

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 17-F-0598 - Application of North Side Energy Center, LLC
for a Certificate of Environmental
Compatibility and Public Need Pursuant to
Article 10 of the Public Service Law for
Construction of a Solar Electric Generating
Facility Located in the Towns of Massena,
Brasher, and Norfolk, St. Lawrence County

ORDER DENYING CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

Issued and Effective: August 9, 2022

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York
State Board on Electric
Generation Siting and the
Environment held in the City of
Albany on August 9, 2022

BOARD MEMBERS PRESENT:

Tammy Mitchell, Alternate for
Rory Christian, Chair of the
New York State Public Service Commission

Louis Alexander, Alternate for
Basil Seggos, Commissioner,
New York State Department of Environmental Conservation

Elizabeth Lewis-Michl, Alternate for
Mary T. Bassett, M.D., M.P.H., Commissioner,
New York State Department of Health

Vincent Ravaschiere, Alternate for
Hope Knight, President, CEO and Commissioner,
New York State Empire State Development

John Williams, Alternate for
Richard L. Kauffman, Chair,
New York State Energy Research and Development Authority

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(Issued and Effective August 9, 2022)

BY THE SITING BOARD:

I. INTRODUCTION

In this Order, we deny the Application for a Certificate of Environmental Compatibility and Public Need (Certificate) by North Side Energy Center, LLC (North Side or the Applicant) pursuant to Public Service Law (PSL) Article 10 for construction and operation of a solar electric generating facility in the Towns of Massena, Brasher, and Norfolk (Towns), St. Lawrence County (the Project or Facility). Based on the record, we cannot make the requisite findings under PSL §168 that would allow the Certificate to be granted. We therefore deny the Application because: (1) the adverse environmental impacts associated with construction and operation of the Project, specifically impacts to wetlands and threatened and endangered species, have not been minimized or avoided to the maximum extent practicable; (2) the Project's compliance with applicable State environmental laws related to wetlands and threatened and endangered species has not been demonstrated; and (3) the Project has not been shown to be in the public interest.

Our decision is supported by the extensive evidentiary record of this proceeding, including North Side's Application, the testimony and exhibits filed by the parties, as well as the partial settlement proposal and the exceptions to that proposal asserted by Department of Public Service Trial Staff (DPS Staff) and the Department of Environmental Conservation Staff (DEC Staff) related to proposed Certificate Conditions governing, wetlands, streams, threatened and endangered species, and related issues. We also base our decision on the initial and reply briefs filed by the parties, the public comments received, and applicable laws, regulations, prior administrative and judicial decisions, and policies.

Given our determination that the record does not support issuance of a Certificate, this Order addresses only those issues in dispute among the parties, which involve terrestrial ecology, including wetlands, threatened and endangered species, North Side's burden of proof, and the Siting Board's required findings under PSL §168(3), as those findings are refined by the factors set forth in PSL §168(4). Considering the evidence in the record related to these issues, we find it unnecessary to review other aspects of the Project that may demonstrate compliance with Article 10's other requirements because the Certificate can only issue if the Siting Board can find that the proposed Project will comply with all of the requirements set forth in PSL §168.

Since Article 10's enactment, the Siting Board has approved a total of seventeen renewable energy generation projects with certificate conditions that are designed to protect the State's environmental resources, to address public health and safety concerns, and to foster the State's energy policies. In this instance, however, we are unable to approve this Project because of its unmitigated and unavoidable adverse impacts to the State's environmental resources and the inability to make all of the requisite findings under PSL §168(3) based on this record.

II. BACKGROUND

A. Project Description

On February 19, 2021, North Side, a wholly-owned indirect subsidiary of NextEra Energy Resources, LLC (NextEra), submitted an Application to construct a major solar electric generating facility (the Facility or Project) pursuant to PSL

Article 10.¹ The Project as proposed would generate up to 180 megawatts (MWs) of solar energy and would consist of commercial-scale solar arrays in a tracker racking system of approximately 8 to 13 feet, but as much as 18 feet, in height.² The Project also includes inverters and other components; approximately 7 miles of access roads with widths between 12 and 20 feet; parking, materials and equipment laydown, and construction staging areas; approximately 33 miles of buried and overhead electric collection lines; a collection substation covering approximately 2.2 acres of currently forested land; electrical point of interconnection facilities; an adjacent 230 kilovolt (kV) switchyard; transmission lines; and chain-link fencing seven feet in height around the entire Project.³ The interconnection facilities would connect the solar Project to the Massena-Moses 230 kV transmission line owned and operated by the New York Power Authority (NYPA) through the existing Massena substation. The Project's switchyard and transmission lines would be transferred to NYPA upon the Project's completion.

The Project consists of approximately 2,235 acres of land leased by North Side (Project Area). The Project Area is

¹ NextEra is in turn a wholly owned subsidiary of NextEra Energy, Inc., a publicly traded company on the New York Stock Exchange whose main subsidiaries are Florida Power and Light and Gulf Power Company. Hearing Exhibit 30 (Application Exhibit 1), p. 6.

² Hearing Exhibit 31 (Application Exhibit 2), pp. 2-3. North Side's applications claims that it is "impossible to determine the specifics" of the solar panels that will be used for the Project, including their height. Although the Application uses a maximum solar panel height of 13-feet in the Visual Impact Analysis and in other associated Application materials, North Side notes the potential for solar panels of 18 feet in height. Hearing Exhibit 55 (Application Exhibit 24, Visual Impact Analysis), pp. 2.

³ Hearing Exhibit 31 (Application Exhibit 2), pp. 2-4.

sited in rural areas in each of the three Towns, which is comprised of agricultural and forested land and includes 37 regulated wetlands and 11 regulated streams. The wetlands total 1,504 acres, or 67 percent (more than two-thirds) of the Project Area.⁴ The Project components are proposed to be located throughout the Project Area.

North Side would own and operate the solar facility under a long-term agreement with the New York State Energy Research and Development Authority (NYSERDA) for Renewable Energy Credits (RECs).⁵

B. Project Application

Prior to submitting its Application, North Side undertook resource-specific impact studies within two miles of the Project Area's boundaries, also known as the Project Study Area.⁶ North Side's Application describes the Project's impacts

⁴ Hearing Exhibit 161 (Application Exhibit 22, Appendix 22-5 Part 1: Wetlands & Streams Delineation), pp. 18-19.

⁵ Hearing Exhibit 31 (Application Exhibit 2), p. 2. North Side submitted a successful proposal in response to NYSERDA's 2019 Renewable Energy Standard Solicitation Request for Proposals (RESRFP 19-1) for the purchase of large-scale renewable energy. North Side asserts that it is contractually obligated to commence commercial operations by November 30, 2023. Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9), p. 13. The contract to which North Side refers is not a part of the record of this proceeding.

⁶ See 16 NYCRR §1000.2(ar) (defining "Study Area" to include the area related to the proposed facility site and setting, which for large facilities with components spread across rural areas "shall generally include the area within a radius of at least five miles from all generating facility components, interconnections, and related facilities;" and for facilities in areas with significant resource concerns, the size of a study area shall be configured to address specific features or resource issues).

on wetlands, water bodies, and threatened and endangered species, among other things.

1. Impacts to Freshwater Wetlands

North Side and its consultants conducted wetland and stream delineation surveys.⁷ The results of these surveys were included in North Side's October 2020 Wetland and Stream Delineation Report (2020 Delineation Report).⁸

On November 17, 2020, and November 18, 2020, North Side and DEC Staff conducted field visits of the Project Area to review the wetlands and streams delineation in the Project Area.⁹ In a February 4, 2021 letter following the field visits, DEC Staff included its Preliminary Wetlands Assessment and noted that it was providing "an early indication of potential issues" associated with the identified wetlands in North Side's 2020 Delineation Report.¹⁰ DEC Staff's letter indicated that "additional acreage of Article 24 jurisdictional freshwater wetlands and associated adjacent areas located within the Project area boundaries" have been identified beyond the protected wetlands described by North Side in its 2020 Delineation Report.¹¹ DEC Staff's letter also noted that wetlands contiguous to and hydrologically connected with State-mapped wetlands in the Project Area "must be considered in the

⁷ Hearing Exhibit 31 (Application Exhibit 2), p. 15.

⁸ Hearing Exhibits 161-163 (Application Exhibit 22, Appendix 22-5), Figure 4 (Maps).

⁹ Hearing Exhibit 295 (North Side Rebuttal Panel), p. 20.

¹⁰ Hearing Exhibit 237 (DEC Wetlands & Streams Panel Exhibit BW-5).

¹¹ Hearing Exhibit 237 (DEC Wetlands & Streams Panel Exhibit BW-5).

Article 10 process.”¹² DEC Staff further indicated that it calculated impacts to approximately 573 acres of wetlands, which was “substantially higher” than the Applicant’s estimate.

In its Preliminary Wetlands Assessment letter, DEC Staff stated that North Side must demonstrate the Project’s compliance with the requirements of ECL Article 24 and the implementing wetlands regulations; must first minimize and avoid impacts to regulated wetlands and adjacent areas before proposing mitigation; must justify and explain in its Application all unavoidable impacts; and must mitigate the unavoidable impacts. DEC Staff concluded that the apparent extent of the Project’s impacts to regulated wetlands and adjacent areas is “substantial” and mitigation of such impacts “would be substantial.”¹³ DEC Staff urged North Side to continue discussions regarding the Project’s wetland impacts and revise its Application prior to filing it with the Siting Board. DEC Staff included with its letter a map depicting its preliminary assessment of the location of regulated wetlands and the Project’s potential impacts.¹⁴

In disregard of DEC Staff’s Preliminary Wetlands Assessment, North Side filed its Application on February 19, 2021, which indicates that no Project components would be located in “State mapped regulated wetlands” and estimated that 7.33 acres of wetlands would be permanently

¹² Hearing Exhibit 237 (DEC Wetlands & Streams Panel Exhibit BW-5), p. 2. In its letter, DEC Staff noted the need to revisit the Project Area in 2021 because the initial visit was outside of the “growing season.”

¹³ Hearing Exhibit 237 (DEC Wetlands & Streams Panel Exhibit BW-5), p. 2.

¹⁴ Hearing Exhibit 237 (DEC Wetlands & Streams Panel Exhibit BW-5), DEC Preliminary Wetlands Assessment Attachment: Project Wetlands Map.

impacted by the Project.¹⁵ Application Exhibit 22 (Terrestrial Ecology and Wetlands) states that "there are no direct impacts to State-mapped wetlands" and that no Project components other than fencing would be located within the 100 foot areas adjacent to mapped wetlands.¹⁶

North Side's Application (Exhibit 22) indicates that impacts have been minimized or avoided to the maximum extent practicable but only insofar as "[t]here are no direct impacts to State-mapped wetlands."¹⁷ It notes that impacts to unmapped wetlands would be subject to "best management practices" and did not propose compensatory mitigation.¹⁸ North Side's Application distinguishes between wetlands that have been "mapped" by DEC and those that are "unmapped" or "non-mapped." While acknowledging that Project components would cross, or be located within or adjacent to, unmapped wetlands and certain on-site streams, Application Exhibit 22 asserts that such unmapped wetlands are not subject to Article 24 protection or mitigation.¹⁹ The Application indicates that historically parts of the Project Area have been used for logging and agricultural purposes and asserts that post-Project construction reseeding

¹⁵ Hearing Exhibit 31 (Application Exhibit 2), p. 15.

¹⁶ Hearing Exhibit 52 (Application Exhibit 22), pp. 1-4. North Side's initial Application showed that 33 of 58 Project inverters were located in delineated wetlands, which were later reduced to 18 inverters. Hearing Exhibits 218-219 (October 18, 2021 Application Update, Exhibit 22), p. 101.

¹⁷ Hearing Exhibit 31 (Application Exhibit 2), p. 21; Hearing Exhibit 52 (Application Exhibit 22), pp. 2-4.

¹⁸ Hearing Exhibit 52 (Application Exhibit 22), p. 73.

¹⁹ Hearing Exhibit 52 (Application Exhibit 22), pp. 68-74, 83-85; Table 22-12 (showing impacts on unmapped wetlands); Hearing Exhibit 101 (Figure 22-5) (showing only mapped wetlands in the Project Area).

may reestablish native wetland vegetation.²⁰ Application Exhibit 22 concludes that “there may remain unavoidable impacts” to wetlands as a result of the Project.”²¹

On May 19, 2021, North Side, DEC Staff, DPS Staff, and representatives of the United States Army Corps of Engineers conducted an on-site field verification of the Project’s wetlands and adjacent areas.²² On May 27, 2021, North Side filed a revision to Application Exhibit 22, which included a map of the Project showing all wetlands and adjacent areas. On July 2, 2021, North Side filed a revised wetlands delineation showing both mapped and unmapped wetlands, streams, and the location of Project components (solar arrays, collection lines, fencing, access roads, etc.) throughout the Project Area.²³

On October 8, 2021, North Side filed another revision to Application Exhibit 22. The overall Project layout remained the same.²⁴ This revision of Application Exhibit 22 notes that the Project will result in “necessary” wetlands impacts “to achieve the Applicant’s goal of a 180 MW renewable energy generating project,” and that the “solar use of the wetlands constitutes a functional ecosystem improvement” over agricultural or logging uses.²⁵

²⁰ Hearing Exhibit 52 (Application Exhibit 22), pp. 2-4, 73, 83, 99.

²¹ Hearing Exhibit 218 (Application Exhibit 22), p. 106.

²² Hearing Exhibit 200 (May 27, 2021 Supplement to Application), p. 16.

²³ Hearing Exhibit 213 (Application Exhibit 22, Updated Figure 22-3A).

²⁴ Hearing Exhibit 218 (October 8, 2021 Application Exhibit 22 Update), p. 100.

²⁵ Hearing Exhibit 218 (Application Exhibit 22 Update), p. 104.

2. Impacts to Threatened and Endangered Species

With respect to threatened and endangered avian species, the Application states that several have been documented in the Project Area, including bald and golden eagles, Northern Harrier, sedge wren, short-eared owl, and upland sandpiper, with "unavoidable adverse impacts to habitat" expected to four of the species.²⁶ With respect to the impacts on these species, North Side's Application stated that "some impacts will occur as a result of this Project," including "adverse habitat modification."²⁷ North Side included in Application Exhibit 22 Breeding Bird and Wintering Raptor Survey Reports that were designed to determine the presence and use of the Project Area by threatened and endangered grassland and raptor bird species.²⁸ The Survey Reports confirmed that multiple threatened and endangered species were observed in multiple locations in the Project Area, with nearly 900 acres of potential habitat.

Application Exhibit 22 includes a "preliminary" Net Conservation Benefit Plan (NCBP) that addresses the Project's impacts to grassland birds and winter raptors and indicates that habitat modification could not be avoided and that impacts to agricultural areas, which constitute the majority of habitat available for grassland birds, are unavoidable.²⁹ The NCBP further provides that avoiding impacts to grassland bird habitat during the nesting season or to raptor habitat during the over-

²⁶ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 108-109.

²⁷ Hearing Exhibit 31 (Application Exhibit 2), p. 16.

²⁸ Hearing Exhibits 156-159 (Application Exhibit 22, Appendices 22-2 and 22-3).

²⁹ Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9), p. 13.

wintering period is "not feasible."³⁰ The NCBP proposes to rely on an Environmental Monitor during construction and, if protected species are discovered and confirmed or observed displaying roosting or breeding behavior within 500 feet of the Project area, DPS Staff and DEC Staff would be notified within 24 hours and the area posted and avoided until further activities are authorized by DEC Staff, which authorization may not be unreasonably withheld, conditioned or delayed.³¹ The NCBP estimates that the Project would adversely impact approximately 175.6 acres of grassland bird habitat.³²

The NCBP did not propose on-site mitigation to address the threatened and endangered avian species and habitat impacts resulting from the Project ("the Applicant is unable to provide suitable and sufficient areas for on-site mitigation").³³ Instead, it proposes to later negotiate off-site mitigation, to pay a one-time "mitigation fee," or to provide off-site mitigation for four of the protected species as follows: for every one acre of occupied breeding habitat adversely impacted, North Side would implement mitigation of 0.4 acres; and for every one acre of occupied wintering habitat adversely impacted, mitigation of 0.2 acres would be implemented.³⁴

With respect to threatened and endangered reptiles and amphibians, North Side's Application Exhibit 22 confirms the

³⁰ Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9), p. 13.

³¹ Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9), pp. 13-14.

³² Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9), pp. 15-16.

³³ Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9, NCBP), pp. 15-16.

³⁴ Hearing Exhibit 167 (Application Exhibit 22, Appendix 22-9, NCBP), pp. 15-16.

presence of the Blanding's Turtle in the Project Area and notes that 1,504.49 acres of wetlands and streams within the Project Area may provide habitat for reptiles and amphibians, including the threatened Blanding's Turtle.³⁵ North Side also identifies known occupied habitat and states that construction activities "may result in a reduction of available habitat."³⁶ Application Exhibit 22 notes that approximately 47 acres of Blanding's Turtle wetlands habitat would be converted by the Project's construction disturbances, with an additional 13.5 acres of forested wetland and open water habitat impacted.³⁷ It also notes that construction of the Project will result in the reduction of available habitat and that mortality events during construction activities within the Project Area are expected, but nevertheless notes that impacts on the Blanding's Turtle are "expected to be negligible."³⁸ Nevertheless, Application Exhibit 22 notes that the taking of State and Federally listed species (including the protected Blanding's Turtle and the identified avian species) "will not be caused by the construction and operation of the Project."³⁹

The Application proposes further studies to determine the presence and site use of the Project Area by the Blanding's

³⁵ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 49-50, 103; Hearing Exhibit 52 (Application Exhibit 22), pp. 28, 32-33, 49-50; Hearing Exhibit 167 (Appendix 22-9, NCBP), p. 15-16; Hearing Exhibit 102 (Figure 22-6, Blanding's Turtle Habitat); Hearing Exhibit 155 (Appendix 22-1, Plant and Wildlife Inventory).

³⁶ Hearing Exhibit 218 (Application Exhibit 22 Update), p. 50.

³⁷ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 49-50, 103; Hearing Exhibit 155 (Appendix 22-1, Plant and Wildlife Inventory).

³⁸ Hearing Exhibit 218 (Application Exhibit 22 Update), p. 50.

³⁹ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 65-66.

Turtle and generally discusses minimization and avoidance measures such as temporary barriers (exclusion fencing), Blanding's Turtle monitors onsite, signage, trap/road hazard protection, educational pamphlets for onsite staff, and/or contractor turtle training.

3. Compliance with State Laws and Regulations

North Side's Application asserts that the Project will comply with all substantive requirements of State laws and regulations.⁴⁰ Application Exhibit 32 lists the substantive requirements of State laws and regulations applicable to the Project and states that North Side "anticipates to fully comply." The listed State laws include water quality certification (6 NYCRR Part 608); historic preservation consultation (9 NYCRR Part 428); standards for construction runoff (6 NYCRR Part 750-1.11); special hauling standards (Vehicle and Traffic Law §385); use/occupancy of highway right of way (17 NYCRR Part 131); highway work permit (Highway Law §52.⁴¹ ECL Article 11 (threatened and endangered species) and ECL Article 24 (wetlands) are not listed among the State laws that are applicable to the Project, and North Side's Application does not expressly state that the Project will comply with those substantive requirements.⁴²

⁴⁰ Hearing Exhibit 31 (Application Exhibit 2), p. 22. The Application also indicates that the Project will comply with the requirements of local laws and regulations, except for eight substantive requirements under the Towns' laws for which North Side requests a finding that they are unduly burdensome. Hearing Exhibits 31 (Application Exhibit 2), p. 22; Hearing Exhibit 63 (Application Exhibit 31). Considering our denial of the Certificate, there is no need to reach this issue.

⁴¹ Hearing Exhibit 64 (Application Exhibit 32), Tables 32-2.

⁴² Hearing Exhibit 64 (Application Exhibit 32), pp. 3-4.

C. Parties to the Proceeding

The signatory parties to the settlement that resolves some, but importantly not all, of the issues in this proceeding include North Side, DPS Staff, DEC Staff, the Department of Agriculture and Markets (DAM Staff), the Towns of Brasher, Massena, and Norfolk, and the County of St. Lawrence. Additional parties to the proceeding include the Department of Health, Friends Against Rural Mismanagement (FARM), the New York State Laborers' Organizing Fund, the North Atlantic States Regional Council of Carpenters, and individuals Kathleen Hyde and Linda Roger.⁴³

D. Procedural Background

On September 25, 2017, North Side filed a Public Involvement Program Plan (PIP Plan) and expressed an intention to file its Application for a Certificate pursuant to PSL Article 10.⁴⁴ On June 5, 2020, North Side filed a Preliminary Scoping Statement (PSS), generally describing the Project and caused notice of the PSS filing to be published in the following newspapers:

- Daily-Courier-Observer (a paid-subscription, daily newspaper for the area that includes the host Towns);
- North Country This Week, Potsdam-Canton Edition (a free-subscription newspaper covering part of the Project Area);
- North Country This Week, Massena-Ogdensburg Edition (a free-subscription newspaper covering part of the Project Area);

⁴³ These additional parties did not sign the settlement package or submit testimony or opposition to the settlement and otherwise have not actively participated in the proceeding.

⁴⁴ North Side filed a revised PIP Plan on November 24, 2017. Hearing Exhibit 1, pp. 3-4. Throughout the Application process, North Side has filed updates to its PIP meeting log on a regular basis.

- Watertown Daily Times (a daily newspaper circulated in the Project Area).⁴⁵

In addition, North Side served the Stakeholder List with notice of the PSS filing, identifying the deadline for public comments, and made it available on the Project website and at numerous local repositories, including each of the Town Halls and public libraries where the Facility would be located.⁴⁶ On June 23, 2020, the Secretary to the Siting Board (Secretary) issued a notice of the PSS filing and set a July 9, 2020 deadline for submitting comments. DPS Staff, DEC Staff, and DAM Staff each submitted comments on the PSS. On July 30, 2020, North Side filed responses to the agencies' comments.

In filing the PSS, North Side also established pre-application intervenor funding totaling \$63,000 pursuant to PSL §163(4). On June 23, 2020, the Secretary issued a notice of availability of pre-application intervenor funds and set a deadline for local municipalities and other interested parties to request funding.⁴⁷ The three Towns collectively applied for pre-application intervenor funding. In an August 5, 2020 ruling, the Examiners awarded the Towns \$61,500 in pre-

⁴⁵ Hearing Exhibits 4-5 (PSS, Affidavit of Service of PSS).

⁴⁶ Hearing Exhibit 5 (Affidavit of Service of PSS). See 6 NYCRR §1000.5 (pre-application procedures and requirements).

⁴⁷ Notice of Availability of Pre-Application Stage Intervenor Funds and Schedule to Request Funds (issued June 23, 2020).

application intervenor funds⁴⁸ and initiated the stipulations process.⁴⁹

On December 9, 2020, North Side filed and circulated to the parties proposed stipulations designed to define the scope and methodologies of the studies to be conducted related to the Article 10 Application. North Side also arranged for publication of a notice of the proposed stipulations in area newspapers. On December 9, 2020, the Secretary issued a notice seeking public comments on North Side's proposed stipulations.⁵⁰ On December 21, 2020, the St. Lawrence County Planning Office filed comments in response to the proposed stipulations. The agency parties also submitted comments and on February 10, 2021, North Side filed revised stipulations. Thereafter, DPS Staff, DEC Staff, DAM Staff, and the Towns executed the agreed-upon stipulations regarding the scope and methodologies of the studies.

In a February 4, 2021 letter, DEC Staff provided North Side with its preliminary assessment of wetlands in the Project Area, which included the results of its November 17 and November 18, 2020 site visits to the Project Area and the review of North Side's Wetlands Delineation Report, State wetlands maps, National Wetlands Inventory maps, Geographic Information

⁴⁸ Ruling Awarding Pre-Application Stage Intervenor Funds and Commencing the Stipulations Process (issued August 5, 2020). The Ruling was re-issued on August 6, 2020, to correct certain typographical errors.

⁴⁹ See 16 NYCRR §1000.5(j). The stipulations process in Article 10 proceedings is for the purpose of reaching an agreement on the methodology and scope of any studies to be undertaken by the applicant in support of the application.

⁵⁰ Notice Inviting Comments on Proposed Stipulations (issued December 9, 2020).

System shapefiles, and aerial images.⁵¹ DEC Staff advised North Side that, due to the timing of the visits outside the growing season, additional site visits would need to be performed during the 2021 growing season and recited the requirement to demonstrate in its Application that it had first avoided and minimized impacts to wetlands protected under ECL Article 24 before mitigation of unavoidable impacts would be considered.⁵² DEC Staff noted that "it is important to continue discussion on this matter prior to an Application being submitted."⁵³

On February 19, 2021, North Side filed its formal Application consisting of numerous exhibits, figures, maps and appendices, along with the required check for \$180,000 in application-stage intervenor funding.⁵⁴ On March 4, 2021, the Secretary issued a notice of availability of intervenor funding for the Project's Application stage.⁵⁵ Thereafter, the Towns and St. Lawrence County collectively requested funding. On April 29, 2021, the Examiners issued a ruling awarding application-stage funding of \$175,000 to the Towns and the County and granting each party status. In the ruling, the Examiners also granted party status to FARM, individual Kathleen J. Hyde, and the North Atlantic Regional Council of Carpenters.

⁵¹ Hearing Exhibit 237 (DEC Wetlands & Streams Panel, Exhibit NYSDEC-BW-5).

⁵² Hearing Exhibit 237 (DEC Wetlands & Streams Panel, Exhibit NYSDEC-BW-5), p. 2.

⁵³ Hearing Exhibit 237 (DEC Wetlands & Streams Panel, Exhibit NYSDEC-BW-5), p. 3.

⁵⁴ On February 24, 2021, North Side filed an affidavit of publication of the notice of the application and on March 4, 2021, filed an affidavit of service of the application on the appropriate persons and entities required to receive it under PSL Article 10. Hearing Exhibits 195-196.

⁵⁵ Notice of Availability of Application Phase Intervenor Funds and Schedule to Request Funds (issued March 4, 2021).

In an April 20, 2021 letter, the Siting Board Chair determined that North Side's Application did not comply with the requirements of PSL Article 10 and identified numerous areas in which the Application should be supplemented.⁵⁶ Responding to the Chair's determination, North Side filed supplemental Application materials on May 27, 2021, including an update to Application Exhibit 22, revised maps and figures for Project component layout, design, and location, delineated wetlands, vernal pool survey, and Blanding's Turtle survey, among other things.⁵⁷ On July 2, 2021, North Side filed further revised Application materials, including wetlands delineation maps and figures showing the relational location of Project components within wetlands in the Project Area.⁵⁸

In a July 9, 2021 letter, the Siting Board Chair determined that the February 19, 2021 Application and the supplemental Application filings of May 27, 2021, and July 2, 2021, complied with PSL §164 for purposes of commencing the Siting Board's review and determination within the twelve-month statutory time frame.⁵⁹ On July 23, 2021, North Side filed a Notice of Impending Settlement Negotiations⁶⁰ pursuant to 16 NYCRR §3.9 and the parties thereafter commenced settlement discussions.

On August 19, 2021, the Examiners held a status conference with the parties to discuss a procedural schedule for

⁵⁶ Hearing Exhibit 198 (Application Deficiency Letter).

⁵⁷ Hearing Exhibits 200-211 (May 27, 2021 Application Supplement).

⁵⁸ Hearing Exhibit 213 (Updated Application Exhibit 22, Figure 22-3A).

⁵⁹ Hearing Exhibit 214 (Application Compliance Letter). The statutory time frame ends on or about July 9, 2022.

⁶⁰ Hearing Exhibit 216 (Notice of Impending Settlement Negotiations).

the proceeding and to determine whether settlement discussions would continue. On August 23, 2021, the Examiners issued a ruling adopting a protective order, which set forth the procedures for information claimed to be confidential.⁶¹

On September 3, 2021, the Examiners issued a ruling establishing a procedural schedule, which set the dates for filing final Application updates and corrections, direct and rebuttal testimony, and pre- and post-hearing briefs.⁶² The ruling also set January 24, 2022, as the date for commencement of the evidentiary hearing. The ruling expressly noted that the parties were not precluded from seeking to adjourn the procedural schedule in favor of continuing the then-ongoing settlement negotiations, but that any such adjournment must be accompanied by North Side's agreement to extend the 12-month statutory time frame for Siting Board action on the Application pursuant to PSL §165(4).⁶³

On October 8, 2021, North Side filed updated and revised Application Exhibit 22 related to Terrestrial Ecology and Wetlands, which for the first time included a map depicting the "Forested Wetland Areas Avoided by the Project."⁶⁴ These

⁶¹ Ruling Adopting Protective Order (issued August 23, 2021).

⁶² Ruling Establishing Procedural Schedule (issued September 3, 2021), p. 3, n. 2. The ruling specifically prohibited North Side from filing additional updated or corrected Application materials after the October 8, 2021 deadline established in the ruling without seeking leave from the Examiners.

⁶³ Ruling Establishing Procedural Schedule, p. 3, n. 2; p. 4.

⁶⁴ Hearing Exhibits 218-219 (Application Exhibit 22 Update). In revised Application Exhibit 22, North Side deleted certain language related to judicial precedent and agency practice on wetlands issues (p. 71) and added language identifying the Project's impacts to forested wetlands and the protected Blanding's Turtle habitat (pp. 98-105).

forested wetland areas had not been previously identified in the Application.⁶⁵

On November 18, 2021, North Side filed a Settlement Proposal, consisting of proposed Certificate Conditions, a proposed Site Environmental and Engineering Plan Guide (SEEP Guide), and a Noise Complaint Resolution Protocol (Noise Protocol) (collectively, the November Settlement Proposal), but unaccompanied by any party's signature page.⁶⁶ Between November 19, 2021, and January 5, 2022, the parties filed executed signature pages, agreeing to all or only parts of the November Settlement Proposal.⁶⁷ DPS Staff's signature page expressly excluded numerous Certificate Conditions and SEEP Guide provisions to which it did not agree that are related to wetlands, water bodies and stream crossings, threatened and endangered species, the environmental monitor, exclusionary fencing, invasive species, vegetation management, and other

⁶⁵ Hearing Exhibit 218 (Application Exhibit 22 Update), p. 100 (A/M Figure 1); DPS Initial Brief, pp. 15-16, 18.

⁶⁶ Hearing Exhibits 220-222 (Proposed Certificate Conditions, SEEP Guide, and Noise Protocol).

⁶⁷ Hearing Exhibits 223-225 (DPS, Town of Brasher and DAM Signature Pages); 275-276 (Towns of Massena and Norfolk, St. Lawrence County Signature Pages). On November 19, 2022, DPS Staff, DAM Staff, and the Town of Brasher each filed executed signature pages to the November Settlement Proposal. On December 21, 2021, the Towns of Massena and Norfolk filed executed signature pages and on January 5, 2022, St. Lawrence County filed its signature page.

related issues.⁶⁸ DEC Staff did not agree to any aspect of the November Settlement Proposal at that time and did not submit an executed signature page.

On November 19, 2021, DPS Staff filed testimony and exhibits, which addressed contested issues related to the Project's environmental impacts to wetlands, water bodies, and threatened and endangered species, and which discussed the policy implications of the Project if approved as proposed.⁶⁹ On November 19 and November 23, 2021, DEC Staff filed testimony and exhibits, which similarly addressed issues related to the Project's impacts on wetlands, water bodies, and threatened and endangered species.⁷⁰

On December 17, 2021, North Side filed rebuttal testimony and exhibits.⁷¹ At that time, North Side testified that 100 acres of forested wetlands had been removed from the Project layout, but that the change had not reduced the proposed facility's 180 MW generation capacity.

⁶⁸ Hearing Exhibit 223. In its signature page, DPS Staff indicated that it was contesting proposed Certificate Conditions 69-70, 72, 78, 80, 88, 99-127, 131-132, 139-140; and Proposed SEEP Guide Sections B.16.a, B.17.a - B.17.e, B.17.g, and B.17.j., which dealt with the impacts of construction activities on wetlands, water bodies and stream crossings and threatened and endangered species; and govern the environmental monitor, vegetation management, invasive species, exclusionary fencing, and other associated issues.

⁶⁹ Hearing Exhibit 291 (DPS Policy Panel).

⁷⁰ Hearing Exhibit 294 (DEC Wetlands & Streams Panel); and Hearing Exhibit 293 (DEC Threatened and Endangered Species Panel).

⁷¹ Hearing Exhibits 269-274 (North Side Rebuttal Panel Testimony and Exhibits, including U.S. Army Corps of Engineers Preliminary Jurisdictional Determination; Mitigation Estimate Table; Proposed Wetlands Legislative Bills and Statements in Support; DEC Discovery Response to IR-1; and proposed revisions to Certificate Conditions).

On January 7, 2022, a second status conference was held to discuss the issues that would be subject to adjudication in the January 24, 2022 evidentiary hearing and to determine whether additional settlement discussions could resolve any remaining issues in dispute.

On January 14, 2022, the Examiners held a third status conference for the purpose of discussing the evidentiary hearing, pre-hearing submissions, and related matters. At that time, counsel for North Side, DPS Staff, DEC Staff, and all other parties waived cross-examination of any witnesses. North Side and DEC Staff indicated that the remaining disputed wetlands and related issues between them were legal rather than factual and could be decided without an evidentiary hearing. DPS Staff and the other parties agreed that the evidentiary hearing was unnecessary. In a January 27, 2022 ruling, the Examiners recited the parties' waiver of both cross examination and the evidentiary hearing and revised the procedural schedule, establishing new deadlines for filing initial and reply briefs.⁷²

After circulating several documents to the parties and the Examiners for admission to the evidentiary hearing record, including discovery responses, proposed legislative bills related to ECL Article 24 amendments, and associated memoranda, on January 18, January 19, and January 26, 2022, North Side filed the documents in DMM not accompanied by a motion or affidavit seeking their admission. At the instruction of the Examiners, on January 26, 2022, North Side filed an affidavit of Project Manager, William Boer, which asserted that the documents were relevant and should be admitted to the evidentiary hearing record.

⁷² Ruling Revising Briefing Schedule (issued January 27, 2022).

In a February 10, 2022 ruling, the Examiners admitted certain documents to the record related to relevant discovery responses in the proceeding, but rejected admission of the proposed legislative bills related to ECL Article 24 amendments and associated memoranda submitted in support by organizations who were not parties to the proceeding. The Examiners found that the legislative bills were only proposed ECL Article 24 amendments or a part of the Governor's proposed budget, they were not final and therefore not relevant to the proceeding because they did not reflect an actual change in law.⁷³ The Examiners also found that because the associated memoranda in support of the proposed legislation reflected positions of parties not involved in North Side's Article 10 proceeding, they would not inform the Siting Board's decision. The Examiners found, however, that the proposed bills and associated memoranda were publicly available documents and therefore were subject to official administrative notice in the proceeding. The Examiners critically questioned North Side's legal conclusion that the proposed legislative amendments define the meaning of the current wetlands law and prove the absence of Article 24's applicability to unmapped wetlands and left the issue of DEC's Article 24 authority to the Siting Board for determination here.⁷⁴

On January 21, 2022, North Side filed a "supplemental" settlement agreement to address the issues DPS Staff and DEC Staff had advanced in testimony associated with threatened and endangered (T&E) species (Supplemental T&E Settlement). The Supplemental T&E Settlement included revised

⁷³ Ruling Regarding Admission of Evidence to the Record (issued February 10, 2022), pp. 7-8.

⁷⁴ Ruling Regarding Admission of Evidence to the Record (issued February 10, 2022), p. 8.

Certificate Conditions and SEEP Guide provisions, along with DEC Staff's executed signature page, in which it continued to assert numerous exceptions to the Supplemental T&E Settlement.

Although the Supplemental T&E Settlement addressed certain DEC Staff concerns related to threatened and endangered species, it left unresolved several other issues, including those related to wetlands.⁷⁵ DEC Staff's signature page expressly notes that it was agreeing only to certain Certificate Conditions and SEEP Guide provisions related to threatened and endangered species and the preparation of a NCBP.⁷⁶

As part of the Supplemental T&E Settlement, DPS Staff continued to assert its previous objections to the Certificate Conditions and SEEP Guide provisions related to wetlands,

⁷⁵ In its initial filing of the Supplemental T&E Settlement, North Side did not provide a redline version of the revised Certificate Conditions and SEEP Guide or any executed signature pages in which the other parties agreed to the revisions to the prior settlement that had been reached. The Examiners directed that these deficiencies be corrected and on February 4, 2022, North Side filed a complete Supplemental T&E Settlement with the appropriately revised signature pages from all parties. Hearing Exhibit 288 (Supplemental T&E Settlement).

⁷⁶ Specifically, in the Supplemental T&E Settlement, DEC Staff agreed to Certificate Conditions 99-105 and SEEP Guide provision B.16.b, but continued to oppose Certificate Conditions 1, 9, 15, 20(f), 69-70, 72, 75, 106-125, and 127-140. Hearing Exhibit 288 (DEC Staff Signature Page).

threatened and endangered species, and other associated issues.⁷⁷ DEC Staff's signature page similarly notes its continuing objections to Certificate Conditions dealing with wetlands and several other related issues, while withdrawing its objections to those dealing with threatened and endangered species.⁷⁸ DAM Staff's signature page noted its conditional agreement to the revised Certificate Conditions in the Supplemental T&E Settlement proposal, indicating the right to withdraw that agreement if it was not included in consultations during the development of the required NCBP for threatened and endangered species.

The additional Certificate Conditions (99-a to 99-d) included in the Supplemental T&E Settlement proposal addressed only the preparation of a NCBP for threatened and endangered species and did not resolve the issues related to impacts to mapped and unmapped wetlands and adjacent areas and did not address the minimization and avoidance of such impacts to the

⁷⁷ See Certificate Conditions identified in n. 68, supra. As it had under the November Settlement Proposal, DPS Staff continued to object specifically to Certificate Conditions 69-70, 72, 78, 80, 88, 99-127, 131-132, and 139; and SEEP Guide provisions B.16.a and B.16.b and B.17.a-e and B.17.g-j), which are related to the impact of construction activities on wetlands, water bodies and stream crossings, and threatened and endangered species; and govern the environmental monitor, vegetation management, invasive species, exclusionary fencing, and other associated issues. Hearing Exhibit 288 (Supplemental T&E Settlement, DPS Staff signature page).

⁷⁸ Hearing Exhibit 288 (Supplemental T&E Settlement). DEC Staff continued to oppose Certificate Conditions 1 and 9 (Project authorization); 15 (avoidance, minimization, and mitigation measures); 20(f) (stop work order for environmental threats); 69-70 (stream crossing methods and final maps for wetlands, adjacent areas, and streams); 72 (stream crossing plan); 75 (invasive species management and control plan); 106-125 and 127-140 (wetlands, streams, vegetation, and invasive species).

maximum extent practicable or the required mitigation of unavoidable adverse impacts, as required under ECL Article 24 and PSL §168(3)(c). These additional Certificate Conditions also did not resolve DPS Staff's continuing objections to the Project's impacts to threatened and endangered species, wetlands, and other objections, and also did not resolve DEC Staff's remaining objections.

Thus, the objections of DPS Staff and DEC Staff to specific Certificate Conditions and SEEP Guide provisions involving wetlands and threatened and endangered species remain disputed issues for the Siting Board's determination. Consequently, this Order will address only the disputes related to wetlands and threatened and endangered species insofar as our decision to deny the Certificate turns on those grounds.

On February 18, 2022, North Side and the agency Parties filed initial briefs. On March 4, 2022, North Side, DPS Staff and DEC Staff filed reply briefs. On June 15, 2022, the Secretary issued a notice of the Siting Board's meeting scheduled for June 30, 2022. On June 27, 2022, North Side submitted a letter requesting postponement of the June 30, 2022 Siting Board meeting until no earlier than August 9, 2022, and agreed to waive the 12-month statutory deadline for the Siting Board's decision. On June 28, 2022, the Secretary issued a notice postponing the June 30, 2022 meeting. On July 22, 2022, the Secretary issued a notice of the Siting Board's meeting scheduled for August 9, 2022.

III. PUBLIC PARTICIPATION, NOTICE AND COMMENT

Article 10 requires an applicant to engage and educate the public about a proposed project and to otherwise foster

participation in the proceeding.⁷⁹ North Side's November 25, 2017 PIP Plan provided that it would identify and engage stakeholders, ensure their awareness of the Project, give convenient access to Project information, and gather specific information that could be used in the design objectives and studies for the Project.⁸⁰ Following receipt of DPS Staff's comments on the PIP Plan, North Side filed an update on November 24, 2017.⁸¹ After consultations with DPS Staff regarding the impact of the Covid-19 epidemic and New York's restrictions on public gatherings, North Side filed a Supplement to the PIP Plan (PIP Plan Supplement) on May 11, 2020.⁸²

Pursuant to the PIP Plan Supplement, North Side mailed Project information to a list of 4,270 stakeholders (Stakeholder List), including to host and adjacent property owners within the Project Study Area. The notice described the proposed Project and solicited public comments. In accordance with its PIP Plan Supplement, North Side thereafter conducted numerous conference calls and meetings with the Towns, State and local agencies, and the public, all of which are summarized in the PIP Meeting Logs filed with the Secretary.⁸³ North Side also established a web site with information about the Project and a toll-free telephone number to call for further information.⁸⁴

The Siting Board conducted its own public outreach regarding the Project. On October 4, 2021, the Secretary issued a Notice of Informational Forums and Public Statement Hearings

⁷⁹ PSL §§163(3), 164(2)(b); 16 NYCRR §1000.4.

⁸⁰ 16 NYCRR §1000.4.

⁸¹ Hearing Exhibit 1 (Revised PIP Plan).

⁸² Hearing Exhibit 3 (Supplement to PIP Plan).

⁸³ Hearing Exhibits 9, 11, 16, 197, 199, 215, and 217 (PIP Meeting Logs).

⁸⁴ www.northsideenergycenter.com.

scheduled for October 26, 2021.⁸⁵ On October 26, 2021, the Examiners held virtual afternoon and evening hearings. Several attendees, including area residents, farms and businesses provided statements in support of or in opposition to the Project. Both the afternoon and evening hearings were transcribed, and the transcripts were thereafter posted to the Document and Matter Management (DMM) system website maintained by Department of Public Service (Department).⁸⁶

Eight public comments were filed electronically in the Department's DMM system. The St. Lawrence Industrial Development Authority (IDA) expressed support for the Project based on economic development and job creation, reduction in carbon emissions, and generation of 180 MWs of renewable solar energy.⁸⁷ Certain commenters, who own land near the Project, expressed opposition and complained about the destruction of farmland and the adverse impacts on property values and wildlife.⁸⁸ At least one commenter complained that the Applicant had not contacted him even though he is a landowner of property directly adjacent to the Project.⁸⁹ The owner of a nearby radio station (WMSA AM) in Massena warned in a comment that the Applicant would be responsible for any control or voltage problems caused by the construction and operation of the Facility.⁹⁰

⁸⁵ DMM Item No. 75.

⁸⁶ DMM Item Nos. 89-90.

⁸⁷ November 1, 2021 Letter from Patrick J. Kelly, Chief Executive Officer, St. Lawrence Industrial Development Authority.

⁸⁸ October 27, 2021 Comment of Mark Durham; October 27, 2021 Comment of Gerry Derouchie; October 15, 2021 Comment of Christina Hamel.

⁸⁹ October 27, 2021 Comment of Gerry Derouchie.

⁹⁰ October 28, 2021 Comment of Stephens Media Group.

IV. STATUTORY AND REGULATORY FRAMEWORK

An Article 10 application must identify a project's expected environmental impacts during construction and operation and show that they have been minimized or avoided to the maximum extent practicable.⁹¹ In its determination, the Siting Board is required to identify the Project's environmental and other impacts and to find that such impacts will be minimized or avoided to the maximum extent practicable.⁹² The Siting Board also must find that the Project will comply with applicable substantive State and local laws and regulations and is in the public interest, and may not issue a certificate in the absence of those findings.⁹³

The Article 10 regulations require the application to (1) identify wildlife in the Project Area that may be impacted by a project, including all threatened and endangered species; and (2) delineate, based on on-site identification, the boundaries of all regulated wetlands within the given Project Area and within 100 feet of any areas that would be disturbed by construction.⁹⁴ In other words, the applicant must fully identify in the application and in the record as a whole the environmental and other impacts that will result from construction and operation of the proposed facility.

⁹¹ PSL §164(1)(b).

⁹² PSL §168(2), (3)(c).

⁹³ PSL §168(3)(e).

⁹⁴ 16 NYCRR §1001.22. See also Office of Renewable Energy Siting (ORES) regulation application requirements, 19 NYCRR §900.15 (a) - (e): application shall include "[a] map or series of maps showing jurisdictional boundaries of all federal, state and locally regulated wetlands and adjacent areas present on the facility site and within one hundred (100) feet of areas to be disturbed by construction, including the interconnections," as well as delineation surveys, analysis, and avoidance of impacts.

Among other things, the applicant is also required to show that the Project is designed to comply with applicable substantive requirements of State and local laws and regulations concerning, among other things, the environment.⁹⁵ In addition, the applicant is required to show that the proposed project is in the public interest.⁹⁶ The applicant has the burden of proof to demonstrate that the Siting Board can make all findings and determinations required by Article 10.⁹⁷

In considering an application, the Siting Board is required to consider several factors, including but not limited to, reasonable alternatives, environmental impacts, and any other social, economic, visual, aesthetic, environmental considerations. After considering these factors, the Siting Board "shall not grant a certificate" without making explicit findings regarding the nature of probable environmental impacts resulting from construction and operation of the facility, including impacts on: ecology, air, ground and surface water, wildlife and habitat; public health and safety; cultural, historic, and recreational resources, including aesthetic and scenic values; transportation, communication, utilities, and other infrastructure; and the cumulative impacts on related facilities.⁹⁸ Finally, Article 10 provides that the Siting Board "shall not grant a certificate" unless it finds that identified environmental and other impacts have been "minimized or avoided to the maximum extent practicable;" the proposed facility is designed to comply with applicable State and local laws and

⁹⁵ PSL §168(3)(e). The Siting Board may elect not to apply substantive local laws, but no similar election is available for State laws.

⁹⁶ PSL §168(3)(b).

⁹⁷ 16 NYCRR §1000.12(b)(1).

⁹⁸ PSL §168(2)(a)-(d).

regulations concerning the environment, public health and safety; and the proposed facility is in the public interest.⁹⁹

V. ENVIRONMENTAL IMPACTS - PSL §§168(2)(a), 168(3)(c)

As noted above, the Siting Board "shall not grant a certificate" without making explicit findings as to the nature of the probable environmental impacts resulting from the construction and operation of North Side's proposed Project and "may not grant a certificate" without determining that any adverse environmental impacts will be minimized or avoided to the maximum extent practicable.¹⁰⁰ North Side bears the burden of proof to demonstrate on the record that the determinations required by PSL §168 can be made by the Siting Board.¹⁰¹

The dispute here involves the threshold question regarding whether the Project's delineated wetlands that are not identified on the State's wetlands maps (unmapped wetlands) are nevertheless subject to the substantive requirements of the State's wetlands laws and regulations and to Article 10's requirement to minimize and avoid adverse wetlands impacts to the maximum extent practicable.¹⁰² Integrally related to the wetlands issues are the associated impacts to both threatened and endangered species and their habitat within the Project

⁹⁹ PSL §168(3)(b), (c), and (e). Although not relevant to this proceeding, the Siting Board also may not issue a certificate unless it finds, based on the record, that the facility is a beneficial addition to or substitution for electric generation capacity of the State and that any significant and adverse disproportionate environmental impact on the local community in which the facility is located has been avoided, offset, or minimized to the maximum extent practicable, using verifiable measures. PSL §168(3)(a), (d).

¹⁰⁰ PSL §168(2)(a)-(d), (3)(c).

¹⁰¹ 16 NYCRR §1000.12(b)(1).

¹⁰² ECL Article 24; 6 NYCRR Parts 663-664; PSL §168(3)(c).

Area, which are also subject to Article 10's minimization and avoidance requirement. This dispute must be viewed in the context of the Siting Board's statutory obligation under Article 10 to identify all adverse environmental impacts and find that they have been minimized or avoided to the maximum extent practicable.¹⁰³ The Siting Board's Article 10 authority applies to all environmental impacts regardless of an applicant's interpretation of another agency's jurisdictional laws.

The following sections examine the Project's environmental impacts on wetlands and threatened and endangered species that require the Siting Board's factual findings, pursuant to PSL §168(2); discusses the deficiencies in North Side's proposed measures to minimize and avoid impacts to only mapped wetlands; and evaluates whether the Siting Board can find, on the record, that those impacts will be minimized or avoided to the maximum extent practicable, as required by PSL §168(3)(c).

In short, we find that DEC has ECL Article 24 regulatory authority over the delineated mapped and unmapped wetlands in the Project Area. We further find that, irrespective of the breadth of DEC's authority under ECL Article 24, PSL §168(3)(c) provides the Siting Board with an independent basis on which to evaluate North Side's Application and the identified wetland and threatened and endangered species impacts and requires North Side to minimize or avoid such impacts to the maximum extent practicable. Because North Side has failed to demonstrate that the Project's impacts to mapped and unmapped wetlands and to threatened and endangered species would be minimized and avoided to the maximum extent practicable, the Siting Board cannot make the requisite finding under PSL

¹⁰³ PSL §§168(2)(a), 168(3)(c).

§168(3)(c). Its Application for a Certificate therefore must be denied.

A. PSL Article 10 and ECL Article 24

As set forth in ECL §24-0103, it is the public policy of the State:

to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.

The many functions and benefits derived from freshwater wetlands include: flood and stormwater control; "unparalleled value as wildlife habitat, and the perpetuation of scores of species," particularly where "destruction of those wetlands may threaten the presence of the endangered species for all time;" use as a source of water supply and surface water that can "serve to recharge groundwater and aquifers and to maintain surface water flow;" and ability to "cleanse water that flows through them" and "serve as sedimentation areas and filtering basins that absorb silt and organic matter."¹⁰⁴

ECL Article 24 and the implementing regulations provide the permitting framework for activities that may adversely impact wetlands.¹⁰⁵ Although this permitting framework is supplanted by PSL Article 10, the Siting Board has long-recognized ECL Article 24's singular purpose to protect wetlands

¹⁰⁴ 6 NYCRR §664.3(b).

¹⁰⁵ ECL §24-0701; 6 NYCRR Parts 663 and 664.

from adverse impacts and destruction.¹⁰⁶ This is entirely consistent with Article 10's mandate to find that all environmental impacts, including those to wetlands, have been minimized or avoided to the maximum extent practicable.¹⁰⁷ As such, the Siting Board is guided by the framework in ECL Article 24 and the implementing regulations, but is not limited by their reach.

B. The Project's Freshwater Wetlands Impacts

All applicants for major electric generating facilities must delineate the boundaries of all federal, State and locally regulated wetlands present on the proposed facility site and within 500 feet of areas to be disturbed by construction.¹⁰⁸ North Side's Application Exhibit 22 contains a Wetlands Delineation Report, which identifies both mapped and unmapped wetlands in the Project Area. North Side's expert consultants identified both mapped and unmapped wetlands in the Wetlands Delineation Report because of their features, which showed that they met the regulatory criteria to be characterized as a wetland.¹⁰⁹ The Wetlands Delineation Report focuses only on the impacts to mapped wetlands, that is, those appearing on the

¹⁰⁶ See ECL §24-0103 (setting forth the Legislature's Declaration of Policy "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands..."); see also ECL §24-0105 (setting forth the Legislature's Statement of Findings regarding the extensive benefits of freshwater wetlands and the adverse consequences related to their destruction and loss).

¹⁰⁷ PSL §168(3)(c).

¹⁰⁸ 16 NYCRR §1001.22(i).

¹⁰⁹ Hearing Exhibit 52 (Application Exhibit 22, Figure 3-1); Hearing Exhibit 213 (Application Exhibit 22 Update, Figure 22-3A).

State's wetlands maps. Application Exhibit 22 notes that grading, tree/vegetation clearing, and solar array placement will still impact 17 of 25 non-mapped delineated wetlands in the Project Area.¹¹⁰ Although North Side claims to have minimized impacts to unmapped wetlands by "rearranging access roads and inverter locations, it has only done so "where practicable" to maintain the Project's 180 MW capacity.¹¹¹ Extensive access roads, inverter locations, solar arrays, and areas of tree and vegetation clearing, disturbance, and grading remain in unmapped wetlands. North Side's testimony and the Wetlands Delineation Report reflect North Side's legal position that DEC's authority under ECL Article 24 - and by extension the Siting Board's - is limited to only mapped wetlands.¹¹²

North Side's Wetlands Delineation Report, as field verified by DEC Staff, identified 37 wetlands covering a total of 1,504.49 acres totaling 67 percent (more than two-thirds) of the total Project Area.¹¹³ North Side argues that "of the entire 1,504.49 acres of wetlands delineated, there will be neither temporary nor permanent impacts proposed within the Project Area to DEC-regulated wetlands as depicted in the official DEC maps."¹¹⁴ North Side's Rebuttal Panel testifies that the Project "avoided all DEC-mapped wetlands within the Project Limits of Disturbance" and that only "limited areas" of perimeter fencing

¹¹⁰ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 98-99.

¹¹¹ Hearing Exhibit 218 (Application Exhibit 22 Update), pp. 100-102, 105-106.

¹¹² Hearing Exhibit 161-163 (Application Exhibit 22, Appendix 22-5: Wetlands Delineation Report); Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 10-12.

¹¹³ Hearing Exhibit 161 (Application Exhibit 22, Appendix 22-5, Wetlands Delineation Report), Table 4, pp. 18, 21-22.

¹¹⁴ North Side Initial Brief, p. 15.

will be placed within the 100-foot adjacent area of any mapped wetland.¹¹⁵ Thus, North Side's Application focuses on DEC-mapped wetlands and presents no discussion of minimization and avoidance measures for hundreds of acres of delineated wetlands that are unmapped. Instead, North Side's Application and testimony is limited to a discussion of "best management practices" that would be used in impacted unmapped wetland areas, such as equipment restrictions and storm water prevention measures.¹¹⁶

The DEC Wetlands and Streams Panel testifies that North Side "severely underestimates" the actual impacts to unmapped wetlands by incorrectly assuming that wetland jurisdiction is limited to only those on the State's freshwater wetlands maps.¹¹⁷ DEC Staff asserts that, "[b]ased on the Applicant's wetland delineation, the Project, as proposed, would result in the despoliation and/or destruction of 621 acres of jurisdictional wetlands and the conversion of 136 acres of wetlands adjacent areas" (emphasis in original).¹¹⁸ The DEC Wetlands and Streams Panel defines "Article 24-regulated wetlands" as "delineated wetlands that are included on DEC's freshwater wetland maps, including delineated, contiguous wetland expanses that extend beyond the mapped wetland boundaries;" and defines "Article 24-jurisdictional wetlands" as

¹¹⁵ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 6, 21.

¹¹⁶ Hearing Exhibit 295 (North Side Rebuttal Panel), p. 40; Hearing Exhibit 218 (Application Exhibit 22 Update), p. 83; North Side Initial Brief, pp. 20-21.

¹¹⁷ DEC Staff Initial Brief, p. 10, n. 8.

¹¹⁸ DEC Staff Reply Brief, p. 7. The 621 acres DEC Staff cites is a combination of the 607 acres of disturbance to "Article 24-regulated" wetlands and 14 acres of disturbance to "Article 24-jurisdictional" wetlands identified by the DEC Wetlands and Streams Panel. Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 16-17.

"delineated wetlands that meet state criteria for jurisdiction but have not yet been added to the DEC's freshwater wetlands maps through a wetland map amendment."¹¹⁹

The record reflects no dispute that the wetlands delineated by North Side are nearly all contiguous. Indeed, the DEC Wetlands and Streams Panel testifies that its field inspections "revealed that ten different NYSDEC mapped wetlands are actually all part of the same wetland complex" and that "the wetlands located between the mapped wetlands are indistinguishable as a result of their contiguity."¹²⁰ For contiguous wetland complexes such as this, DEC Staff testifies that it assigns the highest wetlands classification and the highest level of protection to the entire complex.¹²¹

For its part, DPS Staff testifies that the record lacks complete information related to the Project's impacts to freshwater wetlands.¹²² DPS Staff recites North Side's disagreement about DEC's jurisdiction over unmapped wetlands and notes that this issue dictates the Project's impacts and the required mitigation of such impacts, which are not in the record.¹²³ DPS Staff further testifies that its observations of field conditions at the May 19, 2021 site visit "cast further doubt on the reliability of the Applicant's calculated impacts, as presented in the Application."¹²⁴

DPS Staff asserts that North Side did not undertake the appropriate "mitigation sequencing" to address wetland

¹¹⁹ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 5-6.

¹²⁰ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 15.

¹²¹ 6 NYCRR §664.4(b); Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 15.

¹²² Hearing Exhibits 291-292 (DPS Policy Panel), pp. 38, 58-59.

¹²³ Hearing Exhibits 291-292 (DPS Policy Panel), pp. 57-59.

¹²⁴ Hearing Exhibits 291-292 (DPS Policy Panel), p. 61.

impacts.¹²⁵ Mitigation sequencing, DPS Staff explains, is the sequence of actions intended to address wetland impacts starting with avoidance, followed by minimization, and finally, compensatory mitigation, which DPS Staff notes is “a last resort” and is not a substitute for avoidance and minimization measures. In other words, DPS Staff states that steps to avoid and minimize impacts “must be appropriately demonstrated and documented before compensatory mitigation is considered.”¹²⁶

DPS Staff notes that, due to North Side’s dispute related to DEC’s jurisdiction, the Application fails to address the substantive requirements of the Town’s local law governing Resource Conservation District (Local Law No. 2 of 2020, Art. III, Sec. 18), which has the express purpose of protecting special or unique natural resources and safeguarding the public against flooding and gives DEC express jurisdiction over those wetlands.¹²⁷ DPS Staff asserts that in the absence of a complete record, it cannot recommend that the Siting Board make the required finding that the Project’s wetlands impacts have been minimized or avoided to the maximum extent practicable.¹²⁸

North Side essentially makes two legal arguments related to the Project’s wetlands impacts. First, it argues

¹²⁵ Hearing Exhibits 291-292 (DPS Policy Panel), pp. 59-60.

¹²⁶ Hearing Exhibits 291-292 (DPS Policy Panel), p. 60. DPS Staff questions whether the potential extent of impacts to wetlands located in the Town of Brasher Resource Conservation District would be subject to a local law giving DEC express land use and permitting authority.

¹²⁷ Hearing Exhibits 291, 292 (DPS Policy Panel), pp. 61-62. North Side does not request that the Siting Board elect not to apply this local law on the grounds that it is “unreasonably burdensome” under PSL §168(3)(e). See Hearing Exhibit 63 (Application Exhibit 31), pp. 1, 6-17; Table 31-5, pp. 35-37.

¹²⁸ Hearing Exhibits 291, 292 (DPS Policy Panel), pp. 53-54.

that DEC Staff misapplies the Article 24 wetlands regulations to the Project's unmapped wetlands in contravention of the statutory requirement to follow the wetland mapping procedure before exercising jurisdiction.¹²⁹ The inference from this argument is that, if unmapped wetlands are not subject to ECL Article 24 protection, the Project's impacts need not be mitigated under the wetlands law and regulations or, by extension, minimized and avoided to the maximum extent practicable under PSL §168(3)(c). Second, North Side urges that if the Article 24 regulations apply to unmapped wetlands, both DEC Staff and DPS Staff failed to correctly apply the compatibility and weighing standards in the wetlands regulations for purposes of determining compensatory wetlands mitigation.¹³⁰ North Side reasons that mitigation of the magnitude DEC proposes should not be required because the Project would be economically infeasible and should be approved without such mitigation.¹³¹

In making the argument that DEC lacks jurisdiction over unmapped wetlands, North Side relies on a narrow reading of the definition of "freshwater wetlands" to mean that only those wetlands identified on the State's wetlands maps are subject to DEC's jurisdiction and Article 24's protections. DEC's historical implementation of Article 24, as well as numerous DEC

¹²⁹ North Side Initial Brief, p. 24.

¹³⁰ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 7-8, 23-24.

¹³¹ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 39-40, 47-48. North Side did not submit a Wetlands Mitigation Plan as part of its Application that called for any compensatory wetlands mitigation. Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 19. North Side's Rebuttal Panel testifies that it is willing to submit such a Plan after Certificate issuance, but only for certain wetlands. That approach does not enable an evaluation now about whether all of the Project's wetlands impacts are minimized and avoided to the maximum extent practicable.

administrative and judicial determinations, refute North Side's position in this regard. Article 10 precedent also does not support North Side's position.

In its historical and decades-long implementation of ECL Article 24 and the wetlands regulations, DEC's Wetlands and Streams Panel (Wetlands Panel) testifies that it has relied upon on-site wetland delineations to establish the actual boundary of protected wetlands - both mapped and unmapped.¹³² The Wetlands Panel testifies in detail about the process DEC undertakes to review impacts to both mapped and unmapped wetlands, including determining a proposed activity's wetlands compatibility and weighing the need for the activity against the wetlands impacts.¹³³ DEC's Wetlands Panel explained that because the State's wetlands maps were developed using 1970s aerial photography, they are not precise enough to depict the actual extent of the State's protected wetlands, and therefore always require a DEC-verified field delineation.¹³⁴

DEC's Wetlands Panel further testified that, to establish the actual wetland boundary at a site, a field delineation must be performed by trained personnel following established methodologies as set forth in the DEC Freshwater Wetlands Delineation Manual (Wetlands Delineation Manual).¹³⁵ The Wetlands Delineation Manual states:

It is critical to note that the wetland boundaries as shown on the maps are the ". . . **approximate** location of the **actual** boundaries of the wetlands . . . [ECL §24-0301(3)]. . ." The boundaries of a regulated wetland are more precisely established through the process of

¹³² Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 7-8.

¹³³ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 8-11.

¹³⁴ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 7-8.

¹³⁵ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 8.

delineation. The DEC and the APA are required to provide such delineations pursuant to §24-0301(7). Delineation, in this manual, means the more precise depiction of the boundary of a wetland than is possible on the 1:24,000 maps promulgated by DEC and APA.¹³⁶

(Emphasis in original). The Wetlands Delineation Manual directs DEC Staff to consult the official freshwater wetlands map as a first step in the process of establishing the actual boundary of a protected wetland at a project site and then to look to a wetlands delineation.¹³⁷ Thus, the State's wetlands maps are only intended to provide a rough idea of where wetlands subject to ECL Article 24's protection may be located.

The record here reflects DEC Staff's reliance on North Side's Wetlands Delineation Report, which documented extensive wetlands, wetland complexes, and contiguous wetland expanses extending beyond the mapped wetland boundaries in the Project Area.¹³⁸ There is no dispute among the parties regarding the accuracy of North Side's Wetlands Delineation Report.¹³⁹

Indeed, North Side does not directly dispute the testimony of the DEC Wetlands and Streams Panel related to the historical implementation of ECL Article 24 and its

¹³⁶ Wetlands Delineation Manual (July 1995), p. 1. In Article 10 proceedings, pursuant to 16 NYCRR §1001.22(i), an applicant for a major electric generating facility must delineate the freshwater wetlands within the project area. DEC Staff verifies the applicant's delineation.

¹³⁷ Wetlands Delineation Manual, p. 16 (stating that "[i]f the area to be delineated contains or is adjacent to the boundary of a mapped wetland ([i.e.,] within approximately 500 feet), proceed to Step 2").

¹³⁸ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 5-6.

¹³⁹ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 14. DEC confirmed North Side's delineation using geographic information system information and site visits on November 17-18, 2020, and May 19, 2021."

applicability to both mapped and unmapped wetlands. North Side also does not dispute Article 10's requirement to minimize or avoid impacts to all environmental resources, including wetlands, to the maximum extent practicable. As a sophisticated developer with numerous other solar projects in this and other States, it is difficult to understand how North Side could have been unaware of DEC's historical implementation of ECL Article 24 and the protections afforded to wetlands not appearing on the State's maps.

The testimony of the DEC Wetlands and Streams Panel regarding the agency's obligations under Article 24 with respect to unmapped wetlands is supported by significant legal precedent. For example, North Side's narrow reading of ECL Article 24 is similar to an argument that the Court of Appeals flatly rejected. In Wedinger v Goldberger, the Court addressed the appellant's proffered narrow definition of freshwater wetlands in ECL §24-0107 and the argument that only wetlands appearing on the State's official wetlands maps were subject to ECL Article 24 protection and DEC's regulatory authority.¹⁴⁰ The Court found that the definition of freshwater wetlands "may not be interpreted so slenderly, for we would then be ignoring other relevant and integrated portions of the statutory scheme and the plain purpose of the 'Freshwater Wetlands Act.'" The Court further found that, when interpreted reasonably, ECL Article 24 contemplates a mapping process, but "does not create an artificial, intermittently circumscribed jurisdictional anomaly" that would prevent DEC from exercising its regulatory authority

¹⁴⁰ 71 N.Y.2d 428, 438 (1988).

over wetlands not appearing on the State's freshwater wetlands maps.¹⁴¹

The Court in Wedinger rejected the narrow definitional argument North Side advances here, which would limit DEC's regulatory authority to only mapped wetlands and leave in an unregulated loophole for unmapped wetlands that otherwise meet the Article 24 criteria to appear on the State's maps. Indeed, DEC Staff testified that the wetlands in the Project Area are of such high value that a regulatory map amendment is being pursued.¹⁴² Similarly, the court in Forest Creek Equity Corp. v. Department of Environmental Conservation found that ECL Article 24 has a comprehensive and detailed statutory scheme that includes DEC's jurisdiction over all wetlands, whether mapped or unmapped.¹⁴³

Article 10 precedent also supports our rejection of North Side's position. North Side acknowledges that the Siting Board has the authority to impose minimization and avoidance conditions for unmapped wetlands, but argues that the Siting Board has adopted Certificate Conditions and Site Engineering and Environmental Plans (SEEPs) in other cases that are nearly identical to those it has proposed in this proceeding. On that basis, North Side urges the Siting Board to adopt those

¹⁴¹ Wedinger, 71 N.Y.2d at 441. Although the Wedinger case essentially involves a regulatory taking challenge before the final State wetlands maps were promulgated, the Court's interpretation of the definition of freshwater wetlands is relevant to the analysis of North Side's position here.

¹⁴² Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 16. The DEC Wetlands Panel also testified that the mapping process includes reclassification of the wetlands in the Project Area to Class I due to the presence of numerous threatened and endangered species.

¹⁴³ 168 Misc. 2d 567, 571 (Sup. Ct., Monroe County 1996).

Conditions here.¹⁴⁴ North Side cites to the Siting Board's orders in the East Point, Trelina, and Excelsior cases, arguing that wetland avoidance, minimization, and restoration, and not the creation of new wetlands were "endorsed by both agency staffs."¹⁴⁵ We find that the Project's impacts here are entirely different than the impacts presented in those cases. We therefore find the positions advanced by DPS Staff and DEC Staff here to be completely consistent with those cases and other Siting Board precedent.

Notably, DEC Staff challenges North Side's comparison of this matter to prior matters before the Siting Board.¹⁴⁶ DEC Staff argues that in each of the Article 10 proceedings cited by North Side - namely, East Point, Trelina, and Excelsior - the respective applicants selected project sites that did not have significant wetlands impacts and did not require extensive mitigation.¹⁴⁷ In contrast, DEC Staff asserts that North Side's proposed Project layout will result in impacts to approximately 621 acres of protected wetlands and approximately 136 acres of protected adjacent areas.¹⁴⁸

¹⁴⁴ North Side Initial Brief, p. 25.

¹⁴⁵ North Side Initial Brief, p. 25; Case 19-F-0299, Excelsior Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued April 6, 2022), SEEP Guide Section B.17.d.v.a; Case 19-F-0366, Trelina Solar Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions Order Granting Certificate with Conditions (issued November 30, 2021), Appendix B, SEEP Guide, Section B.17.d.v.a.; Case 17-F-0599, East Point Wind, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued August 20, 2019), Appendix B, SEEP Guide Section B.15.d.v.

¹⁴⁶ DEC Staff Reply Brief, p. 6.

¹⁴⁷ DEC Staff Reply Brief, p. 4.

¹⁴⁸ DEC Staff Reply Brief, p. 6.

In East Point, DEC Staff asserts, wetland "impacts were limited to 0.34 acres of protected wetland adjacent areas;"¹⁴⁹ in Trelina, wetland impacts "were limited to protected adjacent areas and totaled approximately 3.41 acres;"¹⁵⁰ and in Excelsior, impacts to "wetlands proper were avoided entirely" and adjacent area impacts only "included 0.25 acres of panel arrays and 0.06 acres of road improvement."¹⁵¹ Thus, the Siting Board orders in those cases show that significant impacts to freshwater wetlands and adjacent areas were largely minimized and avoided and did not involve the nature and extent of this Project's wetlands impacts.¹⁵² Indeed, the impacts in East Point, Trelina and Excelsior were largely limited to wetland adjacent areas and not to the wetlands proper.

What is striking about the Project now before us is not DEC Staff's approach to wetland protection, but rather the extent of the wetlands delineated by North Side that are to be adversely impacted. More than two-thirds of the entire Project Area is made up of wetlands. Despite conceding that the Project's impacts to unmapped wetlands is greater here than in

¹⁴⁹ DEC Staff Reply Brief, pp. 4-5. The East Point Order states that the project would impact 0.34 acre of the adjacent area to a "potential DEC wetland" and that no other impacts to "jurisdictional wetlands are expected." East Point Order, p. 41.

¹⁵⁰ DEC Staff Reply Brief, p. 4. The Trelina Order notes that there would be permanent impacts to approximately 4.8 acres of "regulated adjacent areas," temporary impacts to a fraction of one acre of adjacent areas, and that there would be no other impacts to "jurisdictional wetlands." Trelina Order, pp. 39-40.

¹⁵¹ DEC Staff Reply Brief, p. 5. The Excelsior Order states that the project "entirely avoids Article 24 protected wetlands," although there would be some impacts to adjacent areas. Excelsior Order, p. 37.

¹⁵² Excelsior Order, p. 37.

prior Article 10 projects, North Side nevertheless justifies those impacts by arguing that this Project is "the largest solar project to come before the Siting Board for a decision."¹⁵³ While that may have been true at some point in this proceeding, the Siting Board has since issued an order in the larger 280 MW Excelsior project that "entirely avoids Article 24 Protected Wetlands."¹⁵⁴ Clearly, based on the Excelsior project, large-scale solar projects may be sited without the large-scale impacts to protected wetlands evident here.

In the Alle-Catt Wind Energy Article 10 proceeding, (Alle-Catt) both "regulated" mapped wetlands and "jurisdictional" unmapped wetlands and adjacent areas were identified within the project area.¹⁵⁵ In their Recommended Decision, the Examiners described Article 24 "regulated wetlands" as "delineated wetlands that are included on DEC's freshwater wetland maps, including delineated wetland expansions that extend beyond the mapped wetland boundaries;" and defined "jurisdictional wetlands" as also subject to Article 24 protection as "delineated wetlands that meet the State criteria for jurisdiction but have not been added to the DEC's freshwater wetlands maps."¹⁵⁶ The Alle-Catt applicant never disputed ECL Article 24's applicability to mapped and unmapped wetlands and the need to address impacts to both. The Examiners concluded that the unmapped wetlands "are ECL Article 24 jurisdictional wetlands subject to the review and protections provided for by

¹⁵³ North Side Reply Brief, p. 28.

¹⁵⁴ Excelsior Order, p. 37 (citing DEC Staff testimony in that proceeding).

¹⁵⁵ Case 17-F-0282, Application of Alle-Catt Wind Energy LLC, for Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for a Proposed Wind Energy Project.

¹⁵⁶ Case 17-F-0282, Alle-Catt Recommended Decision (issued February 27, 2020), p. 45.

ECL Article 24 and 6 NYCRR Part 663.”¹⁵⁷ Accordingly, the Examiners recommended that the Siting Board adopt DEC’s proposed certificate conditions to protect both “regulated and jurisdictional wetlands” within the project area.¹⁵⁸

In adopting the Examiners’ Recommended Decision in Alle-Catt, the Siting Board’s order states that “[i]t is undisputed that unmapped freshwater wetlands . . . are jurisdictional wetlands entitled to the protections of ECL Article 24.”¹⁵⁹ The Siting Board thereby recognized that ECL Article 24 protections should be afforded to both regulated and mapped, as well as jurisdictional and unmapped, freshwater wetlands within the project area.¹⁶⁰

Although North Side questions the extent to which prior Article 10 matters have resolved the wetlands issues raised here, it fails to cite to any application for a major electric generating facility in which a delineated wetland that met the jurisdictional requirements set forth under ECL Article 24 was not protected by the resulting Siting Board order and associated certificate conditions and SEEP Guide provisions.

Our determination is consistent not only with the foregoing Article 10 determinations, but with the DEC Commissioner’s administrative determinations under ECL Article 24. In Matter of Jointa-Galusha, LLC (Jointa-Galusha), the DEC

¹⁵⁷ Case 17-F-0282, Alle-Catt Recommended Decision, p. 50.

¹⁵⁸ Case 17-F-0282, Alle-Catt Recommended Decision, pp. 49-50.

¹⁵⁹ Case 17-F-0282, Alle-Catt Energy, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued June 3, 2020) (Alle-Catt Order), pp. 27-28.

¹⁶⁰ Alle-Catt Order, p. 28. The Siting Board only modified the Examiners’ conclusion regarding the wetland classification of certain wetlands but otherwise affirmed the Examiners’ conclusions.

Commissioner found that approximately 35 acres of unmapped freshwater wetlands extending from mapped wetlands were subject to DEC's ECL Article 24 regulatory authority and therefore protected.¹⁶¹ The Commissioner noted that, because these "wetlands are connected to the mapped freshwater wetland on the Applicant's property [they] qualify as wetlands subject to the jurisdiction of the Department."¹⁶² The DEC Commissioner recognized that, although he has the authority to invoke the lengthy map amendment process to protect unmapped jurisdictional wetlands that may be discovered in the course of processing a permit, he also has additional the authority to protect unmapped wetlands on a case-by-case basis in a permitting context without pursuing the mapping process.¹⁶³

Consistent with the Commissioner's finding in Jointa-Galusha of DEC's broad authority in the freshwater wetlands permitting process to protect unmapped wetlands, we find that the Siting Board has the same broad authority in the Article 10 process. The mapping process is not necessary to protect unmapped wetlands. We further find that the Article 10 process is intended to ensure that valuable wetland resources are protected.

¹⁶¹ Matter of Jointa-Galusha, LLC, Interim Decision of the Commissioner, May 7, 2002 (2002 WL 974335, at *7).

¹⁶² Jointa-Galusha (2002 WL 974335, at *7).

¹⁶³ Jointa-Galusha (2002 WL 974335, at *18). The Commissioner emphasized that "jurisdictional wetlands must be subject to the full protections provided by the permitting process . . . and, in particular, the rigorous standards of [6 NYCRR] §663.5." see also Matter of Integrated Waste Systems, Inc., Ruling of the Assistant Commissioner, Oct. 25, 2005 (2005 WL 2822807, at *9) (holding that a wetland at the site of a proposed landfill had "expanded" beyond 12.4 acres over the course of several years "and, as a result, the wetland became subject to State regulation").

North Side argues that in a 1980 criminal case, People v Bondi, "the Town Court of Webster . . . rejected the argument that [6 NYCRR] Parts 663-664 cover alterations of wetlands that will eventually be mapped."¹⁶⁴ As noted by the court, however, that case predated the creation of the official wetlands map for the area in which the violations were alleged to have occurred.¹⁶⁵ Therefore, the question of mapped versus unmapped wetland was not before the court. Accordingly, we find the holdings in Bondi inapposite to the issue now before us.

Additionally, North Side argues that in at least one DEC administrative decision the Commissioner found that a landowner "is entitled to reasonably rely on the map."¹⁶⁶ But in that case, a 1990 enforcement matter, the Commissioner held that a property owner's actual notice that a wetland may be regulated is an important factor to consider in determining liability for activities undertaken without a permit.¹⁶⁷

There is no doubt that North Side had actual notice of the extent of the freshwater wetlands within the Project Area by virtue of its own Wetlands Delineation Report and DEC Staff's February 4, 2021 Preliminary Wetlands Assessment letter that identified approximately 573 acres of impacted wetlands subject to DEC jurisdiction and avoidance, minimization, and mitigation measures, which is "substantially higher than the Applicant's estimates."¹⁶⁸ We are satisfied that the foregoing

¹⁶⁴ North Side Reply Brief, p. 10, (citing People v Bondi, 104 Misc. 2d 627, 628 [Sup. Ct., Monroe County 1980]).

¹⁶⁵ People v Bondi, 104 Misc. 2d at 628.

¹⁶⁶ North Side Reply Brief, p. 14 [citing Matter of Spectrum Assoc., L.P., Decision and Order of the Commissioner (1990 WL 182454)].

¹⁶⁷ Spectrum, (1990 WL 182454, at *1).

¹⁶⁸ Hearing Exhibits 237, 238 (DEC Wetlands & Streams Panel, Exhibits NYSDEC-BW-5 and NYSDEC-BW-6).

administrative and judicial determinations support our determination here that unmapped wetlands are subject to protection.

1. Wetlands Classification

North Side objects to DEC's reclassification and additional protection of the wetlands in the Project Area. Although the highest wetlands classification in the Project Area is currently Class II, the DEC Wetlands and Streams Panel testified that, under the regulations, the presence of threatened and endangered species within the wetlands "qualifies the entire connected wetland complex for Class I protections."¹⁶⁹

North Side argues that because the threatened and endangered species will be addressed under a NCBP, "the T&E function of the wetlands will experience a net benefit." North Side reasons that by benefitting the non-mapped wetlands with a NCBP, DEC's argument that they should be classified as Class I "is illogical at best."¹⁷⁰

North Side's argument is without merit. First, it does not dispute the presence of threatened and endangered species in the Project Area or that DEC's wetlands regulations characterize such wetlands as Class I. As set forth in the wetlands regulations, the protections afforded a Class I wetland may be based upon the presence or absence of a threatened or endangered species, among other criteria.¹⁷¹ Second, Class I

¹⁶⁹ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 16 (citing 6 NYCRR Part 664).

¹⁷⁰ North Side Reply Brief, p. 18.

¹⁷¹ 6 NYCRR §664.5(a)(2). A wetland may be classified as a Class I wetland if it "is resident habitat of an endangered or threatened animal species". Resident habitat is defined to mean "habitat of year-round resident animal species, or habitat of migratory species during their breeding or wintering periods." 6 NYCRR §664.6(c)(2).

wetlands do not, as North Side suggests, cease to be Class I wetlands or lose the proper level of protection simply because impacts to protected resident species are proposed to be addressed through a NCBP.

Here, the record establishes that the Project Area provides resident habitat for multiple threatened and endangered species.¹⁷² Accordingly, for the purposes of our Article 10 review, we agree with DEC Staff and find that the entire interconnected wetland complex should be treated as a Class I wetland subject to the highest protection because of the presence of resident threatened and endangered species.¹⁷³ We are satisfied that the record supports the determination that the wetland complex at the Project site should be classified as Class I due to the presence of numerous threatened and endangered species.

2. Wetlands Compatibility

North Side also takes issue with DEC Staff's characterization of the Project as an "industrial use facility." DEC Staff asserts that the Project is an activity that is incompatible with wetlands' functions and benefits because it involves the construction and operation of an "industrial use facility" and related structures or facilities.¹⁷⁴ North Side counters that DEC Staff "relies on an antiquated definition of an industrial use facility, which places a solar facility in the

¹⁷² Hearing Exhibits 152-160 (Application Exhibit 22, Appendices 22-2, 22-3, 22-4: Breeding Bird, Winter Raptor, and Grassland Survey Reports); Hearing Exhibit 208 (Blanding's Turtle Survey Report).

¹⁷³ North Side delineated only a few relatively small areas of wetland that were isolated from the larger wetland complex. See Hearing Exhibit 213 (North Side's July 2021 update to Figure 22-3A, depicting isolated wetlands in yellow).

¹⁷⁴ DEC Staff Initial Brief, pp. 13-14.

same category as a building or facility that manufactures goods or materials.”¹⁷⁵

An industrial use facility is defined to include any building or facility associated with “the production of power.”¹⁷⁶ The wetlands activities chart sets forth the levels of compatibility and the activities deemed incompatible with the functions and benefits of a freshwater wetland.¹⁷⁷ Incompatible activities include clear cutting vegetation and timber, grading, filling, road and parking area construction, and any activities that can cause permanent loss of wetland benefits or destroy wetlands entirely. The construction of a major solar facility involves those activities, as North Side’s Application indicates.

Similar to North Side’s argument here, the applicant in Alle-Catt argued that the Siting Board should exempt major wind energy projects from being considered an incompatible industrial use facility because the wetlands regulations were adopted in 1995 and did not foresee the renewable wind energy facilities now being proposed.¹⁷⁸ The Examiners in Alle-Catt rejected that argument and the Siting Board affirmed their conclusion, finding that the proposed wind project entailed activities that were incompatible with the functions and benefits of a freshwater wetland.¹⁷⁹

While agricultural uses in wetlands are generally exempt from regulation,¹⁸⁰ the Project will involve clearcutting,

¹⁷⁵ North Side Reply Brief, pp. 16-17.

¹⁷⁶ 6 NYCRR §663.2(q).

¹⁷⁷ 6 NYCRR §663.4(d).

¹⁷⁸ Alle-Catt Recommended Decision, p. 49.

¹⁷⁹ Alle-Catt Recommended Decision, p. 28; Recommended Decision, p. 51.

¹⁸⁰ ECL §24-0701(4); 6 NYCRR §663.2(z).

construction, and disturbance activities throughout the Project Area for the placement of solar panels (on 723.9 acres); collection lines (on 38 acres); access roads (on 13 acres); laydown yards and parking (on 10 acres); fencing (on 3.7 acres); and a collection substation (on 3.6 acres).¹⁸¹ This is, by definition, an industrial use that is "incompatible with a wetland and its functions and benefits."¹⁸² We agree with DEC Staff that the Project falls within the regulatory definition of an "industrial use facility," which is incompatible with the functions and benefits of freshwater wetlands.¹⁸³

We also disagree with North Side's assertion that the Project is subject to the weighing standards established under 6 NYCRR §663.5(e)(2). Whether the Project meets the weighing standards need not be addressed if North Side has failed to minimize and avoid wetland impacts to the maximum extent practicable and the Project is otherwise incompatible with wetland functions and benefits.

Based on the record and these determinations, we find that DEC has regulatory authority over delineated unmapped wetlands in the Project Area regardless of whether they appear on the State's wetlands map. The protections of ECL Article 24 and its implementing regulations are applicable to all delineated freshwater wetlands meeting the criteria to be

¹⁸¹ Hearing Exhibit 52 (Application Exhibit 22), p. 11.

¹⁸² 6 NYCRR §663.4(d)(43).

¹⁸³ 6 NYCRR §663.4(d)(43).

designated on the State's wetlands maps.¹⁸⁴ We next turn to whether the impacts to ECL Article 24-protected wetlands have been minimized or avoided to the maximum extent practicable.

C. North Side's Proposed Minimization/Avoidance Measures

Having found that unmapped wetlands in the Project Area are afforded ECL Article 24 protection, the remaining issue is whether North Side's Application demonstrates impact minimization and avoidance measures to the maximum extent practicable. As noted above, PSL §168(3)(c) provides the Siting Board with a separate basis beyond ECL Article 24 to deny North Side's Application if impacts to wetlands have not been avoided or minimized to the maximum extent practicable.

DEC Staff Wetlands and Streams Panel testified that North Side's Project entails impacts to and permanent conversion of approximately 757 acres of wetlands and adjacent areas (comprised of 621 acres of wetlands proper and 136 acres of adjacent areas) resulting from construction, filling, grading, fencing, installation of solar panels and associated components, vegetation maintenance, and other industrial activities.¹⁸⁵ The DEC Panel further testified that these activities "in the wetlands and their adjacent areas will significantly and permanently degrade these wetlands' functions and benefits."¹⁸⁶ DPS Staff's testimony asserts that the record lacks sufficient

¹⁸⁴ See ECL §24-0107(1) (stating that freshwater wetlands are lands and waters of the State as shown on the freshwater wetlands map that contain any or all of the wetland characteristics enumerated); ECL §24-0301(1) (providing that the DEC Commissioner shall map those freshwater wetlands that have an area of at least 12.4 acres or are of unusual local importance).

¹⁸⁵ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 16-17.

¹⁸⁶ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), p. 15.

information to determine both the extent of the wetland impacts and the required mitigation, minimization or avoidance of impacts.¹⁸⁷

We find that the record lacks clarity on the total number of wetland acres impacted by the Project. Nevertheless, North Side concedes, and therefore we can assume, that at least 507 acres of wetlands proper will be impacted by the Project, although we recognize that many more acres may be impacted according to DEC Staff.¹⁸⁸

North Side urges that wetland impacts are necessary in order to achieve its goal of a 180 MW renewable energy generating project.¹⁸⁹ It asserts that, as minimization and avoidance efforts, "areas previously disturbed by agricultural practices and logging activities were given preference" for the placement of Project components.¹⁹⁰ North Side proposes that in lieu of mitigation, minimization or avoidance measures, "best management practices" will be used instead to address impacts to unmapped wetlands.¹⁹¹ North Side asserts that due to "a

¹⁸⁷ Hearing Exhibit 291, 292 (DPS Policy Panel), pp. 57-58; DPS Initial Brief, pp. 15-16.

¹⁸⁸ Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 16-17; Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 5-6. North Side presented evidence of wetlands and adjacent area impacts totaling 739.2 acres when estimating the required number of mitigation acres that likely would be required under the Office of Renewable Energy Siting's regulatory scheme (Executive Law §94-c). Hearing Exhibit 271 (North Side Rebuttal Exhibit NSRP-3). North Side does not explain the variance between the asserted 507 acres of wetlands impacted and the 739.2 acres impacted it estimates for purposes of mitigation.

¹⁸⁹ Hearing Exhibit 218 (Application Exhibit 22 Update), p. 99; Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 41-42.

¹⁹⁰ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 41-42.

¹⁹¹ Hearing Exhibit 52 (Application Exhibit 22), p. 73.

multitude of siting constraints, the Project's layout cannot be reconfigured to further avoid or minimize impacts to non-mapped wetlands."¹⁹²

North Side also argues that the construction and operation of the Project will improve the functions and benefits of the 507 acres of impacted wetlands because a portion of the Project Area was subject to agricultural and logging activities.¹⁹³ This argument is premised on North Side's erroneous assumption that these activities have impaired and degraded the wetlands so impact minimization and avoidance is unnecessary. The record does not support that assumption. North Side's Wetlands Functions and Values Assessment outlines in detail current wetland functions and benefits in the Project Area.¹⁹⁴ In addition, North Side's own Wetlands Delineation Report further belies this assumption. Based on the record, we reject North Side's argument that the wetlands will be improved by construction and operation of the Project and that

¹⁹² North Side Initial Brief, p. 15; Reply Brief, p. 21.

¹⁹³ North Side Initial Brief, p. 16. North Side concedes that 507 acres of wetlands will be impacted, but nevertheless claims that after construction of the Project "the hydrology of the wetlands in agricultural areas will restore itself or be expedited by the Project restoration efforts, and other wetland functions and values will be improved." See also Hearing Exhibit 295 (North Side Rebuttal Testimony), pp. 5, 10, 18, 26-28, 33.

¹⁹⁴ Hearing Exhibit 164 (Application Exhibit 22, Appendix 22-6), pp. 8-11 (indicating that all or most wetlands in the Project Area had the following functions and values: wildlife habitat and support; groundwater recharge/discharge; flood/flow alteration; sediment retention ability; nutrient retention; high ecological richness and structural diversity; sediment/shoreline stabilization; and recreation, visual/aesthetic, and threatened and endangered species values).

minimization and avoidance to the maximum extent practicable is not necessary.

D. Alternative Project Layouts

North Side asserts that it is "uncontroverted that the proposed Project layout is the only practicable alternative that would allow construction of the Project approved by NYSERDA for a [Renewable Energy Credit] contract."¹⁹⁵ North Side further asserts that there are "no alternative sites or Project layouts that are practicable, considering the multitude of on-site constraints ranging from DEC mapped wetlands, Blanding's Turtle and T&E avian species potential habitat, municipal setbacks, and on-site streams."¹⁹⁶ North Side also states that neither DEC Staff nor DPS Staff proposed another practicable alternative layout to reduce wetland impacts and otherwise failed to request that North Side consider an alternative layout.¹⁹⁷

As DPS Staff correctly states, North Side bears the burden to establish that there are no alternative site layouts that would avoid or minimize impacts to the wetlands to the maximum extent practicable.¹⁹⁸ The agencies had no obligation to propose an alternative layout. With regard to potential limitations on the Project layout purportedly resulting from the provisions of the NYSERDA Renewable Energy Credit contract, DEC Staff urges that "even if this is true, it is due to self-imposed limitations by the Applicant" who "may be able to seek modifications to its [NYSERDA] contract if necessary, and in any

¹⁹⁵ North Side Initial Brief, p. 46.

¹⁹⁶ North Side Initial Brief, pp. 46-47.

¹⁹⁷ North Side Initial Brief, p. 47.

¹⁹⁸ DPS Staff Reply Brief, pp. 2-3.

case can mitigate for the Project's wetland impacts without altering the amount of installed solar capacity."¹⁹⁹

We agree with DEC Staff and reject North Side's assertion that its contract with NYSERDA dictates the current layout of the Project with its associated environmental impacts. The terms of any contract that North Side may have with NYSERDA regarding the Project are not determinative of either our findings with respect to environmental impacts or our analysis of potential alternative layouts. To hold otherwise would essentially allow an applicant to contract away with NYSERDA the environmental requirements imposed under Article 10.

Based on this record and North Side's representations, it appears that no alternative layout would achieve minimization or full avoidance of impacts to the protected wetlands in the Project Area to the maximum extent practicable. Despite filing supplements and updates to the wetlands portion of the Application (Exhibit 22), North Side did little to reconfigure the layout of the Project's solar arrays and components to minimize or avoid wetland impacts. Only when North Side filed its rebuttal testimony in November 2021 did it advise of its removal of 100 acres of palustrine forested wetlands subject to the jurisdiction of the U.S. Army Corps of Engineers (USACE), which had advised North Side of concerns regarding proposed Project activities within federally-protected forested wetlands.²⁰⁰ The North Side Rebuttal Panel testified that although it had removed 100 acres of wetlands from the Project, impacts to 507 acres of "non-mapped" wetlands would still

¹⁹⁹ DEC Staff Reply Brief, p. 13.

²⁰⁰ Hearing Exhibit 295 (North Side Rebuttal Panel), p. 42.

result.²⁰¹ The North Side Rebuttal Panel testified further that “[b]ased upon input received from the USACE about an incorrect assumption made by the Applicant regarding what constitutes a dredge and/or fill when conducting mechanized land-clearing, also referred to in the DPS Staff testimony, the Applicant is removing the placement of solar arrays in forested wetlands (totaling an area of approximately 100-acres) from the Project layout.”²⁰² The Rebuttal Panel also testified that no further relocation of components or reduction in acreage is proposed to avoid or reduce remaining wetland impacts.²⁰³

North Side’s attempt to address the USACE’s concerns did little to address the continuing objections asserted by DPS Staff and DEC Staff. Indeed, in their briefs, both DPS Staff and DEC Staff viewed this belated effort as entirely insufficient.²⁰⁴ DEC Staff requested that the Siting Board extend the twelve-month statutory deadline based on “extraordinary circumstances” pursuant to PSL §165(4)(a) so that an adequate record could be developed for reconfiguring the Project to avoid impacts to 757 acres of wetlands.²⁰⁵

²⁰¹ Hearing Exhibit 295 (North Side Rebuttal Panel), p. 6; see also Hearing Exhibit 294 (DEC Wetlands & Streams Panel), pp. 16-17 (noting DEC Staff calculation that the Project would result in “607 acres of disturbance to Article 24-regulated wetland proper” and an additional “14 acres of disturbance to Article 24-jurisdictional wetland proper”).

²⁰² Hearing Exhibit 295 (North Side Rebuttal Panel), p. 42 (citations omitted).

²⁰³ Hearing Exhibit 295 (North Side Rebuttal Panel), p. 42.

²⁰⁴ DPS Staff Initial Brief, p. 15-16; DEC Staff Initial Brief, pp. 17-18 (impacts to 621 acres of wetlands and 136 acres of wetland adjacent area with no mitigation “is unprecedented and unsupported” and not permissible under ECL Article 24 or the Executive Law §94-c governing the Office of Renewable Energy Siting).

²⁰⁵ DEC Staff Initial Brief, p. 30.

We find that North Side's failure to address wetland impacts during the proceeding does not constitute extraordinary circumstances within the meaning of PSL §165(4)(a) and cannot justify an extension. North Side has had ample opportunity to address such impacts before this point in time.

Other than this belated effort to satisfy the USACE nine months after receiving DEC Staff's Preliminary Wetland Assessment, the record contains no indication that North Side made any effort to reconfigure the Project layout and reduce impacts to freshwater wetlands in the Project Area and address the concerns of both DEC Staff and DPS Staff.

We find that North Side's elimination of Project components from approximately 100 acres of palustrine forested wetlands undermines its repeated representation in Application Exhibit 22 and the updates that "the Project layout and design avoids and/or minimizes impacts to forested wetland areas to the maximum extent practicable" and that the Project layout cannot be changed without reducing the proposed 180 MW generation and making the Project financially infeasible.²⁰⁶ This belated measure to satisfy the USACE is not sufficient in light of the remaining 507 acres of wetland impacts for which North Side has made no effort to minimize or avoid to the maximum extent practicable.

North Side essentially acknowledges that our imposition of any Certificate Conditions designed to change the Project layout to minimize and avoid wetland impacts would make the Project economically infeasible. North Side has repeatedly urged that no alternative layout is available that would retain the Project's 180 MW generation capacity and achieve its own

²⁰⁶ Hearing Exhibit 52 (Application Exhibit 22), p. 99.

objectives.²⁰⁷ In other words, North Side asks the Siting Board to accept the untenable position that Certificate Conditions cannot be imposed that would minimize and avoid wetlands impacts to the maximum extent practicable.

North Side's position is in direct conflict with PSL §168(3)(c). Nevertheless, in view of the record as a whole, we see no way to adjust the Project layout by imposing Certificate Conditions to address wetland impacts due to the extent of the wetlands, wetland complexes, and adjacent areas in the Project Area. We see no reason to attempt to impose Certificate Conditions to address these impacts in light of North Side's position that any such conditions involving changes to the Project layout would render the Project no longer financially viable. In making this finding, we reach no determination with respect to DEC Staff's position regarding the number of acres that may be necessary for wetlands mitigation or with respect to North Side's purported estimate of the cost of mitigation and its assertion that the Project "could not survive the financial blow."²⁰⁸ In denying the Certificate, we need not reach those issues.

Because North Side has failed to demonstrate that the Project's impacts to all freshwater wetlands would be minimized and avoided to the maximum extent practicable, including the 507

²⁰⁷ North Side Initial Brief, p. 16, 23 ("the only feasible layout required placing Project Components" on unmapped wetlands); Hearing Exhibit 295 (North Side Rebuttal Testimony), p. 32 ("proposed Project layout is the only practicable alternative" and "there are no alternative sites or Project layouts that are practicable, considering the multitude of on-site constraints").

²⁰⁸ North Side Initial Brief, p. 23. North Side testified that it had not budgeted any dollars for mitigation of impacts to DEC jurisdictional wetlands as a part of this Project. Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 36-38.

acres it concedes are impacted, the Siting Board cannot make the requisite finding under PSL §168(3)(c).

E. Threatened and Endangered Species/Habitat Impacts

Our findings and determination with respect to the Project's freshwater wetlands impacts are integrally connected to other, additional impacts to threatened and endangered species and their habitat, which are documented in the record. Although our determination to deny the Certificate based on wetlands impacts can stand alone, separate but related impacts to threatened and endangered species and the destruction of their habitat resulting from construction and operation of the Project provide an additional basis for our decision.

New York's endangered species law and implementing regulations, ECL §11-0535 and 6 NYCRR Part 182, protect endangered and threatened species and species of special concern (Protected Species).²⁰⁹ The "taking" of any Protected Species is prohibited.²¹⁰ Taking includes impacts to or destruction of the occupied habitat of a Protected Species.²¹¹ Thus, ECL Article 11 protects both Protected Species and their habitat, that is, the location in which they successfully perform life functions and essential behavior, including sheltering, movement, feeding, foraging, nesting, roosting, wintering, breeding, and

²⁰⁹ "Endangered species" are defined as species that are "seriously threatened with extinction;" "threatened species" are defined as species "likely to become endangered species within the foreseeable future throughout all or a significant portion of their range;" and "species of special concern" are defined as species found to be "at risk of becoming threatened." ECL §11-0535(1).

²¹⁰ ECL §11-0535(2).

²¹¹ ECL §11-0103(13); State of New York v. Sour Mountain Realty, Inc., 276 A.D.2d 8, 13-14 (2d Dept. 2000).

reproduction.²¹² Protected Species and their habitat may not be taken, modified, or destroyed.²¹³

The presence of several threatened and endangered species as well as species of special concern in the Project Area is not only fully supported by the record, that fact is not disputed by North Side. North Side identifies the following avian (grassland birds and wintering raptors) and reptile (turtle) species observed in the Project Area, which meet the regulatory criteria for protection under ECL Article 11:²¹⁴

Endangered: Short Eared Owl, Golden Eagle;

Threatened: Blanding's Turtle, Northern Harrier, Sedge Wren, Upland Sandpiper, Bald Eagle;

Species of Special Concern: Vesper Sparrow, Grasshopper Sparrow.²¹⁵

²¹² 6 NYCRR §182.2(p) (defining occupied habitat); Hearing Exhibit 293 (DEC T&E Panel), pp. 7-8, 10-12.

²¹³ State of New York v. Sour Mountain Realty, Inc., 276 AD2d at 13-14 (defining taking of protected rattlesnake species to "logically include habitat modification"). See also State of New York v. White Oak Co. LLC, 13 A.D.3d 435 (2d Dept. 2004), leave denied, 6 N.Y.3d 710 (2006) (upholding injunction under ECL Article 11 enjoining residential construction near pond that was habitat for endangered tiger salamander).

²¹⁴ ECL §11-0535; 6 NYCRR §182.5 (List of Endangered and Threatened Species and Species of Special Concern). DEC has proposed certain regulatory changes to the List of protected species that, once promulgated, may change the classification of one or more of the foregoing species identified in North Side's Application.

²¹⁵ Hearing Exhibit 52 (Application Exhibit 22), pp. 21-24; Hearing Exhibit 218 (October 2021 Supplemental Application Exhibit 22), pp. 108-109; Hearing Exhibit 293 (DEC T&E Panel), pp. 10-12. North Side conducted a Grassland Bird Breeding Survey and a Wintering Raptor Survey to identify the observed species within the Project Area. Hearing Exhibits 156-159 (Breeding Bird and Winter Raptor Survey Reports).

Grassland Birds and Wintering Raptors. North Side's Rebuttal Panel estimates that 954.5 acres of occupied habitat for threatened and endangered grassland bird will be potentially "taken" and adversely impacted by the Project, while the DEC Staff's Threatened and Endangered Species Panel (DEC T&E Panel) estimates that 1,050 acres of occupied habitat will be taken.²¹⁶

The DEC T&E Panel testified that North Side's own avian surveys document the presence of several wintering and breeding threatened and endangered grassland birds species throughout the Project Area.²¹⁷ The DEC T&E Panel testified that these species displayed breeding and/or wintering behavior in several locations within the Project Area.²¹⁸ Consistent with DEC's testimony, for its part, DPS Staff testified that substantial habitat for threatened and endangered grassland species within the Project Area will be taken, within the meaning of ECL §11-0535, including habitat within delineated wetlands.²¹⁹

²¹⁶ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 49-50; Hearing Exhibit 293 (DEC T&E Panel), p. 28; Hearing Exhibits 254, 255 (DEC T&E Panel Exhibit TE-11).

²¹⁷ Hearing Exhibit 293 (DEC T&E Panel), pp. 7-12. The DEC T&E Panel testimony (p. 10) also identifies species of greatest conservation need that have been documented in the Project Area in the NYS Breeding Bird Atlas, the U.S. Geological Survey Breeding Bird Survey, the NY Natural Heritage Program, and other third-party surveys.

²¹⁸ Hearing Exhibit 293 (DEC T&E Panel), p. 12. See also Hearing Exhibit 254 (DEC T&E Panel Exhibit TE-11), identifying areas of impact to listed grassland bird wintering and breeding habitat).

²¹⁹ Hearing Exhibits 291, 292 (DPS Policy Panel), pp. 63-64. DPS Staff estimates that, based on North Side's Application, a total of approximately 495 acres of protected species habitat would be taken as a result of the Project (i.e., 383 acres of breeding habitat and 112 acres of wintering habitat).

North Side's avian surveys included in Application Exhibit 22 also document that the endangered short-eared owl and threatened Northern Harrier are overwintering in the Project Area based upon "[t]he timing, essential behavior, concentrated location, number of observations, and confirmed roost locations" of these species.²²⁰ Thus, North Side, DEC Staff, and DPS Staff, all agree that the Project Area is occupied habitat for grassland birds and wintering raptors protected under ECL Article 11 and that a substantial portion of the habitat will be taken as a result of the Project. North Side proposes to address this habitat take through a NCBP, which is not detailed in the Application, although Certificate Conditions 99-a to 99-d purport to mitigate this adverse impact of the Project in the post-Certificate compliance phase by requiring a NCBP.²²¹ North Side proposes in its rebuttal testimony to "mitigate" the avian habitat take through a NCBP that addresses only 175 acres of the 569.4 acres of impacted avian habitat.²²² We find that this is insufficient.

Blanding's Turtle. North Side estimates that the Project will take or adversely impact 7.2 acres of the threatened Blanding's Turtle habitat.²²³ The DEC T&E Panel testified that, based on North Side's own assessment, wetland and nesting habitat for the threatened Blanding's Turtle was identified in the Project Area and Turtles have been observed at road crossings "encircling the Project area (e.g., in all

²²⁰ Hearing Exhibit Hearing Exhibit 293 (DEC T&E Panel), p. 12.

²²¹ Hearing Exhibit (February 2022 Settlement Proposal), pp. 36-38.

²²² Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 64-65.

²²³ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 64-65, 70-71; Hearing Exhibit 102 (Figure 22-6, Potential Blanding's Turtle Habitat); Hearing Exhibit 208 (Attachment G, Blanding's Turtle Survey Figures).

cardinal directions),” and “there is a strong possibility that the Blanding’s Turtle is using the Project site for part or all of its life cycle.”²²⁴ Although the North Side Rebuttal Panel contested DEC Staff’s characterization of certain aspects of its own Blanding’s Turtle assessment in Application Exhibit 22, it nevertheless stated that it “agreed with DEC staff that the presence of the species is assumed in potential nesting and habitat areas.”²²⁵ North Side, DPS Staff, and DEC Staff all agree that the Project Area is occupied habitat for the endangered Blanding’s Turtle species protected under ECL Article 11.

Again, the NCBP is not detailed in North Side’s Application, although Certificate Conditions 99-a to 99-d purport to address this aspect of the Project in the post-Certificate compliance phase.²²⁶ In those Certificate Conditions, North Side agrees to avoid construction activities in nesting areas during certain time frames and to notify DEC Staff within 24 hours of the discovery of the Protected Species’ nests or roosts, but only if confirmed by the observations of the Environmental Monitor. In addition to the Environmental Monitor, these Certificate Conditions introduce a Blanding’s Turtle Monitor, who has DEC Staff notification responsibility, with the added responsibility of placing any observed Blanding’s Turtle in the Project Area “in a bucket or a cooler.”

Essentially, these Certificate Conditions require no more than future notice to DEC Staff and in-the-field ad hoc measures during construction that rely on Project personnel. Article 10 requires more before the Certificate is issued,

²²⁴ Hearing Exhibit 293 (DEC T&E Panel), p. 44.

²²⁵ Hearing Exhibit 295 (North Side Rebuttal Panel), pp. 67-69.

²²⁶ Hearing Exhibit 288 (Supplemental T&E Settlement), pp. 36-38.

including methodical, planned and practicable minimization and avoidance measures to support our required findings.

As previously noted, DPS Staff continues to object to North Side's proposed Certificate Conditions (99-105) related to threatened and endangered species.²²⁷ Unlike DPS Staff, DEC Staff withdrew its objections once North Side added proposed Conditions 99-a to 99-d, which provide for the post-Certificate submission of a NCBP.²²⁸ The DPS Staff Policy Panel testified that the record is incomplete insofar as it fails to identify the actual impacts on the Blanding's Turtle and other threatened and endangered species, particularly because a substantial portion of their habitat overlaps with delineated but unmapped wetlands, which will be impacted by the Project, but which North Side asserts do not require minimization, avoidance or compensatory mitigation measures.²²⁹

The DPS Staff Policy Panel explains that the primary impacts to Protected Species will be from habitat modification, but also notes that even though North Side recognizes that compensatory mitigation for such impacts could be required, North Side did not propose such mitigation in its Application due to the dispute related to whether DEC has ECL Article 24 jurisdiction over unmapped wetlands in the Project Area.²³⁰ DPS Staff asserts that the record therefore lacks the requisite

²²⁷ DPS Staff Brief, pp. 24-25.

²²⁸ After North Side agreed to add Certificate Conditions 99-a to 99-d, DEC Staff signed on to a part of the February Settlement Proposal, while asserting objections to wetlands-related and other Certificate Conditions. DPS Staff did not agree to Certificate Conditions 99-a to 99-d and did not withdraw its objections to numerous Certificate Conditions and remain in dispute.

²²⁹ Hearing Exhibit 292 (DPS Policy Panel), pp. 63-64.

²³⁰ Hearing Exhibit 292 (DPS Policy Panel), p. 63-64.

information on the extent of the Project's impacts to threatened and endangered species and their wetland habitat.²³¹ DPS Staff concludes that it cannot recommend that the Siting Board make the required findings that adverse impacts on the Protected Species have been minimized or avoided to the maximum extent practicable.²³²

We find that the protections afforded in ECL Article 11 and 6 NYCRR Part 182 are applicable to this Project and prohibit the "taking" of these species, which includes impairment, modification, or destruction of their habitat in mapped and unmapped wetlands. We further find that the record lacks sufficient information on which we can determine that the uncontroverted Project impacts on the Protected Species and their habitat have been minimized or avoided to the maximum extent practicable. The proposed Certificate Conditions (99, 99-a to 99-c) related to post-Certificate submission of an NCBP is insufficient and does not reflect impact minimization and avoidance to the maximum extent practicable. Reliance on the post-Certificate submission of a NCBP to define the Project's impacts and to address minimization and avoidance measures is contrary to the requirements in PSL §168(3)(c). We find such impacts must be addressed before Certificate issuance.

In this case, Project impacts to threatened and endangered species are of a vastly more substantial nature than those we have examined in other Article 10 proceedings. Here, hundreds of acres of wetlands, at least nine Protected Species have been observed in the Project Area, and the occupied habitat of at least four of those species is expected to be adversely impacted and taken. In short, the Application and the proposed

²³¹ Hearing Exhibit 292 (DPS Policy Panel), pp. 64-65.

²³² DPS Staff Initial Brief, pp. 44-45.

NCBP Certificate Conditions do not represent minimization and avoidance of impacts to the maximum extent practicable. North Side has not met its burden to demonstrate that the Project's impacts on threatened and endangered species and their habitat have been minimized or avoided to the maximum extent practicable, as required by PSL §168(3)(c).

VI. COMPLIANCE WITH SUBSTANTIVE STATE LAWS - PSL §168(3)(e)

Prior to issuing a certificate, PSL §168(3)(e) expressly requires the Siting Board to find that the Project is designed to comply with applicable substantive requirements of State law concerning the environment, public health, and safety.²³³ In light of our findings related to the Project's failure to fully identify and minimize or avoid impacts to wetlands and threatened and endangered species to the maximum extent practicable, we cannot find that the Project is designed to comply with the applicable substantive requirements of State laws, including ECL Article 11, ECL Article 24 and the implementing regulations, as required by PSL §168(3)(e).

Notably, despite being required to list all applicable substantive State laws in Application Exhibit 32,²³⁴ North Side fails to list ECL Article 11 or ECL Article 24 as substantive

²³³ The Siting Board is given the authority to elect not to apply the substantive requirements of a local law upon a finding that it is "unduly burdensome," but is given no similar authority with respect to the application of State law. PSL §168(3)(e). Although State and local substantive requirements are made applicable to a proposed project, Article 10 preempts State and local agencies from requiring any permit or other approval, and from otherwise imposing procedural requirements on a proposed project. PSL §172(1). This preemption provision does not apply to State permitting authority delegated under federal laws, such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.

²³⁴ 16 NYCRR §1000.32(c).

State law requirements that are applicable to the Project.²³⁵ North Side also does not include the required statement that the Project will comply with State law or set forth the details of compliance.

North Side asserts in its Initial Brief that specific Certificate Conditions detail its commitment to comply with applicable State laws and regulations.²³⁶ For example, North Side claims that Certificate Condition 20(g) shows that it will comply with the State laws and regulations that are identified in Application Exhibit 32. But, as noted above, ECL Articles 11 and 24 and the implementing regulations are not identified in Application Exhibit 32, making the requirement in Certificate Condition 20(g) insufficient. Moreover, PSL §168(3)(e) does not require compliance with only those State laws that are identified in the Application. Compliance with all applicable State environmental laws and regulations is required, including those governing wetlands and threatened and endangered species.

North Side also asserts that other Certificate Conditions prove its compliance with applicable State laws and regulations, but none go to the issue of minimizing or avoiding impacts to protected wetlands and threatened and endangered

²³⁵ Hearing Exhibit 64 (Application Exhibit 32), Tables 32-1, 32-2. The Article 10 regulations require an applicant to list all State approvals, consents, permits, certificates, or other conditions of a substantive nature along with a statement that the facility as proposed conforms to all such substantive requirements. 16 NYCRR §1001.32(c)-(d). See, e.g., Case 18-F-0087, Flint Mine Solar, Application Exhibit 32, Table 32-2, p. 3 (DMM Item No. 87); Case 16-F-0205, Canisteo Wind Energy, Application Exhibit 32, Table 32-2 (DMM Item No. 115); and Case 16-F-0490, Cassadaga Wind, (DMM Item No. 63).

²³⁶ North Side Initial Brief, p. 89.

species to the maximum extent practicable.²³⁷ Instead, North Side's Application relies on a flawed interpretation of ECL Article 24 and the wetlands regulations and the argument that protection is not applicable to unmapped but delineated wetlands in the Project Area and therefore impacts are not subject to minimization and avoidance to the maximum extent practicable.

The DPS Policy Panel testified that the Siting Board cannot make a finding that the proposed Facility is designed to operate in compliance with applicable State environmental laws in the absence of a complete record on the Project's impacts to both wetlands and threatened and endangered species.²³⁸ North Side never adequately addresses this issue.

The previous section details the Project's environmental impacts and contains an extensive discussion showing North Side's failure to adhere to long-standing DEC precedent and compliance with the protections afforded by ECL Article 11 and ECL Article 24. The foregoing section has informed our finding here that North Side has failed to demonstrate on the record that the Project will comply with applicable State environmental laws. We find that both ECL Article 11 and ECL Article 24 and the implementing regulations

²³⁷ North Side cites the following Certificate Conditions in support of its assertion of compliance with substantive State laws: Certificate Conditions 17 (construction of collection facilities and collector cables in compliance with American National Standard Institute standards); 36 (Stormwater Pollution Prevention Plan, Uniform Fire Prevention and Building Code, Energy Conservation Construction Code); 37 (road work and transportation permits); 69 (trenching and trenchless installation methods); 81(e) (submission of Cultural Resource Mitigation Plan); 92(d) (excavation of contaminated materials); 106 (federal wetlands and water quality certification); 123 (removal of construction debris); and 135 (stream disturbance timeframe).

²³⁸ Hearing Exhibit 291-292 (DPS Policy Panel), p. 86; DPS Staff Initial Brief, p. 39.

are substantive environmental requirements that are applicable to the Project and require compliance. North Side has the burden to demonstrate that the Project is designed to comply with those and other substantive and applicable State and local laws, whose permitting and other procedural requirements are supplanted by Article 10.²³⁹ We find that North Side has not met its burden and that the record does not support the required finding of compliance with those laws, as required by PSL §168(3)(e).²⁴⁰

VII. PUBLIC INTEREST STANDARD - PSL §168(3)(B)

In addition to the foregoing required findings, the Siting Board is required to determine that construction and operation of the Project will serve the public interest.²⁴¹ Based on the Application's inadequacies in avoiding or minimizing environmental impacts to wetlands and threatened and endangered species to the maximum extent practicable, and its related failure to comply with applicable State wetlands laws and regulations, we cannot find the proposed Project to be in the public interest.

Although we agree with North Side's argument that the development of renewable solar electric generation is an important State objective, we find that the significant environmental impacts to wetlands and threatened and endangered species resulting from the construction and operation of the Project outweigh that objective. Article 10 requires both environmental compatibility and public need. Consequently, after considering the required findings in PSL §168(3)(c) and (e), weighing the factors in PSL §168(4), and viewing the record

²³⁹ 16 NYCRR §1001.32(c)-(d).

²⁴⁰ 16 NYCRR §1000.12(b)(1).

²⁴¹ PSL §168(3)(b).

as a whole, we find that the Project does not meet the overarching public interest standard.

VIII. CLCPA CONSISTENCY

The CLCPA requires, among other objectives, the procurement of 6,000 MW of solar energy by 2025; a 70 percent reduction in greenhouse gas emissions by 2030; an 85 percent reduction by 2050; and 100 percent zero emission electricity by 2040. In furtherance of these objectives, CLCPA Section 7(2) requires all State agencies to consider whether their administrative approvals and decisions “are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits” established in Environmental Conservation Law (ECL) Article 75.

Although the CLCPA includes specific requirements for the development of renewable energy, it does not override other statutory obligations to preserve, protect, and conserve environmental resources, including freshwater wetlands.²⁴² Large wetland complexes and associated adjacent areas are well-recognized as critical resources needed to protect against storms and flooding, to support wildlife, and to accumulate and store carbon.²⁴³

²⁴² ECL §24-0107(1).

²⁴³ See ECL §24-0105; see also L. 2022, ch. 58, Part QQ, sections 1(1), 1(3) (“[t]he freshwater wetlands of the State of New York are invaluable resources for flood protection, wildlife habitat, open space, climate change mitigation through the accumulation and storage of large amounts of carbon, and water resources;” and “[t]he increasing severity and duration of storm-related flooding due to climate change, which has caused billions of dollars of property damage across the state, makes protection of all freshwater wetlands in the state of vital importance”).

The CLCPA does not require us to ignore adverse impacts to hundreds of acres of wetlands, including the permanent loss of their functions and benefits, and to disregard identified threatened and endangered species simply because an applicant seeks to construct and operate a renewable energy facility in an environmentally sensitive location. In contrast, Article 10 explicitly states that before issuing a certificate to construct and operate a facility, the Siting Board must find that adverse impacts to the State's environmental resources have been minimized or avoided to the maximum extent practicable. Article 10 and the CLCPA are not in conflict. Our protection of the State's environmental resources has been consistent in the seventeen (17) renewable energy projects we have approved to date, each of which will foster achieving the State's CLCPA objectives. We therefore find that our determination here to deny the Certificate is consistent with both the CLCPA and with our obligations under Article 10, and will not interfere with the CLCPA's objectives.

IX. CONCLUSION

Pursuant to PSL §168(3), we determine that North Side has failed to meet its burden to demonstrate (1) that the environmental impacts of the Project have been minimized or avoided to the maximum extent practicable; (2) that the Project is designed to operate in compliance with ECL Articles 11 and 24 and the implementing regulations; and (3) that the Project as proposed is in the public interest. We further find that our determination is consistent with the CLCPA and will not interfere with achieving its greenhouse gas emission reduction objectives. We therefore deny the Certificate, dismiss the

Application, and terminate the proceeding.²⁴⁴

The Board on Electric Generation Siting and the Environment
hereby orders:

1. This Order constitutes the final decision of the Siting Board in this proceeding.

2. For the reasons set forth in this Order, the Application of North Side Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need pursuant to Article 10 of the Public Service Law, for the construction and operation of a solar electric generating facility, is denied and this proceeding is terminated and closed.

By the New York State Board
on Electric Generation Siting
and the Environment,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

²⁴⁴ 16 NYCRR §1000.14 (the Siting Board may dismiss an application for a certificate and terminate the proceeding if "it appears that the statutory requirements for a certificate cannot be met").