "cumulative impacts," "avoid, minimize, and mitigate to the maximum extent practicable," and other terms of art common in the industry and found in the CIL, "without resorting to guesswork."⁵⁵²

Applicant claims the word "proposed" in CIL § 4(2) "proposed industrial solar array" presents a confusing range of possibilities, ranging from informal contact between a developer and municipalities to submitted applications to ORES. We find "proposed" to have a common meaning, as used in the above referenced statutes and regulations.

Likewise, "segmentation" as used in the CIL is not vague; the CIL expressly refers to dividing a facility "into two or more phases for the purposes of seeking distinct or amended permits for construction and operation[.]" Additionally, in environment review, segmentation has a well-developed and

⁵⁵⁰ PSL § 164(1)(g).

⁵⁵¹ PSL § 168(2).

⁵⁵² See Oakwood.

specific meaning.⁵⁵³ If the County intended the CIL to refer to some other meaning, it could have defined it; in the absence of a definition, developers have a wealth of guidance.

Applicant's statement that "every [megawatt] counts towards the State's energy goals" overstates the matter. Under the CLCPA, only megawatts generated at facilities designed, constructed, operated, and to be decommissioned in accordance with Article VIII and its numerous requirements count towards the State's energy goals. Nonetheless, we find that the body of SEQRA decisional law readily accessible and familiar to experienced developers vitiates the vagueness claim.

vi. Conflict Preemption and Field Preemption

Applicant and ORES staff argue, for the first time, in their responses, that the CIL is preempted by the principle of conflict preemption, that is, "local governments may not adopt laws that interfere with or frustrate the operation of state administrative agencies acting pursuant to their legislatively delegated authority."⁵⁵⁴ ORES staff also argue, for the first time, in their response, that the CIL is preempted by the principle of field preemption, that is, that the Legislature in

⁵⁵³ See Friends of Stanford Home v Town of Niskayuna, 50 AD3d 1289, 1290 (3d Dept 2008), lv denied 10 NY3d 716 (2008); Defreestville Area Neighborhoods Assn. v Town Bd. of Town of N. Greenbush, 299 AD2d 631 (3d Dept 2002); Concerned Citizens for Env't. v Zagata, 243 AD2d 20 (3d Dept 1998), lv denied 92 NY2d 808 (1998); 6 NYCRR 617.2(ag), 617.3(g)(1); see section V.K.1.b below.

⁵⁵⁴ Applicant response at 17-18; ORES staff response at 40-41.

adopting Article VIII intended to “occupy the field of environmental review and permitting.”⁵⁵⁵

Discussion

Conflict preemption holds that when a local law conflicts with a state law, the state law prevails. A local law is conflict preempted only if it directly or expressly conflicts with state law where the state “specifically permits the conduct prohibited at the local level”⁵⁵⁶ or where they “impose prerequisite additional restrictions on rights under State law[.]”⁵⁵⁷

Field preemption prohibits local governments from enacting laws pertaining to a subject the legislature has assumed full regulatory responsibility.⁵⁵⁸ When the state has preempted the entire area of law, a local law regulating the same subject matter is void if it either “prohibits conduct which the [s]tate law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or . . . imposes additional restrictions on rights granted by [s]tate law.”⁵⁵⁹ Where not expressly stated, the state’s intent to

⁵⁵⁵ See ORES staff response at 38-40. Leave was granted on motion to the petitioning parties to submit further briefs on this issue. See DMM Item No. 196, email ruling granting leave, July 9, 2025; DMM Item No. 201, County submission; DMM Item No. 99, GFL submission.

⁵⁵⁶ Police Benevolent Association of New York City v City of New York, 40 NY3d 417 (2023).

⁵⁵⁷ Eric M. Berman, P.C., v City of New York, 25 NY 684 (2015).

⁵⁵⁸ People v Torres, 37 NY3d 256 (2021); DJL Rest. Corp. v City of New York, 96 NY2d 91, (2001).

⁵⁵⁹ Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91 (1987); New York State Club Assn. v City of New York, 69 NY2d 211

preempt local laws maybe be implied from a declaration of state policy, the state's enactment of a "comprehensive and detailed regulatory scheme in a particular area," or "from the nature of the subject matter being regulated and the purpose and scope of the [s]tate legislative scheme, including the need for [s]tate-wide uniformity in a given area."⁵⁶⁰

Here, although the enactment of the CLCPA, the Accelerated Renewable Growth and Community Benefit Act, and Article VIII represent a comprehensive and detailed regulatory scheme, the Legislature expressly did not preempt substantive local laws in the field of renewable energy siting. This is manifest from the text of PSL § 142(5), which refers to "local laws that would otherwise be applicable to the facility." Article VIII thus requires consideration of substantive local laws, not preempts them. For this same reason, there is also no conflict preemption; Article VIII requires consideration of substantive local laws.

We reach our ruling on this issue as a matter of law, without regard to party status or the need for testimony. No factual disputes related to this issue meet the standard for a hearing. We note that the draft siting permit will require modification prior to finalization to indicate that the CIL is applicable to the facility.

Ruling: The CIL was in effect on the date of the notice of complete application, and is applicable to the

(1987), affd 487 US 1 (1988), see also Incorporated Vil. of Nyack v Daytop Vil., Inc., 78 NY2d 500 (1991).

⁵⁶⁰ People v Diack, 24 NY3d 674, 679 (2015); Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d at 372 (1989); Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 105 (1983).

facility notwithstanding its promulgation after the initial application filing; the law is not a zoning law but rather is within the municipal home rule power of the County; is applicable to the facility by its own terms and is not preempted by Article VIII; is not unconstitutionally vague, overly broad, impossible to comply with, or violative of due process; and the Legislature did not preempt the applicability of substantive local laws and regulations when it enacted Article VIII.

b. Improper Segmentation

Having concluded that the CIL is applicable to the facility, we now address the County's arguments regarding applicant's compliance with the CIL.

First, the County argues that the facility does not comply with the CIL's prohibition against segmentation. CIL § 4(3) titled "Segmentation Prohibited" provides:

if an industrial solar array project is broken into two or more phases for the purposes of seeking distinct or amended permits for construction and operation of the facility, then the developer shall provide Montgomery County, and any other relevant permitting agency, with analysis of the cumulative adverse impacts of all phases on health and human safety, tourism, agriculture, economic development, minority groups, and the environment.

County applies interpretive case law under SEQRA to the CIL. Pursuant to SEQRA case law, the County argues, segmentation is "heavily frowned upon" as it "precludes full review of the overall impacts of a project;" there are two "dangers" to unlawful segmentation: that a decision in one action may be "practically determinative" in a subsequent one, and secondly that if a project is broken up into multiple parts that individually "would not have as significant an environmental impact as the entire project," those segments may

either evade review completely, or that the full impact to the environment cannot be properly assessed.⁵⁶¹

The County argues that Mill Point Solar I (MPS-I) is an unlawful segmentation of a larger project consisting of MPS-I and another planned facility, Mill Point Solar II (MPS-II). The County claims that MPS-II is not “merely speculative or hypothetical,” in that it has a website and a planned operating date.⁵⁶²

The County claims that the issue is substantive and significant, warranting a hearing. It argues that the unlawful segmentation results in failure to identify the cumulative impacts not only of MPS-II but of other proposed facilities as well, to the extent “that a reasonable person would require further inquiry,” in satisfaction of its burden under 16 NYCRR 1100-8.3(c)(2). In satisfaction of its burden under 16 NYCRR 1100-8.3(c)(3), the County argues that upon consideration of the cumulative impacts of MPS-I, MPS-II, and any other planned facilities within Montgomery County, there is the potential for ORES to deny the permit, or consider imposing significant permit conditions.⁵⁶³

Applicant first raises Town of Glen Resolution No. 22, which it claims explicitly “requested that Mill Point I and Mill Point II submit separate permit applications.”⁵⁶⁴ Second, applicant argues that MPS-I and MPS-II “are in fact independent projects” with separate construction schedules and separate

⁵⁶¹ County petition at 26-27.

⁵⁶² Id. at 29.

⁵⁶³ Id. at 30.

⁵⁶⁴ See DMM Item No. 24, application appendix 24-7, Town of Glen Resolution 22.

commercial operation dates; MPS-II is "at least a year behind Mill Point I," MPS-II has not filed a notice of intent to file an application, and under SEQRA precedent, MPS-II is "speculative," rendering environmental review jointly with MPS-I unwarranted.⁵⁶⁵

ORES staff reiterates its arguments that the law is inapplicable and therefore the unlawful segmentation claim is moot. Staff additionally argues that the facility "will avoid, minimize and mitigate adverse impacts to environmental, visual, agricultural, and other resources to the greatest extent practicable and will achieve a net conservation benefit for affected NYS threatened or endangered species." Staff notes that there is no application for MPS-II filed and pending before the Office; that MPS-II has a website, and staff is cognizant of its contents, including the applicant's claim that "each project will undergo a separate Article VIII application process, including separate municipal engagement and public meetings." Like applicant, they also raise the Town of Glen resolution requesting that these two projects be treated separately and that MPS-II "will require a separate interconnection approval . . . separate community meetings, community engagement, and environmental assessment." Finally, staff argues, in effect, that SEQRA law does not apply, noting that "The RAPID Act creating Article VIII also amended N.Y. Envtl. Con Law §8-0111(5)(b) to provide that SEQRA shall not apply" to ORES applications.⁵⁶⁶

Discussion

⁵⁶⁵ Applicant response at 21.

⁵⁶⁶ ORES staff response at 41-42 and n 196.

In the first instance, despite the § 4(3) paragraph heading and the references to it in the County's petition, the CIL does not prohibit segmentation. It merely requires a developer who is segmenting a project to provide the County "and any other relevant permitting agency" with an analysis of cumulative impacts. For the County to argue § 4(3) is a "prohibition" overstates the matter.

The County argues SEQRA law applies. Applicant agrees. In light of the omission of the drafters of the CIL to define "unlawful segmentation," we agree with the County and applicant that SEQRA case law constitutes persuasive authority.

Under SEQRA case law, segmentation claims fall into two categories: first, where a lead agency has found segmentation appropriate, and second, where a lead agency fails to include in a review another project that is sufficiently related. Here the second type of claim is implicated.

Broadly speaking, "[s]egmentation is 'the division of the environmental review of an action such that various activities or stages are reviewed . . . as though they were independent, unrelated activities.'"⁵⁶⁷ Such division is impermissible when the environmental review of an action is divided into smaller stages in order to avoid the detailed review called for under SEQRA.⁵⁶⁸ "Conversely, segmentation is 'allowed when the agency conducting environmental review clearly

⁵⁶⁷ Matter of Saratoga Springs Preserv. Found. v Boff, 110 AD3d 1326 (3d Dept 2013), quoting Matter of Friends of Stanford Home v Town of Niskayuna, 50 AD3d 1289, 1290 (3d Dept 2008), lv denied 10 NY3d 716 (2008), and citing 6 NYCRR 617.2(ag).

⁵⁶⁸ Id., citing Matter of Concerned Citizens for Envt. v Zagata, 243 AD2d 20, 22 (3d Dept 1998), lv denied 92 NY2d 808 (1998).

sets forth the reasons supporting segmentation and "demonstrate[s] that such review is clearly no less protective of the environment."'"⁵⁶⁹

Proximity is not dispositive. Under SEQRA, for example, construction of one dormitory on a campus was properly segmented from the construction of four others on the same campus and cumulative impacts analysis was not required where there was no nexus between the projects other than proximity.⁵⁷⁰ Thus, the fact that MPS-II would be next to MPS-I does not determine the outcome.

The inchoate status of MPS-II weighs against requiring its inclusion in a cumulative impacts review. The exact point at which a project is far enough along in the process such that it must be included in reviews is not precisely defined. Two projects should be reviewed independently where it is not known if one will actually be undertaken, even if some steps towards it have been taken⁵⁷¹ or where despite present intent, a final commitment has not been made to a project.⁵⁷²

⁵⁶⁹ Id., citing Matter of Defreestville Area Neighborhoods Assn. v Town Bd. of Town of N. Greenbush, 299 AD2d 631, 634 (3d Dept 2002), quoting 6 NYCRR 617.3(g)(1).

⁵⁷⁰ Forman v Trustees of State University of New York, 303 AD2d 1019 (4th Dept 2003); see also Stanford Home (two facilities with common contractual contingencies one mile apart properly segmented in absence of "geographic or environmental interrelationship").

⁵⁷¹ Matter of Seneca Meadows, Inc., Ruling of the Administrative Law Judge on Issues and Party Status, March 26, 2012 (NYSDEC).

⁵⁷² Matter of County Landfill in the Village of Monticello, Ruling of the Administrative Law Judge on Party Status and Issues, July 20, 2004 (NYSDEC).

Reviewing courts have relied upon the New York State Department of Environmental Conservation's SEQR Handbook and the factors enumerated therein for analysis of segmentation claims (handbook factors).⁵⁷³ Those factors are purpose (common purpose or goal), time (common reason for completion at or about the same time), common geographic location, impacts (activities proposed for segmentation share common impacts that may, reviewed together, show potentially significant adverse impact not seen if segments reviewed separately), common ownership or control, common plan (segments are components of an identifiable overall plan; initial phases direct development of, or preclude or limit consideration of alternatives later), utility (functional dependence), and inducement (approval of one phase or segment commits the agency to approve others).

Applying the handbook factors, we conclude that, apart from the goal, common to all Article VIII installations, of helping the State meet the CLCPA goals, there is no common purpose or goal. There is no commonality of time, as MPS-II is claimed to be at least a year behind MPS-I; no evidence to the contrary was offered. The only commonality to their location is that the facilities are next to each other, which as analyzed above, is not a sufficient nexus to warrant a combined review. Both facilities do have the same ownership. They are not part of a common plan and to the extent that they once might have been, they have been asked to be treated separately by the host community. There is no functional dependence - either facility connects to the grid independently of each other, and share no

⁵⁷³ See The SEQR Handbook, Fourth Edition, 2020, accessible at https://dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf, at page 53; Scott v City of Buffalo, 20 Misc3d 1135(A) (Sup Ct, Erie County 2008).

access roads, operation and management building, or other facility or equipment. Approval of MPS-I does not commit the agency to approval of MPS-II. Thus, other than common ownership, none of the handbook factors favor a finding of segmentation, and this factor by itself is insufficient.

Moreover, we cannot overlook the significance of the February 13, 2023, resolution of the Town of Glen.⁵⁷⁴ It acknowledges MPS-I is under ORES review and with respect to applicant's intent to seek a permit for MPS-II, specifically asks ORES to consider it separately from the ongoing review of MPS-I; the concern being that if the two were not treated separately, there would be insufficient engagement with the Town and review by ORES. The Town's memorandum accompanying the resolution is detailed and specific and provides among other things that:

Mill Point 2 is not an expansion of any previous application. As stated, this application will require separate interconnections (Q#1231) approval for adequate availability to the grid, additional Environmental Impacts, Public Health, Safety, and Design of solar energy projects in the Town of Glen. The Town would fully expect required community meetings, municipal engagement and transparency in the application certification process with the full understanding of the area being discussed in the proposal.

The resolution in full provides that:

The Town of Glen Town Board hereby requests each submitted proposal to be reviewed and considered as single applications having due process of the 94-c application procedures and complete review of including, yet not limited to, public informational meetings, cumulative environmental impacts, public health, safety and design of Solar Energy projects.

⁵⁷⁴ See application appendix 24-7, Town of Glenn Resolution 22.

Applicant claims that, in effect, they are prejudiced by their adherence to this resolution, and it would be injurious now to find illegal segmentation in this circumstance. We agree. Thus, whether upholding the sanctity of intent of the Town as expressed in Resolution 22, or applying SEQRA case law and the NYSDEC factors, we conclude that the County has failed to meet its burden of raising a substantive and significant factual or legal issue as to the segmentation of MPS-I and MPS-II under the CIL.

Ruling: The County has not identified a substantive and significant factual or legal issue relating to illegal segmentation under the CIL.

c. Compliance with the CIL

In its petition, the County argues that applicant has failed to demonstrate compliance with the CIL with respect to impacts to the economic development, the Amish community, the environment and wildlife, and agriculture, and visual impacts. In support of its argument, the County provides a table of solar projects in Montgomery County and their various stages of development the County considers relevant to the CIL analysis.⁵⁷⁵

In application appendix 24-5, applicant argued it complied with the CIL with respect to each of the above resources.⁵⁷⁶ In the alternative, applicant requested a waiver of the CIL on the ground that its application is unreasonably burdensome.⁵⁷⁷ For the reasons that follow, we conclude that

⁵⁷⁵ See County petition at 66-67.

⁵⁷⁶ See applicant statement of justification at 69-73.

⁵⁷⁷ See id. at 73-75.

applicant has demonstrated its compliance with the CIL and, therefore, that its waiver request is unnecessary. Furthermore, we conclude that the County has failed to raise an adjudicable regarding applicant's compliance with the CIL.

i. Cumulative Impacts to Economic Development

In addition to proposing that the economic effects of the facility are not properly addressed under Article VIII (see section V.H above), the County also proposes as an issue for adjudication that the economic effects of the facility are not avoided, minimized, or mitigated to the maximum extent practicable, under a cumulative impacts analysis under the CIL. It argues that those impacts are erroneously portrayed in the application, in that rather than applicant's claimed net economic benefit, the facility will cause severe economic damage.

As the County's offer of proof, MRB submits a report on the adverse economic impacts to be suffered by the County, claiming those impacts, including to jobs, land values and tax rates, are "completely unaddressed by the applicant" and will be severe.⁵⁷⁸ The County argues its assessment of adverse economic impacts reveals facts "'contrary to what is in the application materials or draft siting permit,' meeting the standard for hearing."⁵⁷⁹

County's economic expert, MRB Group (MRB), states that in addition to the economic effects analyzed under Article VIII, that the facility's impacts "must also be examined with respect

⁵⁷⁸ See County petition at 33.

⁵⁷⁹ County petition at 33, citing Rock District Solar, Decision at 16.

to other major solar developments planned in the County (the "Cumulative" impacts). The Cumulative impacts over the life of the Project could total 1,736 job-years, \$88.4 million in earnings and \$371.2 million in sales." It alleges that the facility "impacts 2,510 acres of agricultural land, but when combined with other solar projects in Montgomery County, a total of 6,311 acres are removed from agricultural use. This would represent a potential lost agricultural value of \$7 million" noting that "[o]ther solar projects that have been completed or are underway include the Mohawk Solar Project, Flat Creek Solar Project, and High River Energy Center."⁵⁸⁰ The cumulative economic impacts over the 35 year life of the facility include "a total loss of 1,736 job-years, \$88.4 million in earnings, and \$371.2 million in sales."⁵⁸¹

Finally, the County argues it clears its burden under § 1101-8.3(c)(2) with respect to "the applicant's ability to meet statutory or regulatory criteria applicable to the project," by demonstrating the foregoing forecasted facts which are omitted from the application or contrary to it. It argues that the § 1101-8.3(c)(3) standard is met, given the significant adverse economic impacts of the facility.

In its statement of justification, applicant, referencing application exhibit 18, asserts that its "assessment of impacts within [the] specified study areas demonstrates that cumulative impacts have been avoided, minimized and mitigated to the maximum extent practicable," including the facility's

⁵⁸⁰ DMM Item No. 162, County petition, exhibit 3, MRB Report at 10.

⁵⁸¹ Id. at 11.

impacts to economic development.⁵⁸² Application exhibit 18 addresses the socioeconomic impacts of the facility. Operation of the facility is forecasted to created 3.5 full-time job equivalents with an annual payroll of \$260,000.00.⁵⁸³ Exhibit 18 also demonstrates further economic benefits to the County economy: temporary and permanent jobs; new income streams through leases, easement agreements, and good neighbor agreements supporting continued farming.

Through engagement with the local highway department, first responders, and fire department, applicant projects no increased incremental costs to community services. Any increased costs resulting from road use during construction would be mitigated by a road use agreement, as yet not extant, resulting in "no net burden."⁵⁸⁴ Applicant will credit residential utility customers with \$1.25 million over the first ten years of facility operation.⁵⁸⁵

Applicant expects construction to "result in increased spending in the Town and in neighboring area . . . residents working or owning businesses in the region are also anticipated to benefit . . . [T]he facility should result in positive fiscal impacts for the jurisdictions."⁵⁸⁶ Finally, applicant proposes a 15-year period of PILOT agreements with the County, Town, and the Fonda-Fultonville Central School District, followed by regular property tax payments for the remaining 20 years of the

⁵⁸² Applicant statement of justification at 69, 72.

⁵⁸³ See application exhibit 18 at 6

⁵⁸⁴ Id. at 8-9.

⁵⁸⁵ Id. at 9.

⁵⁸⁶ Id. at 12-13.

life of the facility.⁵⁸⁷ Furthermore, application exhibit 3, §§ 3(k) and 3(s) allegedly demonstrate no impacts on recreational uses.

The draft siting permit states that the facility will “create job opportunities [and] support economic growth,”⁵⁸⁸ ORES “has balanced” the facility’s impacts, and “considered” the applicant’s proposed measures to avoid, minimum, and mitigate those adverse economic impacts to the maximum extent practicable.

Applicant’s response includes a memorandum, with projections that differ from MRB’s and criticizing MRB for its method of calculating economic losses.⁵⁸⁹ Applicant cites a University of Michigan study of renewable energy facilities showing increased investment in farm and home infrastructure as evidence of the economic benefits of the facility.⁵⁹⁰ The memorandum also offers five studies that demonstrate that industrial-scale solar energy facilities do not diminish neighboring property values.⁵⁹¹ In its response, ORES staff argues that the County’s expert’s report fails to demonstrate “an omission of required information . . . or show that defective information was used in the application or draft siting permit.”⁵⁹²

⁵⁸⁷ Id. at 17-18.

⁵⁸⁸ Draft siting permit at 3.

⁵⁸⁹ See DMM Item No. 190, applicant response, attachment C, at 2-5.

⁵⁹⁰ Id. at 9-10.

⁵⁹¹ Id. at 11-12.

⁵⁹² Id. at 44.

Discussion

Under the CIL, the facility's contribution to cumulative negative impacts to economic development must be avoided, minimized, or mitigated, to the maximum extent practicable. As the CIL does not define impacts, we again rely on SEQRA and hold that the impacts addressed by the CIL are the environmental impacts to economic development. Applicant having demonstrated to ORES staff's satisfaction that that the facility is designed to be constructed, operated, and decommissioned in a manner that avoids, minimizes, or mitigates, to the maximum extent practicable, its adverse environmental impacts to the local economy, the burden shifted to the County to demonstrate some contribution to the cumulative adverse economic impacts, which burden the County failed to carry. The County has not identified any requirement of application exhibit 18 or any other statutory or regulatory standard to which its offer of proof on economic impacts is relevant and, accordingly, it has provided no basis, such as a specific factual error or omission, for concluding that the facility will contribute to cumulative adverse economic impacts in such a way as to require permit denial, a major modification to the proposed project, or the imposition of significant permit conditions.⁵⁹³

Inasmuch as applicant has demonstrated that it has avoided, minimized, or mitigated, to the maximum extent practicable, environmental impacts to economic development, it follows that it has also avoided, minimized, or mitigated, to the maximum extent practicable, its contribution to cumulative adverse environmental impacts to economic development. In response, the County has not identified a relevant substantive

⁵⁹³ See 16 NYCRR 1100-8.3(c)(2), (3).

and significant issue regarding the socioeconomic effects of the project.

Ruling: The County has not identified a relevant substantive and significant issue regarding the project's contribution to the cumulative impacts to economic development from solar development in the County.

ii. Cumulative Impacts to the Amish Community

The County proposes for adjudication the "issues raised in the petition by GlenFARMLand, Inc. as they relate to the Amish and requests a hearing based on the questions of fact raised in the 'Report on Impact of Proposed Mill Point Solar Project on the Fultonville-Glen Amish Settlement, Montgomery County, New York' written by Steven M. Nolt, Ph.D. dated May 30, 2025 [Nolt Report] as it relates to the Cumulative Impacts Law."⁵⁹⁴ As discussed above, the CIL requires applicant to avoid, minimize, or mitigate, to the maximum extent practicable, its contribution to the cumulative impacts on minority groups and cultural resources.⁵⁹⁵

The County argues that the Nolt Report demonstrates applicant's failure to address "many" issues, making the issue substantive pursuant to 16 NYCRR 1100-8.3(c)(2). It further argues that the "impact on the Amish as identified" by their expert raises the possibility of a denial or major modification of, or the inclusion of significant conditions in, the permit, in satisfaction of 16 NYCRR 1101-8.3(c)(3).

⁵⁹⁴ County petition at 44.

⁵⁹⁵ CIL § 4(1), (2).

A discussion of the Nolt Report is contained in section V.I.1 above. So much as germane here is the report's conclusion that, should the facility be permitted, the Amish community will be severely impacted in important ways, both during construction and operation, and may cause the community to abandon their settlements in Montgomery County all together.

In its statement of justification, applicant references application exhibits 9 and 19 in support of its assertion that the cumulative impacts to minority groups and cultural resources have been avoided, minimized and mitigated to the maximum extent practicable. Application exhibit 19 demonstrates that impacts to minority groups are avoided, minimized, and mitigated to the maximum extent practicable, as there are no significant and adverse disproportionate effects in the PEJA/DAC expected. Impacts to cultural resources are allegedly avoided completely, as demonstrated by the architectural and archaeological surveys submitted in application exhibit 9, and applicant's consultation with the New York State Historic Preservation Office. Further, facility components have not been cited within the Hamlet of Glen historic district.⁵⁹⁶

Applicant argues that the County's concern for health and human safety is covered by its safety response plan and site security plan submitted in application exhibit 6. The application includes proposed construction safety measures for Amish children on their way to school and the establishment of a Complaint Management Plan to address impacts to the Amish community as they arise, which it states constitutes its efforts to avoid, minimize, or mitigate, impacts to the Amish community,

⁵⁹⁶ See applicant statement of justification at 72.

to the maximum extent practicable.⁵⁹⁷ Applicant's efforts are noted in section V.I.1 above.

ORES staff's response notes the public engagement by applicant including its outreach efforts and meetings, resulting in consideration being shown for the construction traffic issues.⁵⁹⁸ ORES staff characterizes the Nolt Report as "speculation."⁵⁹⁹

Discussion

The County's threadbare argument that applicant has failed to demonstrate compliance with the CIL with respect to impacts to the Amish community is unavailing. Section 1100-8.4(c)(1)(v) and (2)(i) require specificity. The County petition merely refers to the "many" issues allegedly unaddressed by applicant, which does not satisfy the specificity requirement. Furthermore, the County's expert fails to identify a factual assertion contained in the application that is erroneous, or an omission therefrom, effecting permit issuance. The Nolt Report's recommendations for applicant are insufficient to raise a substantive and significant issue, and to the extent he identifies school children's safety as an impact, that issue has already been addressed by applicant as a result of its engagement with the community. Nolt's conclusion that the facility will cause the Amish community to leave for greener pastures elsewhere is mere conjecture: even he admits that the

⁵⁹⁷ See DMM Item No. 94, application exhibits 16 (revised): Effect on Transportation; id., application exhibit 19 (revised): Environmental Justice.

⁵⁹⁸ See ORES staff response at 70; see also DMM Item No. 94, application exhibit 2 (revised): Overview and Public Involvement.

⁵⁹⁹ Id.

Amish have a religious prohibition on making predictions of future events, including what they will do if the facility is built.⁶⁰⁰

Regarding cultural resources, although the County refers to them in the header of this argument section, there is no reference to impacts to "cultural resources" as that term is used in the Article VIII context, that is, "any change, beneficial or adverse, in the quality of any historic, architectural, archaeological, or cultural property that is listed in the National Register of Historic Places (NRHP) or in the State Register of Historic Places (SRHP), or that is determined by the Commissioner to be eligible for listing in the SRHP."⁶⁰¹ Here, the County refers only to the Amish community, not to any property of historical consequence.

As for the alleged violation of the CIL, inasmuch as applicant has demonstrated that it has avoided, minimized, or mitigated, to the maximum extent practicable, impacts to the Amish community, it follows that it has also avoided, minimized, or mitigated, to the maximum extent practicable, its contribution to the cumulative impacts from the solar projects cited by the County on that community. The County fails to identify what more applicant could have done.

Ruling: The County has failed to raise an adjudicable issue regarding impacts to minority group and cultural resources issues in violation of the CIL.

⁶⁰⁰ See DMM Item No. 110, GFL petition, exhibit 3, Nolt Report at 15-16.

⁶⁰¹ See DMM Item No. 94, application exhibit 9 (revised): Cultural Resources at 1.

iii. Cumulative Impacts to the Environment
and Wildlife

The County seeks a hearing "on the cumulative impacts to wildlife" under the CIL, which requires those impacts to be avoided, minimized, or mitigated to the maximum extent practicable.⁶⁰² The County offers the report of Dr. Smallwood, submitted by GFL, as its offer of proof.⁶⁰³ A full review of Dr. Smallwood's submission is contained in section V.E above. So far as is relevant here, the County claims that the cumulative impacts are not "properly mitigated," that the county will "lose biodiversity and protect species," that any mitigation funds will protect wildlife outside Montgomery County, not within it, that the applicant's studies and ORES's take determination are deficient, and that the proposed project does not achieve a net conservation benefit as required.⁶⁰⁴ The County claims the issue is substantive as the offer of proof demonstrates that applicant has not met regulatory requirements, satisfying the County's burden under § 1100-8.3(c)(2), and that the drastic impact to wildlife is significant within the meaning of § 1100-8.3(c)(3).⁶⁰⁵

Application appendix 24-5 analyzes the environmental benefits of the facility: production of sufficient renewable energy to power 65,000 households, as well as compatibility with state energy goals, the 2015 state energy plan, the Clean Energy

⁶⁰² The CIL refers only to the "environment" while the County's petition refers also to "environment and wildlife". CIL Section 4, County petition at 46.

⁶⁰³ Id.

⁶⁰⁴ Id. at 47.

⁶⁰⁵ Id. at 47-48.

Standard, and the CLCPA.⁶⁰⁶ Application exhibit 2 in its material facts analysis incorporates various findings from application exhibits 5, 11, 13 and 14, which applicant claims demonstrates avoidance, minimization, or mitigation, to the maximum extent practicable, of impacts to the environment.⁶⁰⁷ Applicant further states that the County's expert "raises no evidence or omission, nor factual evidence that methodologies employed were not scientifically defensible."⁶⁰⁸

ORES staff's response, as discussed, is that the CIL is inapplicable, and the County's issues are therefore moot.⁶⁰⁹ Furthermore, ORES staff argues that the report "conflates temporary and permanent impacts, resulting in an inaccurate characterization of the affected environment . . . erroneously reflects temporary disturbance, permanent conversion, and permanent loss Applicant has agreed to mitigate impacts and provide a net conservation benefit by developing a conservation easement(s) of the required 219.52 acres. . . . [The report] does not provide any information that disputes the applicant's ability to comply with the USCs or Draft Permit conditions, including the requirement that the Applicant submit a final NCBP before commencement of construction."⁶¹⁰

Discussion

Compliance with the CIL would require Mill Point Solar I to avoid, minimize, or mitigate effects in a way that

⁶⁰⁶ Applicant statement of justification at 72-73.

⁶⁰⁷ DMM Item No. 94, Exhibit 2: Overview and Public Involvement (revised) at 7-8.

⁶⁰⁸ Id. at 67.

⁶⁰⁹ See ORES staff response at 41.

⁶¹⁰ Id. at 66-68.

considers the cumulative effects of every other solar installation now built or planned for Montgomery County. In application appendix 24-5,⁶¹¹ applicant argues that it made the showing that it has considered cumulative impacts and avoided, minimized, or mitigated them to the maximum extent practical. The County argues that no relevant studies were done; this overstates the matter, as studies were done, however, they refer to the five-mile study zone, not the entire county. While that is less than the entire county, the County carries the burden here to demonstrate that the failure to include every acre of the county in the study area results in any unavoided, unminimized, or unmitigated impacts, cumulatively or otherwise.

A complete analysis of the County's environmental impacts claim under Article VIII is contained in section V.E above. So far as is relevant here, we concluded that the application avoids, minimizes, or mitigates negative impacts to the environment and wildlife to the maximum extent practicable, and that applicant will satisfy its statutory and regulatory requirements.

Under the CIL, the facility's contribution to cumulative negative impacts to the environment must be avoided, minimized, or mitigated, to the maximum extent practicable.

Applicant demonstrated to the satisfaction of ORES that its plan to avoid, minimize, or mitigate, to the maximum extent practicable, negative impacts to the environment met all statutory and regulatory requirements, shifting the burden to the County to demonstrate a specific factual error or omission in the application of such magnitude that the permit would have to be denied, modified or have significant conditions imposed, which burden the County here also failed to carry. Inasmuch as

⁶¹¹ See applicant statement of justification at 64-75.

applicant has demonstrated that it has avoided, minimized, or mitigated, to the maximum extent practicable, negative environmental impacts, it follows that it has also avoided, minimized, or mitigated, to the maximum extent practicable, its contribution to cumulative negative impacts to the environment.

Ruling: The County has not demonstrated a substantive and significant issue regarding cumulative impacts to the environment under the CIL.

iv. Cumulative Impacts to Agriculture

The County argues that the CIL requires applicant to minimize the cumulative impact of all existing and proposed industrial solar arrays on agriculture. It couches its argument in terms of Article VIII's requirements, adding at the end of that section that all of its foregoing allegations with respect to alleged regulatory noncompliance apply with equal force to analysis under the CIL.⁶¹² It argues that the fact that the facility will be built "94%" on "active farmland" renders the issue substantive within the meaning of § 1100-8.3(c)(2) and that the necessity for additional permit conditions satisfies the "significant" standard under § 1100-8.3(c)(3).

In its statement of justification, applicant references application exhibit 15 in support of its assertion that it avoided, minimized, and mitigated its contribution to the cumulative impacts to agriculture from solar development in the county.⁶¹³ Application exhibit 15⁶¹⁴ assesses impacts to

⁶¹² County petition at 52.

⁶¹³ See applicant statement of justification at 71.

⁶¹⁴ DMM Item No. 132, application exhibit 15 (revised):
Agricultural Resources.

agricultural resources located both within the 5-mile study area and beyond. It provides that:

active agricultural land within the Facility Site (2,509.84 acres) represents 2.2 percent of active agricultural land in Montgomery County (based on the 2017 Census for Agriculture for Montgomery County; see Section 15(a)(6)), and 1.6 percent of land within the three NYS Agricultural Districts discussed above. Therefore, the 2,468.91 acres of the Facility Site that is composed of active agricultural land within an Agricultural District represents a small fraction of the overall Agricultural District land in the Town of Glen and within the 5-mile Study Area.⁶¹⁵

Applicant argues that the general 5-mile study area for the facility encompasses nine towns, three villages, and a city, which, while not the entire County, it claims is sufficient to assess, avoid, minimize, or mitigate to the maximum extent practicable the cumulative effects of the facility. Additionally, “no direct impacts to the 22 known operating farms located outside the Facility Site but within the Study Area are anticipated due to construction or operation of the Facility, as there are no proposed impacts outside the Facility Site.”⁶¹⁶

Discussion

A complete analysis of the County’s agricultural impacts claim under Article VIII is contained in section V.G above. So far as is relevant here, we conclude that the application, including the proposed Agricultural Plan and compliance with NYSAGM guidelines, avoids, minimizes, or mitigates impacts on agricultural land to the maximum extent

⁶¹⁵ Id. at 3.

⁶¹⁶ Id. at 11.

practicable, and that applicant will satisfy its statutory and regulatory requirements.

Under the CIL, the facility's contribution to cumulative negative impacts to agriculture must be avoided, minimized, or mitigated, to the maximum extent practicable. As the CIL does not define impacts, we again rely on SEQRA and hold that the impacts addressed by the CIL are the environmental impacts to agriculture.⁶¹⁷

Applicant demonstrated to the satisfaction of ORES that its plan for impacts to agricultural resources met all statutory and regulatory requirements, shifting the burden to the County to demonstrate a specific factual error or omission in the application of such magnitude that the permit would have to be denied, modified or have significant conditions imposed, which burden the County here also failed to carry. Inasmuch as applicant has demonstrated that it has avoided, minimized, or mitigated, to the maximum extent practicable, environmental impacts to agriculture, it follows that it has also avoided, minimized, or mitigated, to the maximum extent practicable, its contribution to cumulative impacts to agriculture. In response, the County has not identified a substantive and significant factual or legal issue regarding the facility's compliance with the CIL.

Ruling: The County has not raised a substantive and significant issue regarding cumulative environmental impacts to agriculture.

v. Cumulative Visual Impacts

⁶¹⁷ 6 NYCRR 617.2(2)(s) provides that "Impact means to change or to have an effect on any aspect(s) of the environment."

The County proposes for adjudication whether the facility "avoids, minimizes, or mitigates, to the maximum extent practicable the visual impacts of this project and also the cumulative visual impacts under the Cumulative Impacts Law."⁶¹⁸ As discussed above, the CIL requires applicant to avoid, minimize, or mitigate, to the maximum extent practicable, its contribution to the cumulative visual impacts.⁶¹⁹

Analysis of the County's visual impacts claim in the Article VIII context is set forth in section V.C.1 above. So much as is relevant here, the County's visual expert submitted a Visual Impacts Report (VIR), which it alleges demonstrates that applicant failed to avoid, minimize, or mitigate, to the maximum extent practicable, the cumulative visual impacts under the CIL.

The application includes a Visual Impacts Minimization and Mitigation Plan (VIMMP) in satisfaction of the requirements of 16 NYCRR 1100-2.9.⁶²⁰ It plans for screening views of the facility using trees and other plants. The draft siting permit implements that plan through site-specific condition 5(c) and uniform standards and conditions 4.4(1)(2), which require submission of a Final VIMMP including Final Screen Planting Plans and Final Lighting Plans. Additionally, application appendix 8-1 § 10.1.1.3 contains analysis of visual impacts to

⁶¹⁸ County petition at 56.

⁶¹⁹ CIL § 4(1), (2). The CIL does not specifically refer to visual impacts; it refers to environmental impacts, and visual impacts are environmental impacts as matter of law. See Matter of Hart v Town of Guilderland, 196 AD3d 900, 905 (3d Dept 2021); Matter of Cady v Town of Germantown Planning Board, 184 AD3d 983 (3d Dept 2020); see also 6 NYCRR 617.2(1).

⁶²⁰ See application exhibit 16 (revised) and application exhibit 19 (revised).

popular tourism destinations and concludes they will experience no significant visual impact. In its statement of justification, applicant relied on its visual impacts analysis to support its assertion that the cumulative visual impacts to key local resources and tourist destinations have been avoided, minimized, and mitigated to the maximum extent practicable.⁶²¹

Applicant's response argues that it fully complied with the applicable regulations, and that the County's dissatisfaction with its visual impacts mitigation plan does not raise a substantive and significant issue. ORES staff's response argues the CIL claim is moot and that the record demonstrates that the facility "will avoid, minimize and mitigate adverse impacts to . . . visual . . . resources to the greatest extent practicable."⁶²²

Discussion

As with other alleged violations of the provisions of the CIL, the County's argument fails. We concluded, in section V.C.1, that the expert's offer of proof and the County's arguments did not raise a substantive and significant issue. Applicant demonstrated to the satisfaction of ORES that its plan for visual impacts met all statutory and regulatory requirements, shifting the burden to the County to demonstrate a specific factual error or omission in the application of such magnitude that the permit would have to be denied, modified or have significant conditions imposed. Inasmuch as applicant has demonstrated that it has avoided, minimized, or mitigated, to the maximum extent practicable, visual impacts, it follows that it has also avoided, minimized, or mitigated, to the maximum

⁶²¹ See applicant statement of justification at 70.

⁶²² See ORES staff response at 41.

extent practicable, its contribution to cumulative visual impacts.

Ruling: The County has failed to raise an adjudicable issue regarding visual impacts in violation of the CIL. We note that the draft siting permit should be modified to indicate, in the final siting permit, that the facility complies with the CIL.

2. Montgomery County Scenic Byways Law

County seeks a hearing on the applicability of its Scenic Byways Law (SBL), Montgomery County Local Law 3 of 2021, which provides:

SECTION 6. Scenic Byway Guidelines

The following standards shall apply to scenic byways in Montgomery County.

A. Vistas. Roadside views of near and distant scenic landscapes are vital to the quality of life and economy of Montgomery County and shall be preserved and, where possible, enhanced through vegetative management and selective cutting to maintain or open up such views. Roadside views from scenic byways shall remain visually consistent with the views at the time of designation. For the purposes of this paragraph, visually consistent shall mean not obviously different from or in sharp contrast to views at the time of designation taking into consideration the scale and context of the existing conditions at the time of designation.

B. Vegetation. Vegetation on the side of the road shall be maintained in such a way as to preserve the scenic value and beauty of existing flowers, shrubs, and trees.

C. Grades. Hills and valleys and corresponding changes in topography and road grades are correlated with scenic values. Changing grades through cuts and fills shall be undertaken only when necessary for road maintenance and safety.

County claims the law "requires the mitigation of [visual] impacts."⁶²³ The County claims that applicant is required to consult with the County pursuant to PSL § 142(1) and 16 NYCRR 1101-1.3(a), which the County claims was not done.⁶²⁴ It claims the issue is substantive pursuant to § 1100-8.3(c)(2), in that "the law was never applied to this project." It argues the issue is significant pursuant to § 1100-8.3(c)(3), in that application of the law to the facility would result in a "change of permit conditions, particularly given that the Mill Point I project is proposed to be sited directly on several Scenic Byways."⁶²⁵

The application states that the SBL:

pertains specifically to the standards for scenic byways under County jurisdiction, including guidelines for the maintenance of these byways by the County (Section 6 of County Law). The guidelines direct the County on how to maintain roadside views, vegetation and road grades . . . [T]he visual impacts on the County's scenic byways have been considered and assessed, as detailed in Revised Exhibit 8. In addition, the Applicant will work with the County to enter into a Road Use Agreement (RUA) for use of County roads and will work with the County with respect to any applicable provisions of the byway law which may pertain to work in the County roadways and/or right of way.

The application further argues that to the extent the SBL prohibits development of land, it constitutes a zoning law, over which the County has no authority. "This distinction is why the local law has not been identified as an applicable local

⁶²³ County petition at 74.

⁶²⁴ Id. at 75.

⁶²⁵ Id. at 76.

law to the Facility.”⁶²⁶ Finally, to “the extent that the County asserts that the byway law somehow prohibits the Facility from changing roadside views, such prohibition is unreasonably burdensome” and refers to revised application appendix 24-5.

Application appendix 24-5 reiterates the County’s lack of zoning authority and states that the SBL “can only be intended to regulate what the County can do within the County roadways and rights of way, but it cannot regulate what can be done on private property within the Town of Glen.”⁶²⁷

The draft siting permit concludes that the SBL “is not applicable to the facility.”⁶²⁸ ORES staff’s response to petitions states “not only does the Scenic Byways law not contain any substantive requirements (as opposed to “guidelines”), but the plain language of the law makes clear that the law is intended to apply to the County’s roads and to actions taken by the County itself to maintain ‘vistas,’ ‘vegetation,’ and [‘]grades.’”⁶²⁹

Discussion

ORES staff and applicant correctly argue that the SBL has no application to the facility. The SBL requires the County to “preserve” “views of near and distant scenic landscapes” and “where possible” enhance them “through vegetative management and selective cutting to maintain or open up such views.” Roadside vegetation “shall be maintained in such a way as to preserve the scenic value and beauty of existing flowers, shrubs, and trees.” Finally, to further preserve viewpoints, “[c]hanging grades

⁶²⁶ See application exhibit 24 at 6.

⁶²⁷ See applicant statement of justification at 61.

⁶²⁸ Draft siting permit required findings 3(b)(1) at 9.

⁶²⁹ ORES staff response at 61.

through cuts and fills shall be undertaken only when necessary for road maintenance and safety.”

These provisions are directions to County road maintenance staff. To the extent that construction activities would effect a viewpoint, applicant has already indicated that remediation would be agreed to in a road use agreement, thus effectuating the preservation of vistas as the law intends. As correctly contended by applicant and staff, any effect that the facility might have on the scenery from those viewpoints has been avoided, minimized, or mitigated to the maximum extent practicable. The County fails to show what changes in the design or operation of the facility are allegedly required by the SBL. The County claims the law requires mitigation of impacts, however, nothing in the text of the SBL addresses impacts or the mitigation thereof.

Ruling: The County has failed to raise an adjudicable issue regarding the Scenic Byways Law.

L. GlenFARMLand Comments

In its petition for full party status and statement of issues of adjudication, GFL relies on a report attached as exhibit “D” as an offer of proof, “GlenFARMLand Comments Regarding the Draft Permit, Agricultural Impacts and Applicant Company Character,” to claim it is entitled to full party status. GFL claims that the report, which was prepared by its members and filed as a public comment on the draft permit on May 30, 2025,⁶³⁰ raises adjudicable issues under 16 NYCRR 1100-8.3(c)(1)(ii). GLF raises concerns that ORES staff’s reliance on the category of Mineral Soil Groups (MSG) 1-4 to identify

⁶³⁰ See DMM Comment No. 401.

high-quality farmland is contrary to governmental mandates to "preserve farmland" and "insufficient to protect lands in Glen recognized as Prime Farmland if Drained as well as Farmlands of Statewide Importance." GLF also raises concerns regarding applicant's "transparency," particularly where modifications or information affects specific landowners, and "project oversight, quality assurance and overall compliance" with State and local requirements and ORES permit conditions.⁶³¹

Applicant relies on its offer of proof from TRC to assert that its assessment of farmland soils is based on the NYSAGM MSG classification system as required under PSL article VIII. TRC asserts that for analyzing impacts to productive farmland associated with renewable energy projects, MSGs 1-4 "represent the most productive farmland within the State." According to TRC, this ranking system "provides a standard for the agricultural tax assessment system and the New York State Agricultural Land Classification System calculates land value for agricultural designated parcels in NYS based on soil compatibility with agricultural production." Applicant contends that this classification system accurately confirms "the extent of agricultural resources impacted by the Project," including "329.06 acres" of MSG 1-4 soils as detailed in TRC's Table 1, and that "no special or unique soils are located within the Town of Glen and Montgomery County when compared to surrounding towns, counties, and New York State." Applicant concludes that "[t]he comment does not raise a substantive and significant issue for adjudication with respect to agricultural impacts."⁶³²

⁶³¹ GFL petition at 44-45, exhibit D, at 15-17, 20.

⁶³² Applicant response at 76, attachment C, at 1-3.

ORES staff asserts that GFL's public comment "consists of general comments on the Draft Permit, the application process as a whole, including the compliance filing process, and the Applicant themselves." ORES staff relies on ORES case precedent in Heritage Wind, LLC, to contend that "general criticisms, expressions of concern, speculation or conclusory statements" are "insufficient to raise an adjudicable issue." ORES staff concludes that "the Office will consider GFL's Exhibit D a public comment, and public comments will be addressed in the Assessment of Public Comment."⁶³³

Discussion

We agree with applicant and ORES staff that GFL's public comment does not raise any substantive and significant issues.⁶³⁴ GLF's objection to ORES staff's reliance on the category of MSG 1-4 to identify high-quality farmland as contrary to, among other requirements, governmental mandates to "preserve farmland" is misplaced. We agree with applicant that reliance on the MSG 1-4 soil classification system developed and administered by the NYSAGM and incorporated into Part 1100 to assess agricultural impacts was appropriate.⁶³⁵ In Rock District Solar, LLC, we relied on East Point Energy Center, LLC, a PSL article 10 proceeding, and other article 10 case precedent to conclude that the term "prime soils" should be interpreted as referring to lands containing NYS Agricultural Land Classified

⁶³³ ORES staff response at 74, citing Heritage Wind, LLC, Interim Decision at 8-9.

⁶³⁴ See ORES staff response at 74; applicant response at 76.

⁶³⁵ See applicant response at 76; 16 NYCRR 1100-2.16(c); see also NYSAGM, New York State Farmland Protection Working Group, 2022 Interim Report, at 6, https://agriculture.ny.gov/system/files/documents/2022/05/interimreport_farmlandprotectionworkinggroup_05.23.2022.pdf.

Mineral Soil Groups (MSG) 1 through 4, which is precisely the soil classification system relied upon by Part 1100. In East Point Energy Center, LLC, the New York State Board on Electric Generation Siting and the Environment (Siting Board) explained that “[p]rime farmland contains soils classified as groups 1-4 under [the New York Department of Agriculture and Markets’ (AGM’s)] NYS Agricultur[al] Land Classification system. AGM identified lands with these soil groups as the State’s most productive farmland or viable agriculture land, as defined in Agriculture and Markets Law § 301.”⁶³⁶

We note that GFL’s report relies on “AcreValue for each parcel of the project’s footprint” that utilizes the National Commodity Crop Productivity Index (NCCPI), as noted by applicant. The report states that “applicant’s characterization of only 329 acres of prime farmland is based solely on the MSG 1-4 designation and ignores both Prime, if Drained and Lands of Statewide Importance.”⁶³⁷ Applicant correctly points out, however, that 16 NYCRR 1100-2.16(c) specifically requires agricultural impacts to be assessed “using the land classification system developed by NYSAGM which groups soils into Mineral Soil Groups (MSG) on a scale from 1 to 10 based on productivity not the USDA classification ratings.” Based on

⁶³⁶ Rock District Solar, LLC, Issues Ruling at 42-43, citing DPS Case 17-F-0599, Matter of East Point Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, Jan. 7, 2021, at 18 (NYS Siting Board) and DPS Case 19-F-0366, Matter of Trelina Solar Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, Nov. 30, 2021, at 22-23 (NYS Siting Board).

⁶³⁷ GLF petition, attachment D, at 16-17; applicant response at 75.

this, applicant accurately concludes that "there are 329.06 acres of MSG 1-4 soils, which are considered the most productive under the NYSAGM system" within the facility site. We agree with applicant that it did not underestimate agricultural impacts, as GFL's claims suggest.⁶³⁸ As noted by TRC, Table 1 identifies approximately 329 prime farmland acres for both the MSG 1-4 and the USDA soil classifications, acreage that GFL also acknowledges for MSG 1-4 in its report.⁶³⁹

We also note that ORES staff's extensive pre-application procedures under 16 NYCRR 1100-1.3(a), which include pre-application consultations with the NYSAGM and other State agencies to identify active and productive farmland and soils MSG 1-4 in the project area to avoid significant adverse environmental impacts to the maximum extent practicable, addresses GFL's concerns to "preserve farmlands" and "protect lands" in the Town of Glen.⁶⁴⁰ In addition, applicant's commitment to comply with siting permit conditions requiring the hiring of independent third-party environmental and agricultural monitors subject to ORES staff's approval addresses GFL's concerns regarding project oversight.⁶⁴¹ For these reasons, we conclude that ORES staff's reliance on the MSG 1-4 soil

⁶³⁸ Applicant response at 76-77; GFL petition at 45.

⁶³⁹ See GLF petition, attachment D, at 15-16; applicant response, attachment C, at 3.

⁶⁴⁰ 16 NYCRR 1100-1.3; GFL petition at 44-45.

⁶⁴¹ See GFL petition at 44; applicant response at 75; see also draft siting permit uniform standards and conditions 4.4(b) at 15-16.

classification system was appropriate and consistent with ORES and article 10 case precedent and article VIII regulations.

Ruling: The concerns raised by GFL in exhibit D regarding prime farmland, project oversight, and other compliance issues do not present any substantive and significant issues. These proposed issues are accepted as comments on the application and draft siting permit, and to the extent not responded to by ORES staff in its response to the petition or addressed in this ruling, will be addressed in the summary and assessment of public comments issued in this proceeding.

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, and to decide any pending motions.⁶⁴² The Town, the County, and GFL filed petitions seeking full-party status or, in the alternative, amicus status. Pursuant to 16 NYCRR 1100-8.4(f)(1)(ii), entitlement to full-party status at any adjudicatory hearing held is based upon "[a] finding that the petition has raised a substantive and significant issue or that the petition can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party." We have concluded that the County, joined by GFL, raised a meritorious legal issue regarding the applicability of the County's Cumulative Impacts Law as a substantive local law with which the facility must comply. Accordingly, the County's and GFL's petitions for party status are granted in part. Neither party otherwise raised a substantive and significant issue regarding

⁶⁴² See 16 NYCRR 1100-8.3(b)(5)(i), (iv).

the facility's compliance with the County law, nor raised a substantive and significant issue with respect to the remaining issues proposed for adjudication. Accordingly, the County's and GFL's petitions are otherwise denied.

The Town has not raised any substantive and significant issues requiring adjudication and, therefore, its petition for full-party status is denied. Inasmuch as there are no outstanding legal issues, petitioners' alternative requests for amicus status are denied.⁶⁴³ Finally, as determined above, the joint motion by the Town, County, and GFL to dismiss the application is moot and is also denied.

VII. CONCLUSION AND ORDER OF DISPOSITION

We hold that no substantive and significant fact issues are joined for adjudication in this proceeding. Therefore, an adjudicatory hearing in this matter is not necessary. Further, 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

⁶⁴³ See 16 NYCRR 1100-8.4(c)(3)(i).

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.

Accordingly, pursuant to 16 NYCRR 1100-8.3(c)(5), further proceedings in this matter are canceled. ORES staff is hereby directed to submit to the undersigned a final written summary and assessment of public comments received during the public comment period on or before close of business October 8, 2025. Once the summary and assessment of public comments is submitted, the undersigned will forward the draft siting permit modified consistent with this ruling to the Executive Director for execution as the final siting permit.

(SIGNED)

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Dated: October 8, 2025
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