

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 ON REHEARING

Issued and Effective December 7, 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 December 7, 2022

BOARD MEMBERS PRESENT:

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

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

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

Ian Wells, Alternate for
Hope Knight, Commissioner of the
New York State Department of Economic Development

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

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BY THE BOARD:

I. INTRODUCTION

On August 9, 2022, the New York State Board on Electric Generation Siting and the Environment (Siting Board) issued an Order Denying a Certificate of Environmental Compatibility and Public Need (Denial Order) to North Side Energy Center, LLC (North Side) pursuant to Public Service Law (PSL) Article 10. North Side's Application sought approval to construct and operate a 180 megawatt (MW) utility-scale solar generation facility on a 2,241 acre site in the Towns of Brasher, Massena, and Norfolk, St. Lawrence County (the Project or Facility). More than two-thirds of the site (1,507 acres) is comprised of freshwater wetlands and is considered occupied habitat for several threatened and endangered species.

The Siting Board's Denial Order sets forth in detail a description of the Project and associated environmental impacts; the procedural background of this proceeding; the Parties' arguments in support of, and in opposition to, the Project; and the factual and legal basis for the Siting Board's denial of the Certificate. In the Denial Order, the Siting Board concludes that it could not make the findings required by PSL §168(3)(b), (c), and (e) for a Certificate to be issued because North Side had failed to demonstrate on the record that the proposed Project's adverse environmental impacts to wetlands and threatened and endangered species had been minimized or avoided to the maximum extent practicable; that the Project as designed would comply with applicable State environmental laws; and that the Project was in the public interest.

On September 7, 2022, North Side timely filed a Petition for Rehearing (Rehearing Petition) of the Denial Order pursuant to PSL §170 and 16 NYCRR §1000.15(a). On September 22,

2022, Staff of the Departments of Public Service (DPS Staff) and Environmental Conservation (DEC Staff) filed opposition to the Rehearing Petition. For the reasons set forth below and in the Denial Order, we deny North Side's Rehearing Petition.

II. BACKGROUND OF THE PROCEEDING

A. North Side's Application

On February 19, 2021, North Side, a wholly-owned indirect subsidiary of NextEra Energy Resources, LLC (NextEra), filed an Application to construct the Facility in the Towns of Brasher, Massena, and Norfolk (Towns) pursuant to PSL Article 10. On May 27, 2021, and October 8, 2021, North Side filed revisions to certain Application materials.

B. Description of the Project

The Project Area, consisting of approximately 2,241 acres of land, is located in primarily rural areas in each of the three Towns and is comprised of agricultural and forested land that includes 37 wetlands, 11 streams, and habitat for several threatened and endangered species and species of special concern. Wetlands total 1,504 acres, or 67 percent of the total 2,241 acre Project Area.¹

The Project would consist of commercial-scale solar arrays in a tracker racking system, inverters, and other components; approximately 7 miles of access roads, from 12 to 20 feet wide; parking, materials and equipment laydown yards; construction staging areas; 33 miles of buried and overhead electric collection lines; a 2.2 acre collection substation area; point of interconnection facilities; an adjacent 230 kilovolt (kV) switchyard; transmission lines; and fencing around

¹ Denial Order, pp. 35-37; Hearing Exhibit 161, pp. 18, 21-22; Hearing Exhibit 218, pp. 18-19.

more than 900 acres of the Project Area.² 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 through the existing Massena substation.

C. Siting Board's Denial Order

The Siting Board framed the threshold dispute to be whether the Project's delineated wetlands that are not identified on the State's wetlands maps (unmapped wetlands) are nevertheless subject to protection under PSL Article 10, the State's wetlands laws and regulations, Environmental Conservation Law (ECL) Article 24 and 6 NYCRR Parts 663-664, as well as to the requirement in PSL §168(3)(c) to minimize and avoid all environmental impacts to the maximum extent practicable.³ The Siting Board found separate but related questions presented by the Project, including whether it was designed to comply with the substantive requirements of the State's wetlands and threatened and endangered species laws and whether it was in the public interest, as required by PSL §168(3)(b) and (e).

In the Denial Order, the Siting Board determined that Article 10's broad environmental protections, which require minimization or avoidance of adverse environmental impacts, extended to all delineated wetlands regardless of whether they appear on the State's official wetlands maps. The Siting Board determined that unmapped wetlands delineated by North Side were subject to protection under Article 10 and that the Project's impacts must be minimized and avoided to the maximum extent

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

³ Denial Order, p. 32. The Siting Board found that minimization and avoidance of impacts to threatened and endangered species and their habitat are integrally related to the wetlands issue.

practicable.⁴ The Siting Board determined that, irrespective of DEC's ECL Article 24 authority to regulate wetlands, Article 10 provides the Siting Board with a separate and independent authority to evaluate the Project's environmental impacts and to determine whether they have been adequately minimized or avoided to the maximum extent practicable. The Siting Board also examined the Project's impacts on threatened and endangered species and their wetlands habitat.

The Siting Board concluded that North Side had failed to demonstrate on the record that impacts to wetlands and to threatened and endangered species would be minimized and avoided to the maximum extent practicable, and that it could not issue a Certificate based on the required findings under PSL §168(3)(c).⁵ In addition, the Siting Board determined that it could not find under PSL §168(3)(e) that the Project would comply with the substantive requirements of applicable State wetlands and threatened and endangered species laws and regulations, specifically, ECL Articles 11 and 24 and their respective implementing regulations, 6 NYCRR Parts 182 and 663-664.⁶

After considering the factors in PSL §168(4) and the record as a whole, the Siting Board further determined that it could not find that the Project was in the public interest, as required by PSL §168(3)(b).⁷ Although the Siting Board acknowledged that the Project, as a renewable solar generation facility, could serve the important State emissions reduction

⁴ Denial Order, p. 33.

⁵ Denial Order, pp. 33-34, 55-58. The Denial Order notes that, while claiming to have minimized impacts to unmapped wetlands by rearranging access roads and inverter locations, North Side did so only "where practicable" in order to maintain the Project's 180 MW capacity.

⁶ Denial Order, pp. 70-73.

⁷ Denial Order, pp. 73-74.

objectives, it nevertheless noted that "Article 10 requires both environmental compatibility and public need" and that the Project's significant environmental impacts did not meet the overarching public interest standard.⁸

Finally, the Siting Board determined that denying the Certificate was not inconsistent with the Climate Leadership and Community Protection Act (CLCPA).⁹ The Siting Board explained that the CLCPA does not require it "to ignore adverse environmental impacts to hundreds of acres of wetlands, including the permanent loss of their functions and benefits, and to disregard identified threatened and endangered species...."¹⁰ The Siting Board concluded that the Denial Order was consistent with the CLCPA because there is an established need to protect sensitive environmental resources, including wetlands, the loss of which would have detrimental effects on the CLCPA's goals and other State objectives.

III. THE REHEARING PETITION

North Side's Rehearing Petition challenges the Siting Board's Denial Order on several grounds. North Side first asserts that the Siting Board erred in concluding that the record did not demonstrate minimization or avoidance of the Project's wetland impacts to the maximum extent practicable and that it had made the required showing insofar as the record reflects "a multitude of siting constraints in the Project Area that resulted in the proposed layout."¹¹

⁸ Denial Order, pp. 73-74.

⁹ Denial Order, pp. 74-75.

¹⁰ Denial Order, p. 75.

¹¹ Rehearing Petition, p. 7.

The Rehearing Petition avers that the Project "must occupy 900 acres" in order to generate 180 MWs, but that wetlands comprise 1,504 of the 2,241 acre Project Area, leaving only 737 acres of non-wetland areas for the Project.¹² North Side continues to argue in the Rehearing Petition, as it did in its Application and testimony during the proceeding, that ECL Article 24 and the implementing regulations, 6 NYCRR Parts 663 and 664, do not apply to unmapped wetlands impacted by the Project.¹³ Even so, North Side asserts that the Siting Board failed to apply the "weighing standards" in ECL Article 24's implementing regulations and improperly treated unmapped wetlands as Class I wetlands.¹⁴ North Side also asserts that the Siting Board erred in concluding that it had failed to demonstrate on the record that it had minimized and avoided impacts to wetlands and threatened and endangered species to the maximum extent practicable.¹⁵ North Side argues that the Siting Board's Denial Order violates the CLCPA.¹⁶

North Side claims that the Denial Order erroneously assigns an "unconditional burden of proof" standard in concluding that it had not met its burden.¹⁷ The Rehearing Petition asserts that in denying the Certificate, the Siting Board "entirely ignores the practicability requirement" because

¹² Rehearing Petition, p. 8. North Side cites Application Exhibit 2 (Hearing Exhibit 31, p. 2) in support of these assertions, but nothing in that part of the Application supports the claim that the Project has to occupy 900 acres, including wetland areas, in order to generate 180 MWs of solar power.

¹³ Rehearing Petition, pp. 19-27.

¹⁴ Rehearing Petition, pp. 27-29.

¹⁵ Rehearing Petition, pp. 17-19.

¹⁶ Rehearing Petition, p. 4.

¹⁷ Rehearing Petition, pp. 17-19.

impracticable Certificate Conditions or an alternative layout cannot be implemented.¹⁸

North Side's Rehearing Petition argues that the Siting Board erred in not explaining "how the scale of impacts affects acceptable methods of avoidance/minimization/restoration measures."¹⁹ The Rehearing Petition claims that the wetland mitigation proposed by DEC Staff is "impracticable because it could not be reasonably accomplished."²⁰

North Side also challenges the Siting Board's findings with respect to threatened and endangered species. North Side asserts that its proposed Certificate Condition requiring a net conservation benefit plan (NCB Plan) complies with ECL Article 11's implementing regulations (6 NYCRR Part 182), is consistent with other Article 10 determinations, and should have been approved as part of a Certificate.²¹ North Side urges that the Siting Board should not have relied on DPS Staff testimony that the record was not complete with respect to the Project's impacts to threatened and endangered species.

North Side asks the Siting Board to reverse the Denial Order and issue the Certificate, or alternatively, to reopen the record and allow new minimization, avoidance, and compensatory wetlands mitigation measures to be proposed.

IV. OPPOSITION TO THE REHEARING PETITION

DPS Staff and DEC Staff oppose the Rehearing Petition. DPS Staff argues that, in denying the Certificate, the Siting Board did not commit an error of law or fact and correctly

¹⁸ Rehearing Petition, p. 17.

¹⁹ Rehearing Petition, p. 11.

²⁰ Rehearing Petition, p. 18.

²¹ Rehearing Petition, p. 35.

concluded that it could not make the requisite Article 10 findings for a Certificate to be issued.²² DPS Staff notes that North Side concedes the Siting Board's Article 10 authority to consider impacts to unmapped wetlands and recites the Denial Order's finding that the Board "is guided by the framework of ECL Article 24 and the implementing regulations, but is not limited by their reach."²³ DPS Staff argues that in denying the Certificate, the Siting Board carefully considered the CLCPA's objectives and "the totality of all relevant factors" under Article 10, with no one factor given "special weight that elevates it above the other required findings."²⁴

DPS Staff challenges North Side's assertion that "new circumstances" warrant a different determination due to the enactment of legislative amendments to ECL Article 24. First, DPS Staff asserts that the amendments are not new insofar as they were signed into law in April 2022, before the Siting Board's Denial Order was issued.²⁵ Second, DPS Staff claims that the Denial Order correctly notes the Examiners' criticism of North Side's conclusion that the ECL Article 24 amendments indicate that DEC previously lacked regulatory authority to protect unmapped wetlands. DPS Staff notes that the Siting

²² DPS Staff Response to Rehearing Petition, pp. 4-5. DPS Staff incorporates by reference the arguments advanced in its Initial and Reply Briefs to the Siting Board during consideration of North Side's Application for a Certificate.

²³ DPS Staff Response, pp. 5-6 (citing North Side Petition, p. 12; Denial Order, p. 35).

²⁴ DPS Staff Response, p. 6 (citing Case 14-F-0490, Application of Cassadaga Wind LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions [issued January 17, 2018], p. 103).

²⁵ DPS Staff Response, p. 7 (citing Denial Order, p. 24).

Board correctly found such protections are properly afforded unmapped wetlands under Article 10.²⁶

DPS Staff also challenges North Side's attempt to propose the use of new parcels outside of the Project Area as mitigation to compensate for wetland impacts. DPS Staff asserts that as early as July 2020, North Side was aware of DEC Staff's concerns about such impacts and only now is proposing potential mitigation.²⁷ DPS Staff also asserts that although North Side had ample time during the proceeding to address wetlands concerns, even now it has failed to present a feasible, detailed proposal.²⁸ DPS Staff further asserts that North Side's mitigation proposal should not be considered new circumstances because it was only developed in response to the Siting Board's finding in the Denial Order that adverse impacts had not been demonstrably minimized and avoided to the maximum extent practicable.

Like DPS Staff, DEC Staff similarly argues that North Side has not met the criteria for rehearing by showing errors of law or fact or new circumstances. DEC Staff asserts that the Rehearing Petition merely restates arguments North Side previously made during the proceeding.²⁹ Responding to North Side's argument that the Siting Board's decision here is inconsistent with other Article 10 cases, DEC Staff

²⁶ DPS Staff Response, pp. 7-8 (citing Denial Order, p. 73).

²⁷ DPS Staff Response, p. 8 (citing DEC Staff July 7, 2020 Comments on Preliminary Scoping Statement; and Hearing Exhibit 238, DEC Staff February 4, 2021 Preliminary Wetlands Assessment; Hearing Exhibit 294, DEC Staff Wetlands and Streams Panel Testimony; and Hearing Exhibit 292, DPS Staff Policy Panel Testimony).

²⁸ DPS Staff Response, pp. 8-9.

²⁹ DEC Staff Response, pp. 3-4. In its Response to the Rehearing Petition, DEC Staff references and incorporates its Initial and Reply Briefs submitted prior to the Denial Order.

differentiates between the scope and scale of wetland impacts resulting from this Project and the more limited impacts evident in the Siting Board's East Point, Trelina, and Excelsior orders.³⁰ DEC Staff asserts that North Side continues to misunderstand the applicable legal requirements regarding wetlands protection and fails to recognize that restoration and mitigation measures are not available for the "loss of wetland function and value that is extraordinary in scale in comparison to those in East Point, Trelina, and Excelsior."³¹

DEC Staff notes that North Side does not explain why this Project should be subject to similar Certificate Conditions imposed in cases that allowed only nominal impacts. DEC Staff also compares the hundreds of acres of wetland impacts resulting from this Project with the relatively limited impacts in Atlantic Wind, where the Siting Board required the Certificate Holder to provide wetland mitigation.³²

³⁰ DEC Staff Response, p. 6; Case 17-F-0599, East Point Wind, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued August 20, 2019); 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); Case 19-F-0299, Excelsior Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued April 6, 2022). DEC Staff also notes that all of those cases included a confidential settlement among the parties.

³¹ DEC Staff Response, pp. 4-5. DEC Staff identifies the factors it considers in reviewing a proposed wetlands mitigation plan on a case-by-case, site-specific basis and notes that what may be acceptable mitigation in one case may not be appropriate in another.

³² DEC Staff Response, pp. 8-9; Case 16-F-0267, Atlantic Wind, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued June 30, 2020).

DEC Staff further argues that the Siting Board correctly found that the wetlands complex at issue here should be considered a Class I wetland and afforded the highest protection due to the presence of threatened and endangered species.³³ Citing its own testimony, DEC Staff disputes North Side's assertion that the Siting Board "erroneously ignored the uncontroverted evidence in the record" that the Project would restore the functions and benefits of unmapped wetlands, calling it "blatantly inaccurate."³⁴ DEC Staff also criticizes North Side's attempt to shift the burden of proof in asserting that if the agencies had proposed a specific alternative layout, North Side "would have had an opportunity to engage that evidence."³⁵ DEC Staff recites the Denial Order's finding that North Side bears the burden of proof and that the agencies have no obligation to propose an alternative layout.³⁶

With respect to North Side's assertion of "new circumstances" warranting rehearing, DEC Staff argues that neither the legislative amendments to ECL Article 24 nor the use of additional property to mitigate wetland impacts are new circumstances.³⁷ DEC Staff recites the Siting Board's finding that unmapped wetlands are subject to protection under Article 10 regardless of the legislative amendments to ECL Article 24. As such, DEC challenges North Side's legal argument that unmapped wetlands were not protected prior to the amendments. With respect to the use of property for compensatory mitigation to address wetland impacts, DEC Staff questions why North Side

³³ DEC Staff Response, pp. 6-7.

³⁴ DEC Staff Response, p. 7 (citing Wetlands and Stream Panel Testimony, p. 15; Rehearing Petition, p. 12).

³⁵ DEC Staff Response, p. 7 (citing Rehearing Petition, p. 7).

³⁶ DEC Staff Response, p. 7 (citing Denial Order, p. 58).

³⁷ DEC Staff Response, pp. 9-11.

only now is raising this possibility when the need for such mitigation measures was known but rejected by North Side during the entire proceeding. DEC Staff therefore argues that this issue is not new for purposes of reopening the record. DEC Staff asserts that, in any event, North Side still does not now propose measures that would constitute adequate mitigation for the Project's extensive wetland impacts.³⁸

V. STATUTORY AND REGULATORY FRAMEWORK

To issue an Article 10 Certificate, the Siting Board is required to identify a proposed project's environmental impacts and to find, among other things, that such impacts will be minimized or avoided to the maximum extent practicable; that the Project as designed will comply with applicable substantive State laws and regulations; and that the Project is in the public interest.³⁹ Article 10, specifically PSL §168(3), is clear that the Siting Board "may not grant a certificate" in the absence of those and other findings. In addition, an Article 10 applicant has the burden of proof to demonstrate that the Siting Board can make all required findings and determinations.⁴⁰

A party aggrieved by a Siting Board order may petition for rehearing within 30 days of the order's issuance.⁴¹ Any party opposing rehearing may submit a response within 15 days of the petition's filing.⁴² The Siting Board is required to consider and decide a rehearing petition within 90 days of

³⁸ DEC Staff Response, p. 11.

³⁹ PSL §168(3)(b), (c), and (e).

⁴⁰ 16 NYCRR §1000.12(b)(1).

⁴¹ PSL §170(1); 16 NYCRR §3.7(a). Pursuant to 16 NYCRR §1000.3, the Public Service Commission's rehearing regulations apply to challenges to Siting Board Article 10 orders.

⁴² 16 NYCRR §3.7(c).

filing, although that time frame may be extended "where a rehearing is required if necessary to develop an adequate record."⁴³

Rehearing may be sought only on the grounds that the Siting Board committed an error of law or fact, or that new circumstances warrant a different determination.⁴⁴ A petition for rehearing shall separately identify and specifically explain and support each alleged error of law or fact and shall identify the new circumstances warranting rehearing.⁴⁵

The Siting Board's determination on rehearing is based on the record of this proceeding as of the date of the Denial Order and is guided by the Article 10 criteria and the rehearing standard of review.

VI. DISCUSSION

A. The Standard for Rehearing

North Side's Rehearing Petition asks the Siting Board to reverse the Denial Order or, alternatively, to reopen the record. As a threshold matter, North Side's Rehearing Petition fails to meet the statutory standard for rehearing under Article 10 and the applicable rehearing regulations.⁴⁶ It does not raise errors of law or fact warranting a different determination than the decision the Siting Board reached in the Denial Order. Nor does it present new circumstances justifying reopening the record of the proceeding. For the reasons set forth below, we find that North Side is not entitled to either form of relief.

⁴³ PSL §170(1).

⁴⁴ 16 NYCRR §3.7(b). The criteria for seeking rehearing in the Commission's regulations apply to North Side's Rehearing Petition.

⁴⁵ 16 NYCRR §3.7(b).

⁴⁶ PSL §170(1); 16 NYCRR §3.7(a).

1. North Side's Claim of Errors of Law

The Rehearing Petition essentially restates the same legal positions North Side advanced during the proceeding, which are that unmapped wetlands are not subject to the same protections afforded to mapped wetlands and that the Siting Board lacks the authority to find that impacts to both must be minimized and avoided to the maximum extent practicable.⁴⁷ The Rehearing Petition also reiterates North Side's legal position that the Siting Board's authority to protect wetlands is limited to the federal water quality certification under Clean Water Act Section 401 (CWA 401),⁴⁸ and that the U.S. Army Corps of Engineers will effectively address federally-protected unmapped wetlands by requiring mitigation, making Siting Board action unnecessary.⁴⁹ North Side asserts that, in rejecting these arguments in the Denial Order, the Siting Board committed errors of law.

We again reject North Side's attempt to limit the Siting Board's authority to only mapped wetlands and to the CWA 401 water quality certification. We also reject North Side's argument that the U.S. Army Corps of Engineers will adequately

⁴⁷ Rehearing Petition, pp. 4-5, 19-20. North Side disputes that it is challenging the Siting Board's Article 10 authority. North Side notes that during the proceeding it "repeatedly agreed that the Siting Board has jurisdiction over unmapped wetlands." Rehearing Petition, p. 4. North Side provides no record citations that document its repeated agreement in this regard. Nevertheless, its legal position that unmapped wetlands are not subject to protection is well-documented in the record as well as in the Rehearing Petition. For example, as the Denial Order recites, Application Exhibit 22 (Update) indicates that unmapped wetland impacts will be minimized only "wherever practicable" using "best management practices." Hearing Exhibit 268 (Updated Application Exhibit 22), pp. 73-74, 98-101; Denial Order, pp. 36-37.

⁴⁸ 33 U.S.C. §1341.

⁴⁹ Rehearing Petition, pp. 4-5.

protect New York's unmapped wetlands. As we recited in the Denial Order, the Siting Board's broad authority is sourced in Article 10 and while the Siting Board may be guided by the substantive provisions of ECL Article 24 and the implementing regulations, its Article 10 authority to address minimization and avoidance of wetland impacts is not limited by those provisions.⁵⁰

Furthermore, although Article 10 expressly supplants the procedural requirements of ECL Article 24, at a minimum it mandates compliance with the substantive provisions of that law and the implementing regulations.⁵¹ Thus, while Article 10 requires the Siting Board to be as stringent in its protection of wetlands as DEC would be in its own ECL Article 24 permitting matters, it does not limit the Siting Board's authority to Article 24's provisions. Accordingly, the Siting Board may be more stringent in its consideration of the total environmental impacts of any proposed project to assure minimization and avoidance of such impacts to the maximum extent practicable.⁵²

North Side also claims that the Siting Board committed an error of law by misapplying the Court of Appeals' decision in Wedinger v. Goldberger.⁵³ The Rehearing Petition argues that Wedinger actually supports North Side's narrow reading of DEC ECL Article 24 regulatory authority as limited only to mapped wetlands.⁵⁴ As the Siting Board noted in the Denial Order, the Court of Appeals in Wedinger expressly refused to read ECL Article 24 so narrowly and thereby preclude DEC's regulatory

⁵⁰ Denial Order, pp. 32-35.

⁵¹ PSL §168(3)(e).

⁵² PSL §168(3)(c).

⁵³ 71 N.Y.2d 428, 438 (1988).

⁵⁴ Rehearing Petition, pp. 20-21.

authority over unmapped wetlands before the promulgation of the final State wetlands map, that is, wetlands not appearing on the State's then-tentative maps. North Side's attempt to distinguish the Court's finding in Wedinger by virtue of the tentative and final nature of the State's maps evident in that case is simply not relevant here.

This is not a permitting matter before DEC and the Siting Board does not rely wholly on Wedinger and ECL Article 24 in reaching its decision. Instead, the Siting Board relies on its own broad authority under Article 10 in finding that North Side had failed to adequately address the Project's adverse impacts to unmapped wetlands.⁵⁵

In focusing on Wedinger and DEC's regulatory authority under ECL Article 24, North Side's argument is misdirected. The Rehearing Petition does not address the Siting Board's finding of its own broad Article 10 authority, other than to essentially argue that unmapped wetland impact minimization and avoidance must be derived solely from ECL Article 24. Indeed, North Side's Rehearing Petition does not directly dispute the Siting Board's reading of PSL §168(3)(c) that requires an express finding that all environmental impacts resulting from the Project, including impacts to both mapped and unmapped wetlands, must be minimized and avoided to the maximum extent practicable.

North Side's Rehearing Petition merely expresses its disagreement with the Siting Board's factual finding that the environmental impacts associated with the Project, including

⁵⁵ Denial Order, pp. 43-44, 48-50. After reviewing several other judicial and administrative decisions construing ECL Article 24, the Denial Order found meritless North Side's legal argument that unmapped wetlands were not subject to protection under either Article 10 or ECL Article 24 by virtue of the definition of "freshwater wetlands" in ECL §24-0107.

impacts to unmapped wetlands, have not been sufficiently minimized and avoided to the maximum extent practicable. As such, North Side's claim that the Siting Board erroneously relied on Wedinger's construction of ECL Article 24 is not an error of law justifying rehearing.⁵⁶

North Side also claims that the Siting Board committed an error of law in finding that wetlands in the Project Area are considered Class I wetlands and thereby subject to the highest protection.⁵⁷ The Siting Board agreed with DEC Staff's classification of the Project's wetlands as Class I wetlands due to the presence of protected species and occupied habitat and found the classification to be in accordance with the express provisions of ECL Article 24's implementing regulations.⁵⁸

While arguing that the ECL Article 24 regulations do not apply to the Project,⁵⁹ North Side alternatively argues that the Siting Board did not properly evaluate the Project in light

⁵⁶ We also reject North Side's attempt to distinguish some of the illustrative judicial and administrative decisions cited in the Denial Order, which construed the treatment of wetland protections, and its argument that the Siting Board erred in not reconciling the Alle-Catt and Hecate Green Article 10 determinations. Rehearing Petition, pp. 24-26. These decisions each arose in a different factual context, but our discussion of how wetlands were treated fully supported our determination that unmapped wetlands are entitled to Article 10 protection. In short, North Side's Rehearing Petition has not presented any basis for us to conclude that our reliance on these decisions was erroneous as a matter of law.

⁵⁷ Rehearing Petition, pp. 29-31.

⁵⁸ Denial Order, pp. 51-52, n. 171 (citing provisions of the Article 24 regulations, 6 NYCRR §§664.5(a)(2) and 664.6(c)(2) and (4), which define Class I wetlands to include the resident habitat of any endangered or threatened species and which explain in detail the wetland classification system).

⁵⁹ Rehearing Petition, pp. 19-20.

of the weighing standards in the regulations.⁶⁰ We reaffirm the Denial Order's finding that the issue of the regulatory weighing standards need not be reached if North Side failed in the first instance to demonstrate minimization and avoidance of wetland impacts to the maximum extent practicable, as required by PSL §168(3)(c).⁶¹

North Side's Rehearing Petition asserts that the Siting Board committed an error of law in assigning "an unconditional burden of proof standard" to the requirement to minimize or avoid wetland impacts, rather than applying a more reasonable "practicability" standard.⁶² North Side complains that the Denial Order erroneously "provides no rationale as to what additional avoidance and minimization would be practicable," particularly since practicability is not defined in Article 10.⁶³

The Denial Order rejected North Side's attempt to shift the burden of proof to DPS Staff and DEC Staff by arguing that the agencies should have proposed an alternative layout to avoid wetland impacts.⁶⁴ We also reject North Side's attempt in the Rehearing Petition to place the burden on the Siting Board to identify the "additional" minimization and avoidance measures

⁶⁰ Rehearing Petition, pp. 27-29.

⁶¹ Denial Order, p. 54.

⁶² Rehearing Petition, pp. 17-19.

⁶³ Rehearing Petition, p. 18.

⁶⁴ Denial Order, pp. 71, 74 (citing 16 NYCRR §1001.12(b)(1)); Rehearing Petition, pp. 17-18 ("[h]ad the agencies proposed a specific alternative layout, North Side would have had an opportunity to engage that evidence").

necessary to address the Project's impacts to the maximum extent practicable.⁶⁵

North Side also complains that the Siting Board disregarded the "multitude of siting constraints" and the "limitations" resulting from the renewable energy contract (REC) with the New York State Energy and Research Development Agency (NYSERDA), that prevented either reducing the size of the Project or proposing wetland impact minimization or avoidance measures.⁶⁶ The siting constraints to which North Side refers were of its own making. It alone chose the location of the Project amid 1,504 acres of wetlands, wetland complexes and protected species habitat. It alone refused to consider an alternative layout or location, as the Denial Order notes.⁶⁷

Furthermore, the Siting Board's Denial Order summarily dismissed North Side's arguments regarding the NYSERDA REC contract by finding that it cannot dictate the Project layout or the acceptable minimization or avoidance of environmental impacts.⁶⁸ In other words, the Siting Board found that a REC contract cannot be determinative of the required Article 10 findings. The Denial Order states that "[t]o hold otherwise would essentially allow an applicant to contract away with NYSERDA the environmental requirements imposed under Article 10."⁶⁹ The Denial Order went on to find that, based on North Side's own assertions, the record showed no alternative layout was possible to achieve minimization or avoidance to protected

⁶⁵ Rehearing Petition, p. 18 ("[t]he Order errs as it provides no rationale as to what additional avoidance and minimization measures would be practicable").

⁶⁶ Rehearing Petition, pp. 17-18.

⁶⁷ Denial Order, pp. 58-59.

⁶⁸ Denial Order, pp. 58-59.

⁶⁹ Denial Order, p. 59.

wetlands in the Project Area to the maximum extent practicable.⁷⁰ It also noted that the record showed that North Side did little to reconfigure the layout of the Project in an effort to minimize or avoid wetland impacts.⁷¹

North Side's Rehearing Petition further alleges error in the Siting Board's failure to consider the April 2022 amendments to the State's wetlands law, which revised the definition of "freshwater wetlands" in ECL §24-0107 to delete the term "as shown on the freshwater wetlands map." North Side argues in the Rehearing Petition that "there would be no need" for the amendments if DEC already had the authority to regulate unmapped wetlands.⁷²

In the Denial Order, we recited the Examiners' February 10, 2022 ruling taking official administrative notice of the then-proposed legislative amendments to ECL Article 24, but noted that the ruling questioned North Side's conclusion that the proposed amendments defined DEC's regulatory authority over unmapped wetlands.⁷³

⁷⁰ Denial Order, pp. 59-61. The Siting Board noted that, "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."

⁷¹ Denial Order, pp. 60-61. The Siting Board found that the record lacked clarity on the exact number of wetland acres impacted by the Project. North Side conceded that 507 acres would be impacted and DEC Staff testified that approximately 757 acres of wetlands and adjacent areas would be impacted and their wetland functions and benefits destroyed. The Siting Board determined that it could assume, based on North Side's concessions in the record, that at least 507 acres of unmapped wetlands would be impacted. Denial Order, pp. 57-58, n. 188.

⁷² Rehearing Petition, pp. 22-24.

⁷³ Denial Order, pp. 23-24.

Although North Side did not attempt to timely raise this issue once the proposed ECL Article 24 amendments became law in April 2022, which was well before the August 9, 2022 issuance of the Denial Order, we nevertheless find that the amendments do not define or limit DEC's previous regulatory authority and, more importantly, do not address the protection that should be afforded to unmapped wetlands under Article 10. We further find that the legislative amendments reaffirm both the agency's and the regulated community's long-standing practice under ECL Article 24's permitting program to require an on-site wetlands field delineation in order to precisely define wetland boundaries for purposes of minimization, avoidance and mitigation, regardless of whether they are mapped or unmapped.⁷⁴ North Side's Wetlands Delineation Report did precisely that and DEC verified the boundaries. This approach is not only consistent with DEC's long-standing practice, but placed North Side on notice of both mapped and unmapped wetlands that required protection in this proceeding under PSL §168(3)(c).⁷⁵

Finally, North Side claims that the Siting Board erred as a matter of law in finding that the Project does not comply with the State's endangered and threatened species regulations,

⁷⁴ Denial Order, pp. 37-38. The DEC Staff Wetlands and Streams Panel explained the historic regulatory process under ECL Article 24 for both mapped and unmapped wetlands, noting that the State's official wetland maps were developed using 1970s-era aerial photography and were not meant to precisely depict the actual extent of wetlands, but to do that, a DEC-verified field delineation must be performed by trained personnel. Hearing Exhibit 294, pp. 5-8.

⁷⁵ Denial Order, pp. 50-51. In addition to North Side's Wetlands Delineation Report, the Denial Order cites DEC Staff's Preliminary Wetlands Assessment as evidence in the record that North Side had notice of the extent of wetlands that would require minimization and avoidance to the maximum extent practicable.

6 NYCRR Part 182.⁷⁶ As detailed below, the Denial Order found that the record lacked sufficient factual information on which to base a finding that impacts to the protected species in the Project Area would be minimized and avoided to the maximum extent practicable, as required by PSL §168(3)(c), or that the Project complied with ECL Article 11 and the implementing regulations, as required by PSL §168(3)(e).⁷⁷ Contrary to North Side's assertions, this is not an error of law but an absence of record evidence on which the Siting Board could rely in making the requisite Article 10 findings.

2. North Side's Assertions of Factual Errors

a. Wetlands

The Rehearing Petition asserts that the Siting Board committed errors of fact by ignoring record evidence of its minimization and avoidance measures for unmapped wetlands.⁷⁸ North Side fails to provide record citations to such evidence, however. Instead, the Rehearing Petition generally refers to "siting constraints" that prevented minimization and avoidance of wetland impacts. As the Denial Order found, the use of "best management practices" and component siting in already disturbed wetland areas are inadequate to minimize or avoid unmapped wetland impacts.⁷⁹

The Siting Board's Denial Order recites evidence in the record documenting extensive wetlands, wetland complexes, and contiguous wetland expanses extending beyond the mapped wetland boundaries in the Project Area, totaling more than 1,504

⁷⁶ Rehearing Petition, pp. 33-38.

⁷⁷ Denial Order, pp. 69-70.

⁷⁸ Rehearing Petition, p. 11.

⁷⁹ Denial Order, pp. 37, 57-58.

acres.⁸⁰ The Siting Board relied in large part on North Side's own Wetlands Delineation Report in making this factual finding and notes that "[t]here is no dispute among the parties regarding the accuracy" of that Report.⁸¹

After finding that both mapped and unmapped wetlands delineated in North Side's Application are subject to Article 10's broad requirement of minimization and avoidance to the maximum extent practicable, the Denial Order finds that the record failed to reflect sufficient efforts to meet that standard and therefore could not support the required finding under PSL §168(3)(c).⁸² Although there was some evidence in the record of North Side's efforts to minimize and avoid impacts to mapped wetlands where "practicable," the Denial Order found no evidence of similar efforts with respect to unmapped wetlands and adjacent areas.⁸³

Moreover, as the Denial Order notes, North Side failed to include in its Application - and the record - a Wetlands Mitigation Plan, which was required by 16 NYCRR §1001.22(n).⁸⁴ That Plan would have provided clear evidence in the record of the specific minimization or avoidance measures and the required compensatory mitigation measures for unavoidable impacts to both mapped and unmapped wetlands. The Siting Board notes in the Denial Order that, in failing to present a Wetlands Mitigation Plan, North Side's approach did not enable an evaluation of

⁸⁰ Denial Order, p. 43 (citing Hearing Exhibit 294, pp. 5-6).

⁸¹ 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.

⁸² Denial Order, pp. 37-38.

⁸³ Denial Order, pp. 36-37.

⁸⁴ Denial Order, p. 40, n. 131.

whether the Project's wetland impacts would be minimized and avoided to the maximum extent practicable.⁸⁵ Such an evaluation and specific findings are required by PSL §168(3)(c) prior to Certificate issuance.

In finding that Project impacts to unmapped wetlands had not been addressed, the Siting Board relied on North Side's own Application and its expert rebuttal panel testimony in the record, as well as on the testimony of DPS Staff and DEC Staff who separately claimed that North Side's efforts were insufficient.⁸⁶ Indeed, DEC Staff asserted that North Side had not only failed to sufficiently minimize and avoid impacts, but had "severely" underestimated the number of wetland acres impacted by failing to address unmapped wetlands.⁸⁷ Thus, the Siting Board's reliance on record evidence to conclude that North Side had not demonstrated avoidance and minimization measures to unmapped wetlands was not an error of fact.

North Side also argues that the Siting Board erroneously ignored "undisputed" evidence in the record that the Project will actually restore wetland functions and benefits without minimization and avoidance measures.⁸⁸ North Side claims that part of the Project Area was already disturbed by farming,

⁸⁵ Denial Order, p. 40, n. 131.

⁸⁶ Denial Order, pp. 36-37.

⁸⁷ Denial Order, p. 37, n. 118. DEC Staff testified that the Project would impact a total of 757 acres, including 621 acres of mapped and unmapped wetlands and an additional 136 acres of adjacent areas within 100 feet of the wetlands. Hearing Exhibit 294 (DEC Wetlands and Streams Panel), pp. 15-17. North Side never disputed this estimate. In fact, its own estimate of impacts to mapped and unmapped wetlands was approximately 739 acres, a difference of only 18 acres from DEC's estimate. Hearing Exhibit 271 (North Side Rebuttal Panel, NSRP-3).

⁸⁸ Rehearing Petition, pp. 12-16.

logging, and other uses.⁸⁹ Although North Side made this claim throughout the proceeding, it did not provide any quantification of the extent of the disturbed delineated wetland areas and did not demonstrate that there had been any loss of wetland functions and benefits in those areas. As the Denial Order found, North Side's own Wetlands Functions and Values Assessment and Wetland Delineation Report belie the claim that those disturbed areas should not have been subject to protection.⁹⁰

North Side's Rehearing Petition further claims that the Siting Board is treating this Project differently than other previously-approved Article 10 projects. As previously noted, the Siting Board's Denial Order concluded that the Project's wetland impacts far exceeded the modest impacts that had been approved in the cases North Side cites.⁹¹ In addition, the Siting Board cited the Alle-Catt Article 10 recommended decision and subsequently-issued order, finding the Denial Order to be consistent with both.⁹²

b. Threatened and Endangered Species and Habitat

North Side's Rehearing Petition claims error in the Siting Board's fact-based conclusion that the record is incomplete with respect to impacts to threatened and endangered species.⁹³ North Side further claims that its proposed Certificate Conditions bring the Project into compliance with the State's threatened and endangered species regulations, 6

⁸⁹ Rehearing Petition, pp. 13-14.

⁹⁰ Denial Order, p. 57.

⁹¹ Denial Order, pp. 45-48.

⁹² Denial Order, pp. 47-48; Case 17-F-0282, Application of Alle-Catt Wind Energy LLC, Recommended Decision (issued February 27, 2020), p. 45; Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued June 3, 2020), pp. 27-28.

⁹³ Rehearing Petition, pp. 38-39.

NYCRR Part 182, and that the Siting Board erred in finding that the record lacked sufficient information that the Project's impacts on protected species would be minimized or avoided to the maximum extent practicable.⁹⁴ North Side asserts that additional information is to be developed in the post-Certificate compliance phase through the submission of a NCB Plan designed to address mitigation of unavoidable impacts to protected species.⁹⁵ North Side argues that in other Article 10 cases, the Siting Board accepted the NCB Plan as sufficient minimization and avoidance to the maximum extent practicable of protected species' impacts.⁹⁶

The Siting Board's Denial Order found the Project's impacts to threatened and endangered species to be a separate but integrally-related basis for denial of the Certificate in view of the significant scale of wetland impacts and the resulting impacts to the habitat of protected species.⁹⁷ The Siting Board recites the presence of two endangered species, five threatened species, two species of special concern, and occupied habitat in the Project Area, which North Side's own Application documented.⁹⁸ The Siting Board's Denial Order noted that ECL Article 11 and the implementing regulations in 6 NYCRR Part 182 prohibit the "taking" of protected species and the

⁹⁴ Rehearing Petition, pp. 33-38.

⁹⁵ Rehearing Petition, pp. 34, 38-40.

⁹⁶ Rehearing Petition, pp. 36-37.

⁹⁷ Denial Order, p. 64.

⁹⁸ Denial Order, pp. 65-68.

destruction of their habitat.⁹⁹ The Siting Board took issue with the sufficiency of North Side's purportedly species-protective protocol with respect to threatened and endangered species, which would rely on general best management practices and ad hoc measures in the field by Project personnel, rather than on implementation of methodical, detailed, and well-planned measures to protect the species.¹⁰⁰ The Siting Board determined that North Side's reliance on a post-Certificate submission of a NCB Plan was not sufficient to demonstrate minimization or avoidance and that "such impacts must be addressed before Certificate issuance."¹⁰¹

The Siting Board further found that the record showed that Project impacts to protected species "are of a vastly more substantial nature" than the impacts examined in other Article 10 proceedings, and indicated that hundreds of acres of wetland habitat and several protected species and habitat could be impacted and "taken" in violation of applicable law.¹⁰² The Siting Board concluded that the record lacked sufficient information on which to determine the Project's impacts on protected species and their habitat due in part to North Side's

⁹⁹ Denial Order, pp. 63-64, n. 211, n. 213. The Siting Board relied in part on the Appellate Division's decision in State of New York v. Sour Mountain Realty, Inc., 276 A.D.2d 8, 13-14 (2d Dept. 2000), where the taking prohibition in ECL Article 11 and 6 NYCRR Part 182 was affirmed with respect to both protected species and their habitat. Denial Order, pp. 64-65, ns. 211, 213.

¹⁰⁰ Denial Order, pp. 67-68.

¹⁰¹ Denial Order, pp. 69-70.

¹⁰² Denial Order, p. 70.

legal position that unmapped wetlands are not subject to protection.¹⁰³

The Siting Board concluded that because North Side had failed to demonstrate that the Project's impacts to protected species and their habitat would be minimized and avoided to the maximum extent practicable, it could not make the required finding under PSL §168(3)(c).¹⁰⁴ The Siting Board's Denial Order further concluded that North Side had failed to demonstrate that the Project as designed would comply with the substantive requirements of the State's endangered and threatened species laws and regulations, ECL Article 11 and 6 NYCRR Part 182.¹⁰⁵

We find nothing in the Rehearing Petition to require us to revisit our factual findings in this regard based on the record. North Side points to nothing in the record that would refute the finding that the record lacked sufficient information with respect to protected species and habitat impacts in light of North Side's position with respect to unmapped wetlands. Accordingly, the Rehearing Petition presents no error of fact justifying rehearing.

¹⁰³ Denial Order, pp. 70-71. The Denial Order recites DPS Staff's testimony related to the Project's impacts on protected species and the modification of their habitat. The Siting Board agreed with DPS Staff's conclusion that the record lacks sufficient evidence regarding the Project's impacts on protected species in order to make the requisite Article 10 findings. Denial Order, pp. 68-70.

¹⁰⁴ Denial Order, pp. 63-70.

¹⁰⁵ Denial Order, pp. 71-72. The Denial Order also notes that North Side's Application had failed to include any reference to the otherwise applicable substantive requirements of either ECL Article 11 or ECL Article 24. See Hearing Exhibit 64, Application Exhibit 32, Applicable State Laws and Regulations.

3. North Side's Claim of New Information to Reopen the Record

With respect to North Side's alternative request that the Siting Board reopen the record to include "new" potential wetland minimization, avoidance, and mitigation measures, we note that North Side has already had multiple previous opportunities to include such measures in the record for the Siting Board's consideration: first, in its February 19, 2021 Initial Application; second, in its May 27, 2021 and July 2, 2021 Application Supplements, involving wetlands, protected species, and layout changes, among other things; third, in its October 8, 2021 Application Update, involving wetlands, among other things; and fourth, in its December 9, 2021 Application Update, involving wetlands, among other things.¹⁰⁶

North Side's December 17, 2021 rebuttal testimony and exhibits was yet another opportunity to address wetland impact minimization and avoidance measures, issues that DPS Staff and DEC Staff continued to press at that time. In fact, North Side's rebuttal testimony took advantage of the opportunity to indicate for the first time the removal of 94 acres of federally-regulated forested wetlands. As the Denial Order found, the belated removal of federally-regulated wetlands from the Project Area undermined North Side's repeated assertions in the record that further wetlands minimization and avoidance measures were not feasible or practicable.¹⁰⁷

North Side's final opportunity to propose additional wetland impact minimization and avoidance measures was during the six-week timeframe following its request to delay the Siting

¹⁰⁶ In its multiple Application Supplements and Updates, North Side revised Application Exhibit 22, which addresses wetland impacts and proposes only limited minimization and avoidance measures. See 16 NYCRR §1001.22 (identifying the required application contents for terrestrial ecology and wetlands).

¹⁰⁷ Denial Order, p. 61.

Board's scheduled June 30, 2022 meeting. In a June 27, 2022 letter, North Side requested a postponement to the Siting Board's publicly-noticed June 30, 2022 meeting.¹⁰⁸ In its letter, North Side agreed to waive Article 10's twelve-month statutory deadline for the Siting Board's decision and asked the Siting Board not to meet before August 9, 2022. North Side's letter cryptically indicated that the "basis for the request to postpone the Siting Board session is so North Side may continue to explore various options to address potential matters in question related to the proceeding."¹⁰⁹ In response to this request, on June 28, 2022, the Secretary issued a notice postponing without date the Siting Board's June 30, 2022 meeting.

For six weeks, from June 27, 2022, until the Siting Board met on August 9, 2022, North Side could have sought to reopen the record and present what it now proposes.¹¹⁰ But during that timeframe, North Side did not seek that relief and present evidence of its efforts "to explore various options," or file an amended Application to address wetlands and threatened and endangered species impacts, or propose additional minimization and avoidance measures.

North Side's multiple opportunities during the proceeding to address wetland and protected species impacts provide the context for our denial of its request to reopen the record. The proposal in North Side's Rehearing Petition could have been presented during the proceeding, particularly since

¹⁰⁸ On June 15, 2022, the Secretary issued a Notice of Meeting of the Siting Board scheduled for June 30, 2022.

¹⁰⁹ DMM Item No. 125 (North Side June 27, 2022 Letter Requesting Postponement of Scheduled Siting Board Session).

¹¹⁰ On July 22, 2022, the Secretary issued a Notice of Meeting of the Siting Board rescheduled for August 9, 2022, when the Siting Board met and issued the Denial Order.

DPS Staff and DEC Staff identified their wetlands concerns during the proceeding's early stages. In order to provide administrative finality to the parties and to preserve agency resources, we decline to reopen the record of this proceeding. DPS Staff and DEC Staff have already expended significant resources to address, within their expertise, the complex environmental issues raised by North Side's intransigent position regarding unmapped wetlands and appropriate minimization, avoidance, and compensatory mitigation measures. We find that North Side has had a full and fair opportunity to meet Article 10's requirements. Accordingly, in the interest of protecting administrative finality and preserving agency resources, we decline to exercise our discretion to reopen the record.¹¹¹

The Rehearing Petition's proposal to do more to address wetland impacts also belies North Side's consistent representations in the record that it had sufficiently minimized and avoided wetland impacts and that nothing further could be done without jeopardizing the economic viability of the Project.¹¹² In other words, in seeking to reopen the record now, North Side concedes in its Rehearing Petition that more could - and should - be done to address such impacts.

Furthermore, North Side's general proposal to address wetland impacts (e.g., by acquiring nine parcels, using a DEC reforestation area for mitigation, etc.) does not follow DEC's Freshwater Wetlands Regulation Guidelines on Compensatory

¹¹¹ See Long Island Lighting Co. v. Public Service Commission, 134 A.D.2d 135, 146-147 (3d Dept. 1987) (PSC refusal to reopen record and allow LILCO to introduce evidence it had failed to provide in response to agency request was not an abuse of discretion because reopening record "would only encourage utilities to stonewall the PSC").

¹¹² Denial Order, pp. 58-59.

Mitigation (DEC Guidelines) and lacks sufficient detail and a demonstration of feasibility in order to be seriously considered on rehearing.¹¹³

North Side also seeks to reopen the record based on the passage of amendments to ECL Article 24 that clarified the definition of freshwater wetlands. North Side urges that the amendments constitute "clear evidence that ECL Article 24 did not previously confer DEC with the authority to regulate unmapped wetlands and that the intent of the Legislature was to expand that authority."¹¹⁴

As previously noted, the Article 24 amendments are not "new" and were signed into law in April 2022, well before the Siting Board's Denial Order was issued. Moreover, the Examiners considered the amendments when they were still only proposed legislation and issued a ruling questioning North Side's conclusion that, if signed into law, the amendments would define DEC's previous regulatory authority over unmapped wetlands. Without question, wetlands are a resource that changes over time, as the legislative amendments recognize. As we noted above, the amendments to ECL Article 24 reaffirm DEC's long-standing practice to require a current, on-site wetlands delineation assessment on which DEC can rely in making a permitting decision, rather than relying exclusively on maps based on 1970s aerial photographs of changing wetland resources.

¹¹³ North Side's general wetlands "proposal" fails to follow DEC's Guidelines insofar as it does not give priority to minimization and avoidance; does not present a detailed mitigation proposal to restore, create, and/or enhance wetlands on the Project site (and not in a DEC reforestation area three miles away); does not create "in-kind" wetlands like those impacted; and is not "based on plans containing clear specific detail, long-term goals and measurable performance criteria." DEC Guidelines, pp. 4-5, 6-7.

¹¹⁴ Rehearing Petition, p. 23.

We find that the amendments to ECL Article 24 do not define or limit DEC's previous ECL Article 24 authority - or the Siting Board's Article 10 authority. Moreover, the amendments are not germane to this proceeding. The Siting Board relied on its own Article 10 authority rather than exclusively relying on DEC's ECL Article 24 authority in finding that the Project's environmental impacts had not been minimized and avoided to the maximum extent practicable. We therefore reject North Side's argument that the April 2022 amendments to ECL Article 24 constitute new circumstances that justify reopening the record.

Having considered North Side's remaining arguments, we find that they were adequately addressed in the Denial Order and are otherwise without merit.

VII. CONCLUSION

We find that the Rehearing Petition fails to demonstrate that the Siting Board committed an error of law or fact to warrant reversal of the Denial Order or that there is new information to justify reopening the record. As such, North Side does not meet the standard for rehearing. For the foregoing reasons, we deny North Side's Rehearing Petition and reaffirm the Siting Board's August 9, 2022 Denial Order.

The Board on Electric Generation Siting and the Environment
orders:

1. The Petition for Rehearing by North Side Energy Center, LLC is denied.
2. This proceeding is terminated and closed.

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

(SIGNED)

MICHELLE L. PHILLIPS
Secretary