STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

TOWN OF COPAKE,
AMERICAN BIRD CONSERVANCY,
SAVE ONTARIO SHORES, INC., Index No.: _____
CAMBRIA OPPOSITION TO INDUSTRIAL SOLAR, INC,
CLEAR SKIES ABOVE BARRE, INC.,
DELAWARE-OTSEGO AUDUBON SOCIETY, INC.,
GENESEE VALLEY AUDUBON SOCIETY, INC.,
ROCHESTER BIRDING ASSOCIATION, INC.,
TOWN OF CAMBRIA, TOWN OF FARMERSVILLE,
TOWN OF MALONE, TOWN OF SOMERSET,
AND TOWN OF YATES,

Petitioners/Plaintiffs,

vs.

NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING,
HOUTAN MOAVENI AS ACTING DIRECTOR OF THE OFFICE
OF RENEWABLE ENERGY SITING, NEW YORK STATE,
NEW YORK STATE DEPARTMENT OF STATE, AND
JOHN DOES 1- 20,

Respondents/Defendants.

FIRST VERIFIED PETITION AND COMPLAINT

Introduction

1. This Verified Petition and Complaint by public and private organizations seeks annulment of regulations promulgated by the newly created New York State Office of Renewable Energy Siting ("ORES") on or about March 3, 2021.

2. The ORES regulations (a) set forth procedural rules for the review and approval of all applications for large renewable energy facilities throughout New York State, and (b) adopt substantive standards and conditions that will apply uniformly to each of those facilities and are supposedly sufficient to mitigate or avoid adverse environmental impacts. 19 NYCRR §§ 900-1

through 900-15.

3. In creating ORES, the State removed power plant siting authority from a government body with nearly 50 years of experience--the State Siting Board within the Department of Public Service – and gave it to a new agency which is both inexperienced and understaffed, and which outsourced the writing of its regulations and the review of energy project applications to an energy industry consultant currently representing some 25 wind and solar energy developers in New York.

4. ORES possesses the power to authorize renewable energy companies to clear large tracts of forest, level hilltops, degrade or destroy sensitive habitat, harm wildlife, kill birds and bats, waive local laws, interfere with continental scale bird migration, and eliminate vast acreage of farmland and agriculture.

5. The projects approved by ORES will significantly alter and degrade the rural, natural, and agricultural character that draws New Yorkers to disparate regions of the State, including the Finger Lakes of Central New York, the lake plains of Erie and Ontario, the North Country, the Tug Hill Plateau, the Hudson Valley, and the Appalachian foothills of the southern tier.

6. Recognizing the potential of the ORES permit siting program to harm communities, birds, other wildlife, and the environment, the State required ORES to design uniform standards and conditions that "avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility "(NY Exec Law §94-c(3)(c)), and to administer a process "afford[ing] meaningful involvement of citizens affected by the facility". *Id.* § 94-c(5)(g)(ii)(F).

7. ORES disregarded both of those requirements. In relying on an industry consultant to draft its regulations, and in ignoring thousands of public and expert comments raising grave concerns about the draft regulations, including their inadequate consideration and protection of birds, ORES violated N.Y. Exec. L. § 94-c and the State Administrative Procedure Act.

8. In addition, by mischaracterizing its regulations as an "Unlisted" rather than a "Type I" action under the State Environmental Quality Review Act ("SEQRA"), ORES unlawfully relieved itself of its duty to prepare a full Environmental Assessment Form.

9. ORES failed to take a "hard look" at the environmental consequences of its regulations, including their direct, indirect, and cumulative impacts, and failed to consider reasonable alternatives to the substantive requirements of the regulations.

10. As a result, ORES issued a Negative Declaration of Environmental Significance ("Neg Dec"), *i.e.*, a finding that its regulations would not have even one potential adverse impact on the environment, and refused to prepare an Environmental Impact Statement, in violation of SEQRA and the Environmental Conservation Law, 6 NYCRR Part 617.1.

11. ORES also violated the Home Rule provisions of the New York State Constitution and the express terms of N.Y. Exec Law § 94-c by setting uniform substantive standards applicable to wind and solar projects that are less protective than analogous provisions in the Petitioner municipalities' local laws, and by wielding unlimited power to waive local laws.

12. The Court should declare the new regulations unlawful and annul them, and direct ORES to engage in a rulemaking process and SEQRA review that complies with law.

THE PARTIES

Petitioners

13. Town of Copake is a municipality organized and existing under New York State Town Law located in Columbia County. The Town of Copake is the site of the proposed Shepherd's Run solar project, which intends to submit an application to ORES on or about July 15, 2021.

14. American Bird Conservancy ("ABC") is a Section 501(c)(3) non-profit conservation organization incorporated in Delaware, with an office at 4301 Connecticut Avenue, N.W., Washington, D.C. 20008. Its mission is to conserve native birds and their habitats throughout the Americas by safeguarding the rarest bird species, conserving and restoring habitats, and reducing threats to birds from habitat destruction, from collisions with buildings, towers, and wind turbines, and from toxins such as hazardous pesticides and lead. ABC's more than 8,000 individual members, as well as its staff, board members, donors, and supporters, enjoy observing, studying, and photographing birds throughout the country, including in New York, where ABC has over 2,000 donors.

15. Save Ontario Shores, Inc. ("SOS") is a domestic non-profit corporation with an address at 530 Landing Road North, Rochester, NY 14625. SOS is a non-profit, wholly independent, self-funded, grassroots group of local residents and property owners in the Towns of Yates and Somerset in Western New York. SOS has the primary educational goal of informing the general public and government officials about the economic, environmental, health and safety issues that result from the placement of industrial wind turbines in the community. SOS has a 35-member steering committee, and hundreds of people have donated their time or financial resources to SOS's mission.

16. Town of Cambria is a municipality organized and existing under New York State Town Law located in Niagara County. The Town of Cambria is the site of the proposed Bear Ridge solar project, which intends to submit an application to ORES in the second quarter of 2021.

17. Town of Farmersville is a municipality organized and existing under New York State Town Law located in Cattaraugus County. Farmersville is host to part of the proposed Alle-Catt Wind Energy Facility.

18. Town of Malone is a municipality organized and existing under New York State Town Law located in Franklin County. The Town of Malone participated in the state siting proceeding for the Application of Franklin Solar, LLC, to construct a solar energy facility in the town.

19. Town of Somerset is a municipality organized and existing under New York State Town Law located in Niagara County. The Town intends to become involved in the future ORES proceeding for the Somerset Solar project, a 140-175 MW solar facility located on Lake Road in the Town of Somerset.

20. Town of Yates is a municipality organized and existing under New York State Town Law located in Orleans County. The Town participated in the state siting proceeding for Lighthouse Wind LLC, a 201 MW Wind Energy Facility, and joined in multiple sets of written comments on the ORES regulations.

21. Cambria Opposition to Industrial Solar, Inc. ("COIS") is a domestic non-profit corporation, with an address at 5223 Kennedy Crescent, Sanborn, NY 14132. COIS is a citizens group of approximately 300 members that was formed in response to the Bear Ridge Solar Project proposed for the Towns of Cambria and Pendleton, Niagara County. On February 9,

2021, Bear Ridge Solar announced its intent to seek a siting permit from ORES under Exec L. 94-c.

22. Clear Skies Above Barre, Inc. ("CSAB") is a domestic non-profit corporation, with an address at 15202 E Barre Road, Albion, NY 14411. CSAB is a group of citizens concerned about the proposed Heritage Wind Project, and working to protect the health, safety and welfare of the residents of Barre, New York and surrounding communities that would be impacted by the proposed industrial wind turbines. CSAB is currently seeking party status in the 94-c proceeding for the project. CSAB has approximately 135 members.

23. Delaware-Otsego Audubon Society, Inc. ("DOAS") is a domestic non-profit corporation, with an address at 13 Boylston St, Oneonta, NY 13820. DOAS was established in 1968 and incorporated in 1977. DOAS strives to protect the natural environment, connect people with nature, and benefit birds and other wildlife through conservation, education, research and advocacy. DOAS has participated in the review of at least 14 renewable energy projects. DOAS has approximately 319 members.

24. Genesee Valley Audubon Society, Inc. ("GVAS") is a domestic non-profit corporation, with an address at P.O. Box 886, Adams Basin, NY 14410-0886. GVAS promotes environmental conservation and educates and advocates for protection of the environment, focusing on birds, wildlife and habitat. GVAS has approximately 1,750 members.

25. Rochester Birding Association, Inc. ("RBA") is a domestic non-profit corporation, with an address at PO Box 92055, 1335 Jefferson Rd, Rochester, NY 14692-9998. RBA was established in 1975 and incorporated in 1984. Among other things, RBA promotes the study of avian wildlife in its natural environment; actively supports conservation initiatives and

cooperates with and participates in programs of various educational and governmental agencies; encourages the establishment and maintenance of sanctuaries and protective areas for birds; and educates the public about the need for conserving areas and resources as natural habitats for birds. RBA has approximately 437 members.

Respondents

26. The New York State Office of Renewable Energy Siting is a governmental entity of New York State within the Department of State charged with siting renewable energy facilities with a designed capacity of 25 megawatts (MW) or greater pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act of 2020.

27. Houtan Moaveni is both Acting Executive Director of ORES and the Director of Facility Certification & Compliance at the New York State Department of Public Service. When not carrying out his duties in the Department of Public Service, he exercises the authority of ORES under Exec L. 94-c(3)(b). He is sued in his official capacity only.

28. The State of New York is a sovereign entity.

29. The Department of State is a governmental entity of New York State, and the department of state government in which ORES resides.

30. John Does are other persons or entities that may be necessary parties to this action that have not yet presently been identified.

PROCEDURAL PREREQUISITES

31. Petitioners have exhausted their administrative remedies.

32. Petitioners have no adequate remedy at law.

33. No previous application to this or any other Court has been made for the relief

sought herein.

JURISDICTION AND VENUE

34. This Court has jurisdiction over this hybrid action under CPLR Article 78 *et seq.* and CPLR Article 30.

35. Albany County is an appropriate venue for this hybrid action under CPLR Article 5 *et seq***.** and CPLR §7804, because the material events occurred in Albany County and were perpetrated by a state actor, ORES.

36. Petitioners hereby designate Venue/the place of trial as Albany County under CPLR §§506 and 509.

FACTS AND BACKGROUND

Siting of Large Power Plants in New York

37. In 1972, in response to the great northeast blackout of 1965, New York State adopted Article VIII of the Public Service Law, granting the state control over siting new power plants necessary to add capacity and reliability to the state's electricity grid.

38. On December 1, 1988, Article VIII expired by its terms but it was revived in 1992 as PSL Article X.

39. In 2002, Article X expired by its terms, with the result that local governments in New York assumed control over the siting of power plants, including large renewable energy facilities.

40. On August 4, 2011, the Power New York Act of 2011 created Article 10 of the Public Service Law, added provisions governing the siting of large renewable energy facilities, and created the New York State Board on Electrical Generation Siting and the Environment ("Siting

Board").

41. The Siting Board reviewed applications, considered environmental and other relevant impacts, and issued express findings and determinations relating to project impacts prior to granting approval for the construction and operation of power plants.

42. Article 10, like its predecessor statutes, consolidates state and local siting procedures for electrical generation facility siting. It applies to power plants designed to generate 25 megawatts (MW) or more.

43. Applications to the Siting Board were exempt from review under the State Environmental Quality Review Act ("SEQRA"), but the Siting Board was required to make express findings and determinations related to the identification, avoidance, and mitigation of environmental impacts of a particular project before approval. *See* PSL §168(2), (3).

44. The Siting Board promulgated procedural regulations governing the consideration of power plant siting applications, but set no substantive standards for siting power plants, such as setback requirements for wind turbines or solar panels, height limitations, or health-based noise exposure limits.

45. Despite increasing year over year growth in Article 10 applications, and the Siting Board never having denied an application for a renewable energy project, the State determined in 2020 that a more expedited process for the approval of new energy projected was required.

<u>History of 94-c and the creation of ORES</u>

46. In 2019, the State enacted The New York Climate Leadership and Community Protection Act (CLCPA), which seeks to balance the benefits of climate change policies against the burdens those policies could create for local communities and the environment.

47. In the words of Assemblyperson Didi Barrett, the CLCPA was meant to strike a balance "between the encouragement of large-scale renewable development and the preservation of the rural character and local economies of our communities" and "promises equality between climate-smart advances and the values of our local communities in this Home Rule state."

48. The Accelerated Renewable Energy Growth and Community Benefit Act, signed into law on April 3, 2020 ("the Act"), was an express attempt to further the climate and community protection goals of the CLCPA. *See* New York L.2020, c. 58, pt. JJJ, § 4, eff. April 3, 2020.

49. The Act amended the Executive Law by adding a new Section 94-c, which created ORES and charged it with implementing a new procedure and establishing substantive standards for siting renewable energy power plants while ensuring protection of the environment.

50. In particular, ORES is required "to consolidate the environmental review and permitting of major renewable energy facilities [ ] and to provide a single forum [to] undertake a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals *while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities*." Executive Law 94-c(1) (emphasis added).

51. Speed is important under Executive Law 94-c: ORES must determine whether an application for a permit is complete within 60 days of its submission; must impose any permit conditions within 60 days of the completeness determination; and must make a final decision on the application within 12 months of the completeness determination. Exec. L. §§ 94-c(5)(b), (5)(c)(i), (5)(f). Failure to make these determinations within the statutory time frames results in

default approvals in the applicant's favor (a "Default Approval"). *Id*

52. But speed is not everything: in keeping with the CLCPA, the community protection provisions of the law require ORES to "ensur[e] protection of the environment" and consider "all pertinent social, economic and environmental factors" in the permitting process, and to "afford meaningful involvement of citizens affected by the facility". Exec. L. §94-c(1) and § 94-c(5)(g)(ii)(F).

53. The statute further provides that "the uniform standards and conditions established [by ORES] shall be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility." Exec. L. §94-c(3)(c).

54. Section 94-c required ORES to adopt its regulations implementing the Act by April 1, 2021, setting forth uniform standards and conditions applicable to all renewable energy projects. Exec. L. § 94-c(3)(g).

55. The Section 94-c process is novel in power plant siting in providing for the issuance of a draft permit shortly after a project application is submitted.

56. Under the 94-c process, the presumption is that the uniform standards and conditions applicable to draft permits are sufficient to avoid or mitigate environmental or other impacts. The burden to prove otherwise falls on often unsophisticated host communities and intervening parties. *See* Exec Law § 94-c (5)(c)(i); 5(d); 5(f).

57. In responding to the issues statement filed by petitioner-plaintiff CSAB in the pending Application of Heritage Wind, ORES Case No. 21-00026, ORES confirmed that the burden is on intervenors to show the standard conditions should not apply: "In situations

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

58. The ability to challenge uniform standards and conditions is curtailed by ORES's duty to impose permit conditions within 60 days of the application completeness determination, and is extinguished by the Default Approval of a project that ORES has not approved within a year of the completeness determination. Exec L. 94-c(5)(c)(i), (f).

The ORES Rulemaking Process

59. ORES was required to establish its uniform standards and conditions "in consultation with the New York state energy research and development authority the department of environmental conservation, the department of public service, the department of agriculture and markets, and other relevant state agencies and authorities with subject matter expertise." Exec. L. 94-c(3)(b).

60. Rather than rely on the expertise of the agencies the State identified, ORES hired a private consulting company, Tetra Tech, to draft its procedural regulations and its uniform standard conditions; to review and respond to public comments on the draft regulations; and to review future individual project applications submitted for approval.

61. Tetra Tech states on its website that it "offers the full range of management and technical services to support the siting and licensing of complex energy projects" and that, as of March 2015, it had "successfully permitted over 50,000 MW of power plants."

62. In its response to a Request for Proposals for the ORES contract, Tetra Tech disclosed numerous material conflicts of interest based on its representation of renewable energy developers with existing projects in New York State.

63. At the time of that disclosure, Tetra Tech had provided and/or was providing project design and siting services in New York to the following 25 renewable energy developers and projects: Acciona, AES, Apex Wind Energy, Boralex (Green Corners LLC), Bow Renewables, Clean Choice Energy, CS Energy, Cypress Creek Renewables, Distributed Sun (including Sun 8 PDC, LLC), Distributed Solar Development LLC, Dyna Solar LLC, EDP Renewables, Engie, Geronimo Energy, Greenwood Energy, Hecate Energy, Marble River Wind, Novis (Falck Renewables of North Americas), Omni Navitas Holdings, LLC, OYA Solar NY LP, Signal Energy, NextEra Energy Resources (DG New York CS, LLC), RWE (formerly Innogy), SunEdison/ForeFront Power, Whiteface Mountain Solar LLC.

64. Tetra Tech drafted the Wind Siting Guidelines for the American Wind Energy Association, a Washington, D.C.-based national trade association representing wind power project developers, now merged into the American Clean Power Association.

65. On September 16, 2020, ORES issued its draft regulations and Uniform Standards and Conditions for public comment.

66. Upon information and belief, ORES at that time had a staff consisting of one part-time person, respondent Houtan Moaveni, who worked simultaneously as ORES's Deputy Executor Director and as Director of Facility Certification & Compliance at the New York State Department of Public Service.

67. Upon information and belief, ORES posted an advertisement for the Executive

Director position on May 5, 2021.

68. On September 16, 2020, the New York State Register published a Proposed Rule Making Hearing(s) Scheduled for Subpart 900-6 to Title 19 NYCRR. A copy of Vol XLII, Issue 37, of the Register is include as **Exhibit A** to this petition.

69. The notice of rulemaking failed to comply with statutory requirements for a Regulatory Impact Statement; a Regulatory Flexibility Analysis; or a Rural Area Flexibility Analysis.

70. On September 15, 2020, the day before issuing draft regulations and providing notice in the State Register, and before receiving any public comments on the draft regulations, respondent Moaveni signed a Short Environmental Assessment Form Part 1 ("SEAF") under SEQRA, summarily concluding in Attachment B that "[t]he uniform standards and conditions will avoid or minimize to the extent practicable, any potential significant adverse environmental impacts related to the siting design, construction and operation of a major renewable energy facility." The SEAF is included As **Exhibit B** to this Petition.

71. The SEAF requires that an agency promulgating regulations fill out a form (SEAF Part 2) with 11 Yes or No questions, such as "Will the proposed action result in an adverse change to natural resources (e.g. wetlands, waterbodies, groundwater, air quality, flora and fauna?"). SEAF Part I, para 1.; SEAF Part 2, question 9. ORES checked the "No" box for each question.

72. ORES justified its "No" answer to the 10 questions involving potential impacts on land, land use, the environment, and human health with the statement that: "The action of promulgating regulations does not include approval for the siting or constructions of any facilities." ORES SEAF, Part 3.

73. Based on that conclusion, respondent Moaveni made a "negative declaration of environmental significance" ("Neg Dec") under SEQRA, stating that there is no potential for one or more significant adverse impacts as a result of its regulations.

74. ORES then conducted public hearings and opened a written comment period in November of 2020.

75. Over 5,000 comments were received, and nearly 200 individuals commented during the public hearings.

76. Many of the comments raised serious concerns over the direct and indirect adverse environmental impacts of the regulations, including impacts to birds; highlighted vague and ambiguous language; pointed out inconsistencies in the regulations; raised potential violations of the State and Federal constitutions; provided facts and scientific studies undermining ORES's proposed timeframes and standards; and provided alternative regulatory language for ORES's consideration.

77. Copies of all public comments received by ORES, and transcripts of all public hearings, are included in the administrative record of the rulemaking proceeding, and attached as **Exhibits C, D, E, F, G, H, I, J, K, L, M, and N**.

78. The Towns of Malone, Copake, and Farmersville, as well as Cambria Opposition to Industrial Solar, Inc., and Clear Skies Above Barre, Inc., filed timely comments noting the adverse environmental impacts of the regulations; the absence of opportunity for meaningful public participation provided by the regulations; Home Rule violations; and the elevation of private corporate interests over the public interest.

79. The Towns of Yates, Cambria, and Somerset filed timely comments about adverse

noise impacts; adverse natural resources impact; health and safety standards for project "participants"; turbine blade shadow flicker impacts; adverse visual impacts; conflicts with existing State policies for preservation of agricultural and natural resources; the need to align siting of large-scale projects with the siting of transmission improvements; the stakeholder process; weakened substantive protections for environmental and rural communities compared to those developed under Public Service Law Article 10; and the need to balance renewable energy siting with other equally important policies of New York.

80. The American Bird Conservancy ("ABC") filed timely comments raising concerns about the adverse impacts of the ORES regulation on birds; adverse impacts on other wildlife; lack of consideration for non-listed wildlife species; lack of regulatory provisions to ensure appropriate facility siting; unrealistic and inappropriate timelines and automatic project approvals; inappropriate restrictions on public input and lack of data transparency; lack of post-construction wildlife mortality monitoring; and lack of required pre-application field studies to determine the presence of birds and/or important bird habitat at the proposed site.

81. In particular, for example, ABC pointed out that, while the regulations require mitigation of impacts to state-listed Threatened and Endangered birds, they require no protection for State-designated species of Special Concern, and High Priority Species of Greatest Conservation Need – *i.e.,* particularly at-risk species in the State. In refusing to change the draft regulations, ORES offered no justification for not protecting these species, saying only that a project applicant must *consider* unlisted species, but providing no limit to how many unlisted species may be harmed, nor any requirement for minimizing or compensating for loss of unlisted species. ORES admits as much by stating the mitigation required for Threatened and

Endangered species "*can* also provide benefits for unlisted species that utilize similar habitat." (Combined assessment of public comments pg. 65).

82. ABC also emphasized that siting is critical to minimizing impacts on birds because little can be done to mitigate the harm caused by a constructed bird-killing or habitat-destroying turbine. ORES ignored ABC's recommendation of science-based setbacks from areas of identified importance. ORES said that the project applicant is expected to consult with other agencies and stakeholders about adverse environmental impacts, which will somehow "further ensure responsible project design," but the regulations actually impose no actual siting avoidance duties anywhere in the State (except that overstory trees cannot be removed around an active Bald Eagle nest). See pgs. 6-7 of combined assessment of public comments.

83. Save Ontario Shores Inc., filed timely comments about adverse noise impacts; different standards for participants (landowners contracting for turbines on their land) and non-participants (neighbors); shadow flicker exposure; failure to comply with SEQRA; and conflicts between the ORES Regulations and New York State policies for the preservation of agricultural and natural resources, set forth in the State Constitution.

84. The Delaware-Otsego Audubon Society filed timely comments about adverse impacts on birds and other wildlife, net conservation benefits, and the environmental mitigation fund, while also joining other groups in adopting comments filed by the American Bird Conservancy.

85. The Genesee Valley Audubon Society ("GVAS") filed timely comments about the lack of consideration for non-listed wildlife species; lack of provisions to ensure appropriate facility siting; unrealistic and inappropriate timelines and automatic project approvals; inappropriate

restrictions on public input and lack of data transparency; and lack of post-construction wildlife mortality monitoring.

86. The GVAS also signed on to a timely comment filed by the National Audubon Society raising concerns about parity in Endangered Species Protections; grassland Bird Management Plan and Conservation Centers; best management practices; involvement of the Department of Public Service in surveys and habitat assessments; site-specific requirements; the definition of de minimis; occupied habitat; public engagement; the pre-application timeline; national Audubon Society Climate Models; post-construction monitoring; ratios for mitigation; and wetland protection.

87. With no meaningful response to these objections from the public, municipalities, and public interest groups, without acknowledging or reviewing potential environmental impacts, and without considering alternatives, ORES promulgated its regulations on March 3, 2021.

88. On the same day, ORES published a memorandum claiming to summarize the more than 5,000 public comments it received, and acknowledging that, in response, it had not made a single substantive change to any draft regulation. See **Exhibit O**.

89. On November 19, 2020, the Zoghlin Group PLLC made a Freedom of Information Law (FOIL) request on behalf of clients regarding the rulemaking activities. The request asked for the following records: The Environmental Assessment Form parts 1-3; Lead Agency Designation; Records related to coordinated review; Notices published by the Office; Any findings by the lead agency; and Records related to any determination of environmental significance. A copy of the request is attached **Exhibit P.**

90. On November 25, 2020, the Assistant Records Access Officer for the NYS Department of State stated that ORES would respond to the request within 20 business days, on December 22. ORES then granted itself extensions on December 24, 2020 and February 9, April 9, and May 6, 2021. See **Exhibits Q, R, S, T and U.**

91. On June 4, 2021, five and a half months after the request was received, ORES provided the following documents as a *partial* FOIL response: the state Environmental Notice Bulletin SEQRA Notice Publication Forms for the uniform standard conditions and procedural regulations (**Exhibits V, W, and X)**; a "SEAF" Part 1 under SEQRA with negative declaration of environmental significance dated September 15, 2020 (**Exhibit B**); and an Amended SEAF Part 1 and Part 2 dated February 23, 2021, (**Exhibit Y**).

92. Upon information and belief, ORES prepared the Amended SEAF in response to the FOIL request.

93. The initial SEAF and the Amended SEAF both improperly classified the ORES regulations as an "Unlisted action" under SEQRA.

94. The SEQRA documents provided by ORES in June of 2020, months after the regulations had been adopted, reveal ORES's demonstrable failure to take a "hard look" at the potential adverse environmental impacts of the ORES regulations and process.

95. Without basis or serious consideration, ORES determined that promulgation of uniform statewide standards for setbacks, noise limits, shadow flicker exposure and other physical effects of wind and solar energy facilities, some spanning thousands of acres or entire counties, could not result in a single significant adverse impact on the environment, birds, bats, other wildlife, rural persons, or their local government's police powers or local land use plans.

96. Both the ORES procedural regulations and the Uniform Standards and Conditions create new substantive standards and requirements applicable to wind and solar energy development that conflict with, and are less protective than, analogous provisions in local laws.

97. For example, Plaintiff/Petitioner Town of Yates' Wind Law currently requires a wind turbine setback of 0.5 miles or 6 times the total height of the turbine from residences, whichever is greater, while §900-2.6 of the ORES regulations allows a setback of 1.1 times the turbine's total height from any property line.

98. The Town of Farmersville's Wind Law currently requires shadow flicker to be limited to 8 hours per year and 1 hour per month, while the Uniform Standards and Conditions allow up to 30 hours of shadow flicker on non-participating residences (neighbors) annually, which is less restrictive.

99. Farmersville's wind law also requires a noise level of no more than 45 dBA at the outside of any habitable building, while the Uniform Standards and Conditions allow 55 dBA at the outside of any participating residence.

100. The Town of Copake's solar energy zoning law sets express limits on the conversion of farmland to solar energy facilities, while the Uniform Standards and Conditions provide no limit on the amount of farmland that can be converted to non-agricultural uses.

101. The Town of Malone's Solar Law currently prohibits solar energy systems from exceeding a height of 10 feet in Residential Districts or 15 feet in all other Districts, while the Uniform Standards and Conditions allow the height to be up to 20 feet.

102. The Town of Somerset's Wind Law currently limits construction hours to 8 a.m. to 5 p.m., while the Uniform Standards and Conditions allow construction 7 a.m. to 8 p.m. Monday

through Saturday and 8 a.m. to 8 p.m. on Sundays, which is less restrictive.

103. The Town of Cambria's Solar Law currently requires a minimum setback of 600 feet from any non-participating property while the Uniform Standards and Conditions require a setback of 100 feet from any non-participating residence.

104. Finally, Cambria's Wind law also requires a minimum setback of 1.5 times the turbine's total height from any property line while § the Uniform Standards and Conditions require a setback of 1.1 times the turbine's total height from any property line.

105. The ORES regulations' inconsistency with local land use planning laws and objectives should have been considered as part of the ORES SEQRA review, but was not.

106. ORES failed to acknowledge the potential impact of the regulations on local land use plans, and failed to consider the cumulative impact of over-riding land use plans and zoning laws around the state.

107. Part 2 of the Amended SEAF contains patently erroneous statements, including that the regulations will **not** create a material conflict with any adopted land use plan or zoning regulations; will **not** result in the change in or use or intensity of use of land; and will **not** impair the character or quality of the existing community.

108. Part 2 of the Amended SEAF completely fails to address adverse impacts that will be caused by the the Uniform Standards and Conditions.

109. For example, the noise standard set by Rule 900-6.5(a)(1)(i) will expose people to intolerable noise levels and will result in potential public health impacts.

110. Rule 900-6.4(m)(3) permits blasting in karst formations, which the USGS acknowledges has a high potential to cause ground water contamination and impacts on

potable water sources.

111. Rule 900-6.4(p) applies only to state-regulated wetlands and streams, exposing the majority of the state's waters, including small wetlands and streams, to potential adverse impacts.

112. Rule 900-6.4(o)(2) relieves the applicant of the duty to develop a Net Conservation Benefit Plan for impacts on listed species if the applicant's proposed actions are supposedly de minimis, thereby allowing the take of state-listed species under New York law and regulations and avian species protected by the federal Migratory Bird Treaty Act.

113. Rule 900-6.4(o) also permits developers to mitigate impacts on avian species through payment into a mitigation fund, but ORES never assessed the suitability of the mitigation fund as a suitable means of offsetting environmental impact.

114. The regulations do not require project developers to engage in adequate pre-application studies to determine the potential adverse effects of the development on avian and other wildlife species, or on their habitat.

115. The Amended SEAF also fails to review the cumulative impacts of carrying out the ORES siting permit program throughout New York State.

116. ORES's limited ability to review site-specific project applications cannot cure the defects in its Uniform Standards and Conditions, for both practical and legal reasons.

117. As a practical matter, Exec L. 94-c puts ORES under enormous pressure to act within short time periods to approve applications, which become approved by default if ORES misses the deadlines (see para. 51, above), and the opportunity for opponents of applications to get a hearing on their objections is *extremely* limited (see paras. 56-58, above).

118. As a legal matter, Exec L. 94-c(3)(c) sensibly and expressly contemplates that the Uniform Standards and Conditions will ***themselves*** have potential environment impacts, and ***requires them*** to "be designed to avoid or minimize, to the maximum extent possible, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility." See also *id.* 94(c)(3)(b) (ORES charged with promulgating regulations "to avoid, minimize or mitigate potential adverse environmental impacts from the siting, design, construction, and operation of a major renewable energy facility").

119. Moreover, applications for specific projects under Exec L. 94-c are excluded from SEQRA review. N.Y. ECL § 8-0111(5)(b). Hence the sole opportunity for SEQRA review under the Exec. L. 94-c expedited siting process comes during the establishment of the Uniform Standards and Conditions. ORES cannot shirk its responsibility under SEQRA to prepare a Full EAF and an EIS by promising that it will perform its statutory duty to "minimize or mitigate potential adverse environmental impacts" during the highly expedited application process, which is itself exempt from SEQRA.

120. At a minimum, the Generic Environmental Impact Statement ("Generic EIS") ORES should have completed would discuss the objectives and rationale for the components of the proposed regulations, and substantively respond to material comments received by ORES during the rulemaking process.

121. A Generic EIS would also articulate how ORES selected which potentially significant adverse environmental impacts it would avoid or mitigate with uniform standard conditions, and why those conditions mitigated adverse impacts to the maximum extent practicable.

122. Where ORES identified potentially significant adverse environmental impacts for which no uniform standard conditions were imposed, the Generic EIS would explain why uniform conditions were not needed, and why the procedure for imposing site-specific conditions might avoid or mitigate those impacts to the maximum extent practicable.

FIRST CAUSE OF ACTION
ORES VIOLATED SEQRA BY MISCLASSIFYING THE ACTION AS TYPE I, FAILING TO TAKE A HARD LOOK AT POTENTIALLY SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS, AND ISSUING A NEGATIVE DECLARATION OF ENVIRONMENTAL SIGNIFICANCE

123. Petitioners repeat and reallege paragraphs 1 – 122 as if set forth herein at length.

124. ORES's rulemaking was an "action" subject to SEQRA.

125. SEQRA requires all agencies to determine whether the adoption of agency rules, regulations and procedures may affect the environment.

126. Early environmental review of a proposed action serves three purposes: "To relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision-making process in determining the environmental consequences of a proposed action." ECL § 8-0109(4).

<u>ORES Misclassified the Action as Unlisted</u>

127. SEQRA requires agencies to classify their actions as either Type I, Type II, or Unlisted.

128. Type I actions are those identified, nonexclusively, in § 617.4. See 6 NYCRR §§ 617.2(aj), 617.4(a)(1) (non-exhaustive).

129. Type II actions are expressly excluded from SEQRA review. See 6 NYCRR §§ 617.2(ak) (defining a Type II action); 617.5 (identifying Type II actions); 615.3(f) and 617.6(a)(1)(i) (excluding Type II actions).

130. Unlisted actions are those that are neither Type I nor Type II actions. 6 NYCRR 617.2(al).

131. For all Type I and Unlisted actions, the agency must make a determination whether its action "***may*** have a significant adverse impact on the environment." 6 NYCRR §§ 617.1(e)(3), 617.4 (a)(1), 617.7(c)(1) (emphasis added).

132. Type I actions include an action "that involves the physical alteration of 10 acres," or that involves "any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height." 6 NYCRR § 617.4(b(6(i), (7).

133. Type I actions also include "the adoption of changes in allowable uses within any zoning district, affecting 25 or more acres of the district." 6 NYCRR § 617.4(b)(7).

134. Type I actions also include "a nonagricultural use occurring wholly or partially within an agricultural district" affecting 2.5 acres or more. 6 NYCRR § 617.4(b)(8).

135. ORES's promulgation of the Uniform Standards and Conditions applicable to all new renewable energy power plants throughout New York State is a Type I action because:

A. The regulations authorize the physical alteration of 10 or more acres that otherwise would not host renewable energy facilities and related infrastructure.

B. The regulations authorize wind turbines exceeding 100 feet above the ground in municipalities without zoning regulations pertaining to height.

C. The regulations change the allowable use in more than 25 acres of zoning districts throughout the state by setting new and less restrictive standards for power plant siting, or, in the alternative, by providing a means for relaxation and waiver of substantive standards in local laws.

D. The regulations authorize standards for siting wind and solar energy facilities greater than 2.5 acres in size, a non-agricultural use, wholly or partially within agricultural districts.

136. Because ORES action is a Type I action, it "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS," and required ORES to prepare a full Environmental Assessment Form. 6 NYCRR §§ 617.4(a)(1), 617.6(a)(2).

137. ORES failed to classify the action as Type I, and instead misclassified it as Unlisted. 6 NYCRR § 617.2(ak).

138. As a result of misclassifying the action as Unlisted, ORES relieved itself of its duty to prepare a Full EAF to determine whether its action "may have a significant impact on the environment," and instead improperly relied on a Short EAF.

139. Based only on the Short EAF, ORES made the inaccurate and unsupported determination that the default substantive standards applicable to all renewable energy power plants in the state, together with the procedural rules for siting them, would not potentially result in one or more significant environmental impacts.

ORES Failed To Take a Hard Look at Potentially Significant Adverse Environmental Impacts and Improperly Issued a Negative Declaration of Environmental Significance

140. Whenever a proposed agency action "may include the potential for at least one significant environmental impact," the agency must issue a Positive Declaration of Environmental Significance and prepare an Environmental Impact Statement ("EIS") to take a "hard look" at them. ECL § 8-0109(2); 6 NYCRR § 617.2(ad).

141. SEQRA sets forth "criteria to determine whether a proposed [agency] action *may* have a significant adverse impact on the environment (section 6 NYCRR 617.7 of this Part.)" 6 NYCRR § 617.1(e)(3) (emphasis added).

142. A Generic EIS is typically used to evaluate the environmental impacts of the adoption of "an entire program or plan having wide application or restricting the range of future alternative policies or projects". 6 NYCRR § 617.10(a)(4).

143. Adoption of the Final ORES Regulations has the potential for at least one potentially significant adverse environmental impact, and therefore required the issuance of a Positive Declaration of environmental significance.

144. Significant impacts of the ORES Regulations include, as listed in SEQRA, "the creation of a hazard to human health", "a substantial adverse change in existing . . . noise levels"; "the removal or destruction of large quantities of vegetation or fauna"; "substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species"; "the impairment of the character or quality of . . . existing community or neighborhood character"; "a major change in the use of either the quantity or type of energy"; "a substantial change in the use, or intensity of use, of land" and "the creation of a material

conflict with a community's current plans or goals as officially approved or adopted." 6 NYCRR § 617.7(c).

145. As an example of potential impacts resulting in hazards to public health, NYSDOH has determined that shadow flicker exposure in excess of 30 minutes per day and thirty hours per year, and wind turbine noise impacts in excess of 45 dBA L(den) are harmful to human health, based on the World Health Organization, "Environmental Noise Guidelines for the European Region" (2018); the National Association of Regulatory Utility Commissioners, "Wind Energy and Wind Park Siting and Zoning Best Practices and Guidance for States" (2012); and several peer-reviewed scientific research reports.

146. Although ORES's regulations limit shadow flicker exposure to 30 hours per year on a home or habitable structure located on "non-participating" property, the regulations allow unlimited shadow flicker exposure anywhere on "participating" properties, and away from residential structures on "non-participating properties".

147. ORES failed to acknowledge or study health hazards to human life caused by regulations allowing unlimited shadow flicker exposure.

148. The ORES regulations also provide for noise limits in excess of DOH and WHO guidance for both participating and non-participating properties, and set no limit at all on noise exposure away from residential structures on participating properties during the daytime.

149. ORES regulations will permit "intolerable" noise increases on participating and non-participating properties under NYSDEC guidelines for "Assessing and Mitigating Noise Impacts" (2001), which focus on assessing increases over pre-existing ambient noise.

150. In public comments, ORES was provided with expert opinion and ample supporting information on NYSDOH's conclusions about the health impacts of excessive noise, their basis, the NYSDEC noise assessment guidelines, and alternative standards more protective of public health.

151. After reviewing the public comments, ORES did not acknowledge any potential hazard to public health, and made no change to its draft regulations regulating renewable energy facility noise impacts.

152. ORES's response to public comments fails to identify any scientific or public health basis for the limits on shadow flicker and noise exposure included in the final ORES regulations, or acknowledge any other potential significant adverse impact as defined by 6 NYCRR § 617.7(c).

153. In rejecting public comments identifying potentially significant impacts of its draft regulations, ORES reasoned: "Each siting permit application will undergo an individualized, site-specific review by ORES to ensure avoidance or minimization of adverse environmental impacts to the maximum extent practicable." ORES, Notice of Adoption of Procedural Requirements under 19 NYCRR Part 900, State Register, 25a.

154. For the reasons stated in paragraphs 116-119 above, the ORES rationale (a) impermissibly seeks to defer the evaluation of environmental impacts to later project-specific reviews, contrary to the statute's requirement that the default Uniform Standards and Conditions themselves must "be designed to avoid or minimize, to the maximum extent possible, any potential significant adverse environmental impacts" (Exec. L. 94-c(3)(c)), and (b) ignores the likelihood that the expedited permit process and the Default Approval provisions

will lead to the approval of project applications – without SEQRA review – with inadequate avoidance or mitigation measures.

155. Because at least one potentially significant adverse environmental impact may result either directly or indirectly from ORES's regulations, ORES had an obligation to issue a Positive Declaration of Environmental Significance instead of a Negative Declaration.

156. Upon information and belief, the record is devoid of any studies into the potentially significant adverse environmental impacts of ORES's regulations, or any other record evidence, to support ORES's conclusion that no such potential impacts may exist.

157. ORES's misclassification of the action as Unlisted, and use of a Short EAF, was arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence on the record.

158. Even if, *arguendo*, ORES properly classified the Action as Unlisted, ORES should have completed a Full EAF, acknowledged significant adverse impacts of the regulations, issued a Pos Dec, and completed an Environmental Impact Statement.

159. ORES's issuance of a Negative Declaration of Environmental Significance was arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence on the record.

160. By reason of the foregoing, the Negative Declaration of Environmental Significance must be set aside.

161. By reason of the foregoing, promulgation of the Regulations was also arbitrary, capricious, and an abuse of discretion, and must be set aside.

162. By reason of the forgoing, Petitioners are entitled to an order vacating the ORES negative declaration and the adoption of the final ORES regulations, and remanding with directions to ORES to issue new regulations that are supported by substantial evidence of record and otherwise comply with law.

SECOND CAUSE OF ACTION
ORES'S REGULATIONS ARE ULTRA VIRES

163. Petitioners repeat and reallege paragraphs 1 through 162 as if set forth herein at length.

164. Exec. L. § 94-c requires that "uniform standards and conditions established pursuant to this section shall be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility. Such uniform standards and conditions shall apply to those environmental impacts the office determines are common to each type of major renewable energy facility." N.Y. Exec 94-c (3)(c).

165. The ORES regulations may result in even one or more significant adverse environmental impact.

166. ORES declined to look at any potential significant adverse environmental impacts related to the siting, design, construction and operation of major renewable energy facilities based on the unsupported presumption that regulations for siting power plants will have no impact on the environment.

167. Because the ORES uniform standards and conditions fail to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts

related to the siting of power plants, and even fail to acknowledge that such impacts may occur, the ORES regulations are *ultra vires* and must be set aside.

THIRD CAUSE OF ACTION
ORES FAILED TO COMPLY WITH THE STATE ADMINISTRATIVE PROCEDURE ACT

168. Petitioners repeat and reallege paragraphs 1 through 167 as if set forth herein at length.

169. ORES is an agency within the meaning of the State Administrative Procedure Act (SAPA), and the rulemaking process by which ORES adopted its Regulations is subject to the Act. SAPA §102(1), 202.

170. SAPA §202(5)(b) mandates that "each agency shall publish and make available to the public an assessment of public comment for a rule adopted," and, "[s]uch assessment shall be based upon any written comments submitted to the agency and any comments presented at any public hearing held on the proposed rule by the agency."

171. SAPA §202 (5)(b) mandates that "the assessment shall contain: (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments."

172. ORES received over 5,000 public comments on its draft regulations, issued on September 16, 2020.

173. Many public comments identified reasonable alternatives to specific provisions of the ORES draft regulations.

174. ORES failed to adequately explain why it would not consider alternatives raised in the comments.

175. ORES said only that it "made several non-substantive changes" but otherwise simply rejected all alternatives without providing any substantive rationales.

176. As one example of comments ignored by ORES, the Concerned Citizens for Rural Preservation ("Concerned Citizens") provided timely comments that the Draft Regulations failed to provide any guidance on how the new standard for waiver of local laws set forth in Exec L. 94-c (5)(e) can be supported by developers, or opposed by municipalities.

177. Concerned Citizens informed ORES that: "The Draft Regulations violate Article IX of the New York State Constitution and effectively strip local governments of legislative, zoning, and police powers. The Rules fail to precisely state under what circumstances ORES can execute its waiver power. Although Article 94-c identifies inconsistency with state energy policy as the basis for waiving local laws, the regulations to not elaborate on how inconsistency can be shown. Instead, the regulations rely on the technical standard required under [Article 10] Siting Board Regulations, which relate to whether a project is unduly burdensome in light of existing technology or the needs of the rate payers. It is unclear what findings and determinations ORES is required to make as prerequisite to waiver. Without a clear standard for waiver or any internal limitations on the waiver power, ORES will be tempted to waive local laws indiscriminately and in a way wholly inconsistent with local powers granted directly by the state constitution. Neither ORES, nor the legislature for that matter, has the power to preempt local laws on a case by case basis."

178. ORES failed to acknowledge or correct the glaring inconsistency in its draft regulations governing evidence necessary to support waiver of local laws, opting to instead promulgate language from a prior, superseded, and inapplicable regulation tailored to the wrong standard for waiver.

179. ORES also ignored the Yates Town Supervisor's substantive suggestion that ORES follow "Wind Energy: Great Lakes Regional Guidelines," which requires avoiding wind energy development within five miles of the Great Lakes shorelines to help abate mortality of birds and protect coastal stopover habitats.

180. ORES failed to meaningfully address substantive comments submitted from the American Bird Conservancy and other entities about avian impacts, including non-listed species such as species of Special Concern and High Priority Species of Greatest Conservation Need. See para. 81, above.

181. ORES failed to meaningfully address substantive comments from Save Ontario Shores regarding the delineation of wetland boundaries. ORES requires a boundary of 100 feet, but Article 10 required a boundary of 500 feet, which is necessary to reduce adverse impacts.

182. ORES failed to meaningfully address substantive comments from Delaware-Otsego Audubon Society's co-president Andrew Mason seeking revisions pertaining to net conservation benefit and litigation provisions to emphasize and prioritize at risk wildlife.

183. ORES failed to meaningfully address June Summer's comments on behalf of Genesee Valley Audubon Society that called for revising the mitigation ratios to use Department of Environmental Conservation's 2016 guidelines for conducting bird and bat studies at commercial wind projects.

184. ORES failed to meaningfully address substantive comments submitted from the Rochester Birding Association, and other entities concerned with avian impacts, urging revised setbacks for federal and state lands managed for conservation (2 miles); for the Great Lakes shorelines (5 miles); for streams and lakes with high densities of bald eagle nests (1 mile); for rivers, wetlands, and lakes supporting bird migratory corridors and/or concentrations of waterfowl (1 mile).

185. ORES failed to meaningfully address joint substantive comments from several municipalities and entities including the Towns of Farmersville, Copake, Malone, and Clear Skies Above Barre, Inc. that the draft regulations do not allow for meaningful identification, assessment, or mitigation of the negative environmental impacts of individual renewable energy projects.

186. In essence, ORES did not adequately explain why it failed incorporate a single significant alternative into the rule, as expressly required by SAPA §202 (5)(b).

187. Because ORES violated SAPA §202(5)(b), the Court should vacate the regulations and remand them to ORES for a proper consideration of the substantive comments and identified alternatives.

FOURTH CAUSE OF ACTION:
THE ORES REGULATIONS VIOLATE THE HOME RULE PROVISIONS OF ARTICLE IX OF THE STATE CONSTITUTION

188. Petitioners repeat and reallege paragraphs 1 through 187 as if set forth herein at length.

189. Under Section 94-c of the Executive Law, local ***procedural*** laws for siting power plants are expressly preempted and replaced by the state siting process. NY Exec L. 94-c § 6.

190. Examples of preempted local procedural laws include requirements for local permits, or provisions governing the scope of studies needed to support an application.

191. Section 94-c does ***not*** preempt local laws that place ***substantive*** standards on the power plant development, such as setback requirements, height limits, noise limits, and area use limitations.

192. Rather, Section 94-c(5)(e) empowers ORES on a case-by-case basis "not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility."

193. The power to waive specific local laws on a case by case basis violates Article IX, Section 2 (b)(2) of the state Constitution, the Home Rule provision, which prohibits the legislature from enacting legislation that over-rides a specific local law *unless* the legislation is generally applicable, or upon the request of two-thirds of the total membership of the legislature, or upon issuance of an emergency declaration by the governor with concurrence of two-thirds of the legislature, all circumstances not present here.

194. The legislature cannot evade the constitutional limit on its power to meddle with individual municipalities' local laws by vesting ORES with the same proscribed power, but without the constitutional safeguards of a generally applicable law that is applicable to all municipalities equally in both terms and effect, or a vote of two-thirds of the total membership of the legislature, or issuance of an emergency declaration by the governor with concurrence of two-thirds of the legislature, all circumstances not present here.

195. The Legislature's mandate to waive local laws is unenforceable for failure to comply with applicable State constitutional procedures.

196. In response to the legislature's overreach, ORES's Rule 900-6.3(a) states that "the permittee shall construct and operate the facility in accordance with the substantive provisions of the applicable local laws as identified in section 900-2.25 of this Part, *except for those provisions of local laws that the Office determined to be unreasonably burdensome, as stated in the siting permit*."

197. Accordingly, the Court should vacate as unlawful the ORES regulations providing for waiver of local laws at ORES' discretion as a violation of the Home Rule provisions of the State Constitution. *See* Rules 900-2.25, 6.3, 6.4(k)(3), and 8.4(d).

WHEREFORE, petitioners respectfully request that this Court enter an order under CPLR Articles 30 and Article 78 *et seq*.:

a) holding that, in promulgating its regulations, ORES's violated SEQRA, SAPA, and Article IX of the New York State Constitution, related to Home Rule;

b) vacating the regulations and remanding to ORES with direction to promulgate regulations in compliance with those laws;

c) temporarily and permanently enjoining ORES from taking any action on applications under 94-c without first complying with those laws; and

d) tolling any Default Approvals under Exec. L. §§ 94-c(5)(b), (5)(c)(i), (5)(f); and

e) allowing any entity who filed an application under Article 94-c to transfer that application to the New York State Board on Electric Generation Siting and the Environment for review under Article 10;

f) awarding Petitioners their reasonable attorneys' fees, costs and disbursements, together with such other and further relief as this Court deems just and proper.

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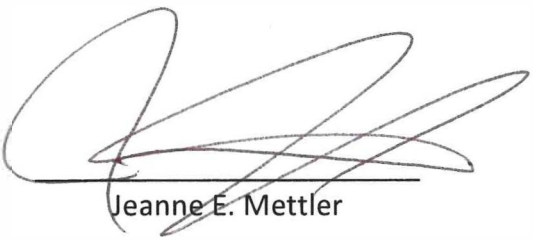
June 28, 2021
Rochester, New York

STATE OF NEW YORK)
COUNTY OF COLUMBIA) SS.:

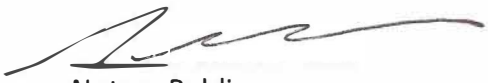
Jeanne E. Mettler, being duly sworn, deposes and says that deponent is the Town Supervisor of the Town of Copake, a municipal petitioner in the within matter. Deponent has read the within Verified Petition and Complaint and knows the contents thereof; that the same is true to deponent's knowledge except as to matters stated to be alleged on information and belief and that as to such matters deponent believes it to be true.

The grounds for deponent's belief as to such matters are personal inquiry and examination conducted in the course of deponent's investigation into the facts and circumstances of this matter.



Jeanne E. Mettler

Sworn before me this 28th
Day of June, 2021.



Notary Public

Gillian S. Sims-Elster
No. 01SI6040715
Notary Public, State of New York
Qualified in Columbia County
My commision expires APRIL 24th, 2022

Exhibits

A. State Register Proposed Rulemaking – September 16, 2020

B. Short Environmental Assessment Form

C. ORES Public Comments, part 1

D. ORES Public Comments, part 2

E. ORES Public Comments, part 3

F. ORES Public Comments, part 4

G. ORES Public Comments, part 5

H. Public Hearing Transcript November 17, 2020

I. Public Hearing Transcript November 18, 2020

J. Public Hearing Transcript November 19, 2020

K. Public Hearing Transcript November 20, 2020

L. Public Hearing Transcript November 23, 2020

M. Public Hearing Transcript November 24, 2020

N. Public Hearing Transcript November 30, 2020

O. Assessment of Public Comments

P. Initial FOIL Request November 19, 2020

Q. ORES FOIL Acknowledgment November 25, 2020

R. ORES Extension Letter – FOIL – December 24, 2020

S. ORES Extension Letter – FOIL – February 9, 2021

T. ORES Extension Letter – FOIL – April 8, 2021

U. ORES Extension Letter – FOIL – May 6, 2021

V. ENB – Adoption of Regulations

W. ENB Form – Procedural Regulations

X. ENB Form – Uniform Standards and Conditions

Y. Amended SEAF Part 1 and Part 2 dated February 23, 2021