New York Supreme Court

Appellate Division—Third Department

TOWN OF COPAKE, AMERICAN BIRD CONSERVANCY, SAVE ONTARIO SHORES, INC., 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 MALONE, TOWN OF SOMERSET, AND TOWN OF YATES,

Petitioners/Plaintiffs-Appellants,

(for continuation of caption, see inside cover)

Docket Nos.:
534318
534413

AMICUS BRIEF OF FRIENDS OF FLINT MINE SOLAR, ET AL. IN SUPPORT OF RESPONDENTS/ DEFENDANTS-RESPONDENTS

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Albany County Clerk's Index No. 905502-21

– and –

TOWN OF CAMBRIA, and TOWN OF FARMERSVILLE,

Petitioners/Plaintiffs,

– against –

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-Respondents,

– and –

ALLIANCE FOR CLEAN ENERGY NEW YORK, INC.

Intervenor-Respondent-Respondent,

– and –

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NEW YORK LEAGUE OF CONSERVATION VOTERS, SCENIC HUDSON, NEW YORKERS FOR CLEAN POWER NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF FLINT MINE SOLAR, WIN WITH WIND, CARRIE AND WILLIAM MCCAUSLAND, SCOTT AND DONNA GRIFFIN, KENNETH ROBERTS, KAROL TOOLE, JOHN OHOL, AND FRIENDS OF COLUMBIA SOLAR, INCORPORATED,

Amici Curiae-Respondents.

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STATEMENT OF INTEREST OF AMICI CURIAE

Proposed *amici curiae* are organizations and individuals who have supported contested wind and solar energy facilities in their communities. They now support the regulations promulgated by the Office of Renewable Energy Siting ("ORES") pursuant to Executive Law Section 94-c to streamline the process for siting renewable energy facilities in New York State. Proposed amici are clients of the Renewable Energy Legal Defense Initiative ("Initiative"), a project of Columbia Law School's Sabin Center for Climate Change Law, and Arnold & Porter Kaye Scholer LLP. The Initiative, working with various law firms, provides pro bono legal representation to grassroots groups and individuals who support wind and solar energy facilities in their communities that are facing opposition. It has previously represented many of these organizations and individuals in siting proceedings concerning specific projects.

Proposed *amicus* Friends of Columbia Solar, Incorporated ("Friends of Columbia Solar") is a 501(c)(4) organization that was formed in 2021. Its mission is to support clean, renewable and reasonable solar projects in Columbia County, New York, including but not limited to the proposed 60-megawatt (MW) Shepherd's Run Solar Farm in Copake. The organization is comprised of more than fifty residents of Copake and nearby towns, including a landowner who plans to lease land for the Shepherd's Run Solar Farm and others who support the project

because of their concerns about climate change. In advocating for the project, group members have met with their local elected officials, published editorials and letters to the editor, met with the head of the Columbia Economic Development Corporation, met with project opponents to advocate for broader discussion between concerned parties, and participated with a working group whose members are seeking consensus to support the project in conjunction with discussions with the developer.[1]

The Shepherd's Run Solar Farm was initially under review by the New York State Board on Electric Generation Siting and the Environment ("Siting Board") under Article 10 of the Public Service Law. On May 4, 2021, the project's developer informed the Siting Board that it would instead opt into the new siting process before ORES. On March 8, 2022, the developer filed a permit application for review by ORES under Section 94-c.[2]

Proposed *amicus* Friends of Flint Mine Solar is a group of approximately thirty property owners, residents, and other stakeholders living and working in the

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[1] *See* Affirmation of Michael Gerrard dated December 2, 2022 in Support of Motion for Leave to File Amicus Curiae Brief (Gerrard Aff.) ¶ 5.

[2] *See id.* ¶ 6; Permit Application, *In re Application of Hecate Energy Columbia County 1, LLC for a 94-c Permit for a Major Renewable Energy Facility*, Section 94-c Matter No. 21-02553 (Mar. 8, 2022), *available at* https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=21-02553.

vicinity of the proposed Flint Mine Solar Project, a 100 MW solar facility that will be located in the towns of Coxsackie and Athens in Greene County. The group's mission is to promote the Flint Mine Solar Project and educate the public about the project's benefits, including the benefits that it will provide to the local community, local lands, and the environment. Some group members are farmers who face increased difficulty making a living through agriculture, and see solar energy as a way to revitalize their distressed farming community. They plan to participate in the project by selling or leasing their land to the project developer. As Friends of Flint Mine Solar President Giuseppina Agovino has explained:

> We are farmers, and we have an opportunity to harvest the sun. I think that the Flint Mine Project will breathe new life into the farming community. . . . The supplemental income that the solar lease will provide will make it easier for us to stay on our land. Throughout the town, the Project will give struggling farmers income to continue farming, or to be able to finally take a day off and retire with some financial security.

In addition to this financial stake, Friends of Flint Mine Solar is also supportive of solar energy in general because the group's members are concerned about climate change.[3]

Friends of Flint Mine Solar has advocated for the Flint Mine Solar Project since 2018, when the group began to organize booths and tables at fairs to show

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[3] Gerrard Aff. Ex. A, Affidavit of Giuseppina Agovino dated Aug. 23, 2021 ("Agovino Aff.") ¶¶ 2-5, 7.

support and provide information to the public. However, in November 2018 the Coxsackie Town Board passed an ordinance to prohibit utility-scale solar development in the Residential Agricultural-2 District (RA-2), which, if enforced, would preclude the Flint Mine Solar Project from proceeding.[4] After Friends of Flint Mine Solar sued the Coxsackie Town Board in March 2019 to challenge the ordinance, the Town Board addressed certain procedural deficiencies and enacted a new ordinance to prohibit utility-scale solar development in that same district.[5]

Friends of Flint Mine Solar subsequently participated in an administrative proceeding before the Siting Board regarding Flint Mine Solar's application for a Certificate of Environmental Compatibility and Public Need under Article 10 of the Public Service Law. On August 4, 2021, the Siting Board issued the certificate and waived Coxsackie's restrictive solar law, allowing the project to proceed.[6]

Proposed *amius* Win With South Fork Wind, Inc. ("Win With Wind") is an independent, nonpartisan group of residents of East Hampton and other towns on

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[4] *See* Decision and Order, *Friends of Flint Mine Solar v. Town Board of Coxsackie*, No. 19-0216 (Sup. Ct., Greene Cnty. Sept. 13, 2019) at 3, 12.

[5] *See id.* at 4-5.

[6] Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, *In re Application of Flint Mine Solar, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10*, Case No. 18-F-0087 (Aug. 4, 2021), *available at* https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-F-0087; Agovino Aff. ¶ 6.

the South Fork of Long Island. Win With Wind aims to produce fact-based information regarding the benefits of offshore wind energy. The group has spent years advocating for the South Fork Wind Farm, which will be New York State's first offshore wind farm. Win With Wind participated in litigation before the Public Service Commission to support the issuance of a Certificate of Environmental Compatibility and Public Need under Article VII of the Public Service Law for a transmission line that will connect the South Fork Wind Farm to the electric grid in East Hampton. The certificate application was opposed by several local intervenors, resulting in nearly three years of litigation. On March 18, 2021, Win With Wind celebrated when the Public Service Commission granted the certificate.[7] Meanwhile, a group of local residents filed an Article 78 petition to challenge the Town of East Hampton's decision to grant an easement allowing the transmission cable to be constructed on Town property. Win With Wind filed an amicus brief to support the Town in that proceeding.[8] On February 24, 2022, the court dismissed the challenge to the transmission cable.[9]

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[7] Gerrard Aff. ¶ 8.

[8] Amicus Brief of Win With Wind, *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, Index No. 601847/2021 (Sup. Ct., Suffolk Cnty. Apr. 13, 2021), Dkt. No. 107.

[9] Decision and Order, *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, Index No. 601847/2021 (Sup. Ct., Suffolk Cnty. Feb. 24, 2022), Dkt. No. 125.

Proposed *amici* Carrie and William McCausland are grape farmers in Portland, New York. In 2018 they signed a lease to host wind turbines on their land for a proposed community-scale wind project developed by a company called EWT. Grape farming has become increasingly difficult in Portland due to changes in weather patterns, and the lease payments would provide much-needed financial stability by insulating the McCauslands from losses in frost years when their harvest is greatly reduced and by helping to offset their increasing property taxes. Ms. McCausland, a high school social studies teacher, had anticipated that the EWT project would provide revenue to the school district as well as educational opportunities such as internships for her students. In 2020, however, Portland adopted an ordinance that effectively bars the project from proceeding. In February 2021 the McCauslands and EWT filed a lawsuit against Portland to challenge the ordinance. However, following the denial of a motion for a preliminary injunction EWT stopped pursuing the case.[10]

Proposed *amici* Donna Griffin and Karol Toole are property owners in Fenner, New York, who plan to participate in the proposed 140 MW Oxbow Hill Solar Project by leasing some of their land to the project developer. Ms. Griffin is a

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[10] *See* Verified Petition and Complaint, *NY Directwind Portland, LLC et al. v. Town of Portland et al.*, No. EK12021000236 (Sup. Ct., Chautauqua Cnty. Feb. 18, 2021), Dkt. No. 3; Gerrard Aff. ¶¶ 10-11.

farmer who sees the Oxbow Hill Solar Project as a way to receive some income from the part of her land that is not agriculturally productive. Ms. Toole and her late husband used to have a large dairy farm but were forced to sell when it became unprofitable. Farming has become increasingly difficult in Fenner, and Ms. Toole has seen the number of dairy farms drop to only a handful today. Ms. Toole supports the project because she believes it will economically benefit her community and because she is deeply concerned about climate change. However, on August 11, 2021 the Fenner Town Board adopted a law that prohibits large-scale solar facilities, such as the Oxbow Hill Solar Project.[11]

Proposed *amicus* John Ohol is a dairy farmer in Cambria, New York, who is transitioning to grain farming because it has become increasingly difficult to make a living in the dairy industry. He plans to lease a parcel of his land to the developer of the Bear Ridge Solar Farm. Mr. Ohol sees the Bear Ridge Solar Farm as an opportunity to receive supplemental income without harming his farming operations because he can farm around the solar panels and return the land to agricultural use when the project is decommissioned. In Mr. Ohol's view, participating in a solar farm is also a way to slow down the urbanization he sees

[11] Gerrard Aff. ¶¶ 12-14.

around his community because solar energy provides tax revenue and lease payments but requires relatively little development.[12]

This diverse group of proposed *amici curiae* have an interest in this proceeding as New Yorkers who wish to see renewable energy projects in their communities. As discussed, for some *amici,* leasing or selling land to a renewable energy developer can bring in much-needed income when making a sustainable living through agriculture alone has become untenable.[13] Some *amici* are motivated simply by their concerns about climate change and their desire to see their communities at the forefront of the transition to a renewable energy economy.[14] However, renewable energy project supporters can be stymied by their local governments when zoning restrictions are a barrier to renewable energy development, even where proposed facilities enjoy broad favorability. The proposed *amici* submit this brief to provide additional information to the court regarding the need for such a process and to share the perspectives of host community members other than the views represented by Petitioners/Plaintiffs-Appellants ("Appellants").

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[12] Gerrard Aff. ¶ 15.

[13] *See* Agovino Aff. ¶¶ 3-4; Gerrard Aff. ¶¶ 7, 10, 12-13.

[14] Gerrard Aff ¶ 8.

PRELIMINARY STATEMENT

Amici file this brief urging the Court affirm the Supreme Court's decision upholding the renewable energy siting regulations that ORES lawfully promulgated. Consistent with *amici*'s interests, and without conceding any other points, this brief addresses why Appellants' claims under the State Environmental Quality Review Act (SEQRA) must fail.

ARGUMENT

Appellants argue that ORES failed to comply with SEQRA in three ways: (1) by not classifying its regulations as a Type I action, *see* Appellants' Opening Brief, Dkt. No. 35 ("App. Br.") at 21-22; (2) by unlawfully deferring or segmenting environmental review, *id.* at 23-35; and (3) by not taking a "hard look" at the environmental impact of its regulations, *see id.* at 35-40. These arguments are all without merit.

First, Appellants fail to show that ORES took a Type I action. The regulations of the New York State Department of Environmental Conservation (DEC) under SEQRA provide examples of activities that, if "directly undertaken, funded or approved" by state agencies, constitute Type I actions. Here, Appellants do not argue that ORES directly undertook or funded any activity. Nor do Appellants argue that ORES *approved* any activity. Instead, they argue that the "ORES regulations *will* approve" certain qualifying activities in the future. *See*

App. Br. at 21-22 (emphasis added). However, Appellants fail to identify a single relevant activity that ORES approved—or will approve—simply by adopting the regulations.

Second, Appellants fail to establish that ORES unlawfully deferred or segmented environmental review. Agencies are not required to speculate about the consequences of their regulations, and courts have held that agencies have no obligation to consider the impacts of future projects for which plans do not yet exist.

Third, Appellants fail to establish that ORES did not take a hard look at the environmental impacts of its regulations. While ORES was required to consider and respond to comments, which ORES did, it was not required to agree with or adopt them. Additionally, Appellants ignore that in completing its SEQRA review of the regulations, ORES incorporated multiple existing SEQRA reviews of the State's efforts to expand renewable energy.

I. Appellants Have Not Shown that ORES Took a Type I Action

Appellants fail to establish that ORES took a Type I action when it promulgated regulations to implement the new siting process pursuant to Executive Law § 94-c. First, they fail to show that ORES approved any qualifying activity within the meaning of SEQRA. Second, they are incorrect that the ORES regulations will change what is allowable under local law. Finally, even if ORES

did err by designating its action as unlisted rather than Type I, which it did not, the error would be harmless because ORES properly found that no significant environmental impact will result.

A. Appellants Fail to Show that ORES Approved Any Relevant Action by Adopting the Regulations

The SEQRA regulations define a Type I action as one that "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR § 617(a)(1). The regulations offer examples of actions that—if "directly undertaken, funded or approved by an agency"—constitute Type I actions. *Id.* § 617(b)(4).

Here, Appellants do not argue that ORES directly *undertook* or *funded* any relevant action. Nor do they argue that ORES *approved* any project. Rather, they argue that "the ORES regulations *will* approve" two sorts of Type I actions, namely: (i) "the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district," *id.* § 617.4(b)(2); and (ii) "a nonagricultural use occurring wholly or partially within an agricultural district" on more than 2.5 acres, *id.* § 617.4(b)(8). *See* App Br. at 21-22 (emphasis added).

However, Appellants fail to identify a single such activity that ORES approved—or will approve—simply by adopting the regulations. They do not specify *which* projects will be approved as a result of the regulations, *when* those

projects will be approved, or *whether* such projects would have been approved anyway absent the ORES regulations under the State's preexisting siting process pursuant to Article 10 of the Public Service Law.

Moreover, Appellants' statement that "the ORES regulations will approve" various projects incorrectly suggests that, by adopting the regulations, ORES will automatically approve such actions. SEQRA makes clear that approvals—by definition—are not automatic. The SEQRA regulations define an "[a]pproval" as "a discretionary decision by an agency to issue a permit, certificate, license, lease or other entitlement or to otherwise authorize a proposed project or activity." 6 NYCRR § 617.2(e). Here, in promulgating the regulations, ORES did not make a "discretionary decision" to "issue a permit [or] certificate" or to "otherwise authorize a proposed project." *See id.* The ORES regulations set forth the standards and conditions that future renewable energy projects must meet; they do not approve any present or future projects. To obtain approval, all applicants will need to successfully navigate the multistep process laid out in the ORES regulations, which is many steps removed from promulgation of the regulations. *See* 19 NYCRR Part 900.

B. Appellants Are Incorrect that the Regulations Will Change What Is Allowable Under Local Law

Appellants are incorrect that the ORES regulations will change what is allowable under local law within the meaning of section 617.4(b)(2) of the SEQRA regulations. Appellants claim that the regulations "will approve" the adoption of changes in allowable uses in zoning districts affecting 25 or more acres of land within the meaning of section 617.4(b)(2), because the "procedural and substantive standards" set forth in the regulations will "change the uses that would be allowable under local zoning and land use laws." App. Br. at 21-22. While Appellants do not explain how the change in what is "allowable" under local law will occur, they appear to be referring to the fact that ORES can elect not to apply local laws that are "unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility." *See* Executive Law § 94-c(5)(e).

There are two problems: (1) when ORES elects not to apply local law as to a particular project, it does not change what is allowable under local law; and (2) the regulations that Appellants are challenging did not create, augment, or otherwise modify ORES's authority to waive local laws.

First, when ORES elects not to apply a local law that is unreasonably burdensome, it does so on a case-by-case basis, without changing the law itself. *See* Executive Law § 94-c(5)(e). The agency does not have the authority to

invalidate or amend local laws and therefore does not change what is allowable under local law. Instead, the statute allows ORES to elect, when evaluating a specific application, not to apply local law as to a specific project—and only after evaluating whether the local law is unreasonably burdensome when applied to that particular project in light of the environmental benefits of that project. The precise language of the statute is as follows:

> [ORES] may elect 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.

Executive Law § 94-c(5)(e) (emphasis added). Local zoning and land use laws remain intact whether or not ORES elects to apply them to a particular project: what was not allowable under local law still is not allowable under local law.

Second, the agency's authority to set aside local laws comes from the statute, Executive Law § 94-c(5)(e), not from the regulations that Appellants are challenging. The regulations that ORES promulgated to implement the statute did not create, augment, or otherwise modify the agency's authority to set aside local laws beyond the authority granted to ORES by the Legislature. The regulations simply establish a process for applicants to identify the local law provisions that they believe are unreasonably burdensome and formally request that ORES use its

statutory authority not to apply them. *See* 19 NYCRR § 900-1.3(a)(4) (pre-application procedures); *id.* § 900-2.25(c) (application exhibits). Moreover, the State's power to set aside local laws on a case-by-case basis predates ORES itself. Under the Article 10 process that preceded the creation of ORES, the Siting Board also had the authority to set aside local laws. *Compare* 19 NYCRR § 900-2.25(c) (recognizing ORES's statutory authority to waive a local substantive requirement that is unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the proposed facility) *with* 16 NYCRR § 1001.31(e) (allowing the Siting Board under Article 10 to waive a local substantive requirement on the grounds that compliance is technically impossible, impractical or otherwise unreasonable; the costs to consumers of applying the requirement would outweigh the benefits of applying the requirement; or the needs of consumers for the facility outweigh the waiver's impacts on the community).[15]

C. ORES's Decision Not to Classify the Regulation as Type I Is Immaterial

Finally, even if ORES did err by designating its action as unlisted rather than Type I, which it did not, the error would be harmless because ORES properly

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[15] Indeed, the Siting Board recently exercised this authority in issuing a certificate for the Flint Mine Solar Project, granting all requested waivers of local laws. *See* Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, *In re Application of Flint Mine Solar LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10*, Case No. 18-F-0087 (Aug. 4, 2021) at 70.

found that no significant environmental impact will result. *Matter of Bd. of Mgrs. of the Plaza Condo. v. New York City Dep't of Transp.*, 131 A.D.3d 419, 420 (1st Dep't 2015); *see also Friends of Port Chester Parks v. Logan*, 305 A.D.2d 676, 677 (2d Dep't 2003) (explaining that "the mere circumstance that" the project should have been designated "a Type I action does not render the negative declaration improper"); *Ahearn v. Zoning Bd. of Appeals*, 158 A.D.2d 801, 804 (3d Dep't 1990) (finding that where respondent took the requisite "hard look" at relevant areas of environmental concern and made a "reasoned elaboration" of their determinations, any misclassification was harmless error). "A negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion." *Spitzer v. Farrell*, 761 N.Y.S.2d 137, 140 (2003) (citations and alterations omitted). As discussed *infra* in Section III, ORES took the requisite hard look. The regulations should therefore not be invalidated even if the Court determines that the action was misclassified.

II. Appellants Have Not Shown that ORES Improperly Deferred or Segmented Environmental Review

Appellants argue that ORES "improperly deferred environmental impact review" by issuing a negative declaration without "consider[ing] the consequences of approving projects under its regulations." App. Br. at 26, 31. Here, however, the challenged ORES regulations, which set out standards and conditions for

applications, are many steps removed from any ORES action on any particular application. The Court of Appeals has held that agencies, such as ORES, are not required to consider "speculative environmental consequences which might arise under [a] new or amended regulation." *Indus. Liaison Comm. of Niagara Falls Area Chamber of Com. v. Williams*, 72 N.Y.2d 137, 143 (1988); *see also Schulz v. New York State Dep't of Envtl. Conservation*, 200 A.D.2d 793, 795 (3d Dep't 1994) ("speculative consequences need not be evaluated prior to issuance of a negative declaration"), *leave to appeal denied*, 83 N.Y.2d 758 (1994). The impacts of any future projects—for which no applications have been submitted—are highly speculative.

Appellants further argue that, by deferring review of individual projects until the time when applications are submitted for review, ORES unlawfully segmented review. App. Br. at 32. However, waiting to review the impacts of individual projects until applications for those projects have been submitted for review does not constitute unlawful segmentation. *See Schodack Concerned Citizens v. Town Bd. of Schodack*, 142 Misc. 2d 590, 596 (Sup. Ct., Rensselaer Cnty. 1989) (finding that the EIS for a supermarket warehouse facility need not assess the impacts of 23 retail stores the same applicant also planned to build when plans for those stores had not been submitted), *aff'd*, 148 A.D.2d 130 (3d Dept.), *leave to appeal denied*, 75 N.Y.2d 701 (1989). Indeed, courts have found that agencies are not required to

consider the impacts of future projects for which no plans have been submitted, even when the specifications of those future projects were far more granular than those at issue here. *See id* (finding that EIS need not address impacts of 23 futures stores even when the applicant knew the precise number of stores it intended to build); *Flax v. Ash*, 142 Misc.2d 828, 830, 834 (Sup. Ct., N.Y. Cnty. 1988) (finding that the EIS for a navy base need not consider the impact of future housing facilities for which plans had not been submitted, even when many details about the future housing facilities, such as the number of units, had already been decided).

The proper time to evaluate the impacts of future projects is when plans for those projects have become very specific. *See Flax*, 142 Misc.2d at 834 (allowing agency to "reserve environmental review" of a future project "to such time as site-specific issues and the scope of the project could be reasonably ascertained"); *Schodack Concerned Citizens*, 142 Misc. 2d at 596 (noting that each of the anticipated future projects "will be subjected to its own SEQRA review process by whatever agency must approve its location."). Here, ORES will consider the environmental impact of each proposed project when an application for that project is submitted. And the process that ORES will use to review each application is at least as rigorous as SEQRA. Before issuing any permit, ORES must consider site-specific potential impacts and determine whether the uniform standards and

conditions will address those impacts. N.Y. Exec. Law § 94-c(d). In issuing a final permit, ORES may "impos[e] significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions." 19 NYCRR § 900-8.3(c)(3). To help ORES evaluate site-specific impacts, applicants are required to submit 25 exhibits assessing many different types of impacts ranging from endangered species impacts to environmental justice impacts. *See* 19 NYCRR §§ 900-2.1 to 900-2.26. Moreover, the ORES regulations provide for an extensive public comment process, and any significant or substantive issue regarding a permit condition raised in a public comment is subject to adjudication before a final permit is granted. *Id*. §§ 900-8.3(a), 900-8.3(c)(1)(i). Therefore, any specific project permitted through the ORES process will undergo significant individualized review.

For their part, Appellants attach too much significance to the fact that courts have required government agencies to consider the impacts of "zoning amendments to allow new industrial uses." *See* App. Br. 32-33 (citing *Eggert v. Town Board*, 217 A.D.2d 975, 976-977 (4th Dep't), *app. denied*, 86 N.Y.2d 710 (1995)); App. Br. 34 (citing *Kravetz v. Plenge*, 102 Misc. 2d 622, 632-34 (Sup. Ct., Monroe Cnty. 1979)). Here, the ORES regulations did not create a *new* use of land. Renewable energy facilities were already allowed under state law, and there was already a process for siting them pursuant to Article 10 of the Public Service Law.

In sum, while Appellants correctly observe that the purpose of SEQRA "'is to incorporate the consideration of environmental factors into the existing planning, review and decision-making process . . . at the earliest possible time,'" *see* App. Br. at 32 (quoting 6 NYCRR § 617.1(c)), the earliest possible time to do a meaningful analysis of the impacts of future projects is when plans for those projects have become very specific. And the case law does not require otherwise. *See Flax*, 142 Misc.2d at 834.

III. Appellants Have Not Shown that ORES Failed to Take a "Hard Look"

Finally, Appellants' argument that ORES failed to take "a hard look" at the potential impacts of the new regulations is not supported by law or fact. Appellants argue first that ORES failed to take a hard look by deferring review. App. Br. at 35. This is incorrect for the reasons described in the previous section: briefly, ORES is not required to speculate about the environmental consequences of its regulations or to consider the impacts of future projects that cannot yet be clearly defined. *See, e.g.*, *Indus. Liaison Comm. of Niagara Falls Area Chamber of Com.*, 72 N.Y.2d at 143 ("[I]t is not arbitrary and capricious or a violation of existing law for the agency, when it takes its 'hard look' and makes its 'reasoned determination' under SEQRA, to ignore speculative environmental consequences which might arise under the new or amended regulation."); *Schodack Concerned* Citizens, 142 Misc. 2d at 596 (Sup. Ct., Rensselaer Cnty. 1989).

Appellants argue second that ORES failed to take a hard look when it "rejected scientific evidence and legitimate concerns from commenters without sufficient reasoning or justification," noting, in particular, that ORES "rejected thousands of public comments and made no substantive changes to its draft regulations." App. Br. at 36-37. However, agencies are only required to consider and respond to public comments, which ORES did. *See, e.g.*, 6 NYCRR § 617.9(a)(4)(iii) ("comments will be received and considered by the lead agency"). Here, the record includes over 170 pages of responses to comments. *See* R.8487-8659. ORES was not required to agree with or to adopt any such comments.

Moreover, as the Supreme Court correctly found, ORES "engaged in a reasonable analysis" of various issues "and determined its proposed regulation was appropriate." R.13; *see also* R.10-12. Nonetheless, on pages 37-40 of their brief, Appellants provide various examples of purportedly inadequate responses by ORES. For example, Appellants claim that ORES "offered no justification" for not adding certain protections requested by commenters to avoid impacts to endangered and threatened species, "other than that such concerns would be reviewed in association with specific applications." App. Br. at 39-40. Appellants do not cite any actual language that ORES used in its response. However,

Appellants' brief suggests that the agency's response was perfunctory and dismissive. It was not.

In fact, ORES addressed the comments at issue by responding that, pursuant to the regulations, applicants are required to conduct habitat assessments and/or site surveys for NYS threatened and endangered species during the pre-application process "to allow the applicant to design its facility to avoid or minimize impacts to occupied habitat." R.8551. ORES further explained that it "expects that applicants will utilize the siting and study recommendations provided in the New York State Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects." *Id.* ORES also further explained that "[t]he applicant must then detail in its application the efforts made to avoid and minimize impacts." *Id.* In total, the ORES regulations reference provisions for endangered and threatened species 48 times, *see* 19 NYCRR Part 900, and they require, among other things, that applicants submit an exhibit—Exhibit 12—that is dedicated to addressing impacts on "NYS Threatened or Endangered Species," *see* 19 NYCRR § 900-2.13. To give a real-world example, when the developer of Shepherd's Run submitted its application and all of the required exhibits, it included with Exhibit 12 six separate appendices focused on endangered and threatened species, namely: (1) a wildlife site characterization report; (2) a grassland breeding bird survey that reflected four rounds of point counts at 16 survey locations between May 29, 2020 and July 8,

2020; (3) a winter raptor survey; (4) a bog turtle survey; (5) a determination of occupied habitat; and (6) a net conservation benefit plan.[16] The agency takes all of these impacts into account when deciding whether or not to grant a permit.

Finally, Appellants continue to ignore the fact that in completing its SEQRA review of the regulations, ORES incorporated multiple existing SEQRA reviews of the State's efforts to expand renewable energy from over the last decade.[17] Most recently, in September 2020, the Public Service Commission issued a generic EIS on the impact of the CLCPA, including the impact of the statute's mandate to rapidly scale up renewable energy facilities,[18] which ORES was created to make possible. *See* N.Y. Exec. Law § 94-c(a). This generic EIS addresses precisely the types of alleged impacts that petitioners raise, such as vegetation removal, noise pollution, avian impacts, effects on agricultural land and community character,

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[16] *See* Appendices 12-1 to 12-6, *In re Application of Hecate Energy Columbia County 1, LLC for a 94-c Permit for a Major Renewable Energy Facility*, Section 94-c Matter No. 21-02553 (March 8, 2022).

[17] *See* Amended Short Environmental Assessment Form (Feb. 23, 2021), R.7254-56 (stating that ORES, "in completing this review, has evaluated and incorporated the prior SEQRA determinations in the 2015 GEIS, 2016 FSEIS, 2020 FSEIS and related prior SEQRA proceedings, and concurs with the findings").

[18] Final Supplemental Generic Environmental Impact Statement for the Climate Leadership and Community Protection Act, Case No. 15-E-0302 (Sept. 17, 2020), *available at* https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-E-0302; *see also* R.7251.

visual impacts, and cumulative impacts.[19] Thus, to the extent that Appellants argue that ORES should have developed a generic EIS, *see* App. Br. at 12, 31, to assess the potential impacts of the plan to expand large-scale renewable energy siting, the State has already done just that. Requiring ORES to go back and prepare a new environmental review for its regulations would be highly redundant and unproductive. For these reasons, Appellants have not shown that ORES failed to take a "hard look" at the potential impacts of its regulations.

CONCLUSION

For these reasons and the reasons discussed by the State, *amici* respectfully urge the Court to affirm the decision of the New York Supreme Court and uphold the regulations promulgated by ORES.

Respectfully submitted,

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