

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

ORES DMM Matter Number 24-03041 - Application of HECATE ENERGY COLUMBIA COUNTY 1, LLC,, for a Major Renewable Energy Facility Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 42-Megawatt (MW) Solar/Wind Energy Facility Located in the Town of COPAKE, COLUMBIA COUNTY.

FINAL DECISION OF THE INTERIM EXECUTIVE DIRECTOR

(Issued October 14, 2026)

JASON ZEHR, Interim Executive Director:

I. Introduction

This Final Decision of the Interim Executive Director for the Office of Renewable Energy Siting and Electric Transmission (ORES or the Office) denies the application of Hecate Energy Columbia County 1, LLC, (Applicant) for a permit to develop, design, construct, operate, maintain, and decommission a 42-Megawatt (MW) Major Renewable Energy Facility pursuant to Article VIII of the New York State Public Service Law (PSL). While this ruling adopts the ultimate recommendation of the Hearing Report and Recommended Decision (Hearing Report) of the presiding Administrative Law Judges (ALJs), it departs from the Hearing Report's subordinate analysis on certain topics as discussed below.

II. Background and Proceedings

A full recitation of the factual and procedural background of this proceeding may be found in the combined recitations of the ALJs' ruling on issues and party status (Issues Ruling) and the ALJs' Hearing Report and, therefore, will not be repeated here. The facts and procedural posture relevant to this final decision are as follows. On considering appeals from the Applicant and Town of Copake (Town) of the ALJs' Issues Ruling, I issued an Interim Decision of the Interim Executive Director (Interim Decision).

In the Interim Decision, I remanded the matter for an adjudicatory hearing. I directed the remand having determined from the appeals that the Issues Ruling identified factual disputes that, if left unaddressed, demonstrated evidentiary gaps in the record preventing issuance of an Article VIII permit. My decision required that the hearing develop the record on the project's compliance with Town of Copake Code Chapter 135 (Chapter 135) concerning development in special flood hazard areas.¹ I explained in the Interim Decision that without an affirmative determination of State and Local Law compliance, and absent the project's demonstration that

¹ Noting that the ALJs had included additional site-specific conditions that had not previously been the subject of public comment, I also directed in the Interim Decision that the revised draft permit including those conditions be issued for public comment. See Hearing Report at 23-24. As this final decision denies the requested permit, issues regarding the inclusion of the site-specific conditions are moot. Notably, however, the procedural direction provided in the Interim Decision remains that where new site-specific conditions are under consideration during the issues phase, the proposed revisions should be subjected to a public comment process.

significant adverse environmental impacts had been avoided or minimized to the maximum extent practicable, a permit could not be issued.

After accepting the parties' prehearing evidentiary submissions, on September 14, 2026, the ALJs held an adjudicatory hearing at the Town of Copake Town Hall. The parties submitted post-hearing briefs on September 21, 2026, and the ALJs issued their Hearing Report on October 5. The Applicant, Town, ORES, and DEC submitted comments on the Hearing Report on October 13, 2026.

III. Hearing Report

In their Hearing Report, the ALJs found that the record in this proceeding remained deficient as to the impacts to jurisdictional wetlands and compliance with the Town's floodplain protection law, Chapter 135. As to the wetlands application materials and jurisdictional determination, the ALJs found that the jurisdictional determination inadequately catalogued the scope and number of Department of Environmental Conservation (DEC) jurisdictional wetlands. Most relevant, the ALJs found that the absence of any record evidence on the number of and size of omitted wetlands precluded a finding that the project's environmental impacts have been avoided or minimized to the maximum extent practicable² or that the proposed project will be in compliance with applicable state and local laws and regulations.³

² See PSL § 138(1)(b).

³ PSL § 142(5).

As for Chapter 135, the ALJs confirmed their previous recommendation that the Town is correctly vested with the authority to implement Chapter 135 to maintain its eligibility in the National Flood Insurance Program (NFIP) as mandated by Environmental Conservation Law Article 36.⁴ In making their recommendation, the ALJs determined that the post-hearing record lacks sufficient technical information to enable a finding that the project will comply with Chapter 135, particularly as to project components located within the Federal Emergency Management Area (FEMA) Zone A special flood hazard area.⁵ The ALJs found that there was no evidence in the existing record regarding the Applicant's ability to demonstrate compliance with Chapter 135 and that, given the determination in the Interim Decision that a post-permit issuance compliance determination was legally unsupportable, the permit could be denied on this independent ground despite the permit's inclusion of condition 3(b)(1) mandating that the Applicant comply with the local law.⁶

IV. Standards of Review

a. Determining Issues for Adjudication

To issue a permit, the Office must make a finding that the proposed project, together with any applicable provisions of

⁴ Hearing Report at 57-58. See DMM Item No. 268, Affirmation of Scott Crisafulli.

⁵ Hearing Report at 58-61.

⁶ Hearing Report at 61-70 (discussing record defects on issues related to a showing of compliance with Chapter 135).

the uniform standards and conditions (USCs), necessary site-specific conditions, and applicable compliance filings:

- 1) complies with Public Service Law article VIII (Article VIII) and applicable provisions of the Office's regulations at 16 NYCRR part 1100 (Part 1100);
- 2) complies with substantive provisions of applicable State laws and regulations;
- 3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the facility;
- 4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and
- 5) achieves a net conservation benefit with respect to any impacted threatened or endangered species.

In making the required finding, the Office is directed to consider the CLCPA targets and environmental benefits of the proposed major renewable energy facility.⁷

⁷ See ORES DMM Matter No. 23-02972, Matter of ConnectGen Montgomery County, LLC, Decision of the Executive Director, Jan. 27, 2026, at 9-10 (Mill Point Solar I); ORES DMM Matter No. 21-02104, Matter of Bear Ridge Solar, LLC, Decision of the Executive Director, July 31, 2023, at 9-10; ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar Energy, LLC, Decision of the Executive Director, Dec. 9, 2022, at 8, citing ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 13, 2022, at 8-

The Office's regulations at 16 NYCRR subpart 1100-8 which became effective on July 17, 2024, provide for an issues determination process to define the scope of any disputes. Through the issues determination procedures, the ALJs determine whether any substantive and significant issues of fact related to the findings that the Office must make on an application require adjudication and, if not, resolve any legal issues related to the required findings. Specifically, pursuant to 16 NYCRR 1100-8.3(b)(2), the purpose of the issues determination procedure is:

- (i) to narrow or resolve disputed issues of fact without resort to taking testimony;
- (ii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues as set forth in subdivision (c) of 1100-8.3;
- (iii) to receive argument on whether party status should be granted to any party status petitioner;
- (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and
- (v) to decide any pending motions.

The procedure under 16 NYCRR 1100-8.3(b) is a form of summary judgment. The initial inquiry is whether a party

9, citing Executive Law § 94-c(3)(b)-(d), (5)(e); see also Climate Leadership and Community Protection Act (CLCPA), L 2019, ch 106, § 7.

challenging an application or draft permit is seeking to raise a substantive and significant factual issue requiring adjudication. A party seeking to litigate a factual dispute must demonstrate the existence of a triable issue of fact through a sufficient offer of proof, usually through the proffer of expert evidence.⁸ If the ALJ determines that a party has raised a triable issue of fact requiring adjudication, the ALJ will define the issue as precisely as possible, set the matter down for an evidentiary hearing, and determine which parties are granted party status for the hearing.⁹

If it is determined that no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are reviewed. Legal determinations made by ORES staff as reflected in the draft permit are examined for an error of law.¹⁰ Exercises of discretion and policy decisions made by ORES staff are reviewed for an abuse of discretion.¹¹

⁸ See 16 NYCRR 1100-8.4(c)(2)(ii); Mill Point Solar I, Decision at 11; Bear Ridge Solar, Decision at 13-14; Horseshoe Solar, Decision at 11-12; ORES DMM Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Decision of the Executive Director, July 25, 2022, at 8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 5.

⁹ See 16 NYCRR 1100-8.3(b)(5)(i), (ii).

¹⁰ See Mill Point Solar I, Decision at 12; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6, citing Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 (1979).

¹¹ See Mill Point Solar I, Decision 12; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 6, citing Matter of

With respect to a factual issue sought to be raised by a potential party, the issue is adjudicable if it is both substantive and significant.¹² An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.¹³ An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions.¹⁴

To participate as a party in any adjudication under 16 NYCRR subpart 1100-8, the potential party seeking full party status must file a petition in writing that, among other things, identifies an issue for adjudication that meets the criteria of 16 NYCRR 1100-8.3(c), and presents an offer of proof specifying the party's witnesses, the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to that issue.¹⁵ Where ORES staff has reviewed an application and finds that a component of the applicant's

Peckham v Calogero, 12 NY3d 424, 430-431 (2009); Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 (1974).

¹² See 16 NYCRR 1100-8.3(c) (1) (iv).

¹³ See 16 NYCRR 1100-8.3(c) (2).

¹⁴ See 16 NYCRR 1100-8.3(c) (3).

¹⁵ See 16 NYCRR 1100-8.4(c) (2) (ii).

project, 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.¹⁶ To raise a fact issue for adjudication, a potential party must allege facts that are either (i) contrary to what is in the application materials or draft permit, (ii) demonstrate an omission in the application or draft permit, or (iii) show that defective information was used in the application or draft permit.¹⁷

To carry its burden of persuasion, a potential party need make its offer of proof through a qualified expert.¹⁸

¹⁶ See 16 NYCRR 1100-8.3(c)(4); Mill Point Solar I, Decision at 13; Cider Solar, Decision at 27-28.

¹⁷ See Mill Point Solar I, Decision at 13; Bear Ridge Solar, Decision at 13-14; Horseshoe Solar, Decision at 11-12; Cider Solar, Decision at 10. At the issues determination stage of the proceeding, the applicable standard is similar to the standard on a CPLR 3212 motion for summary judgment - the party with the burden of persuasion must present an offer of proof "sufficient" to raise a triable issue of fact requiring adjudication. See ORES DMM Matter No. 21-00976, Matter of Homer Solar Energy Center, LLC, Decision of the Executive Director, Jan. 9, 2023, at 8 n 23 (citing Matter of Terry Hill South Field, First Interim Decision of the Commissioner, Dec. 21, 2004, at 9-10 [NYSDEC]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; CPLR 3212[b]). See also Heritage Wind, Interim Decision at 8 (administrative decisions by DEC interpreting the corollary provisions of 6 NYCRR part 624 provide persuasive authority for the interpretation of 19 NYCRR former subpart 900-8, now 16 NYCRR subpart 1100-8).

¹⁸ See 16 NYCRR 1100-8.4(c)(2)(ii).

Importantly, in determining whether a potential party has demonstrated an issue is substantive and significant, the party's offer of proof is evaluated in light of the application and related documents, the standards and conditions, or permit, the content of any petitions for party status, the record of the issues determination procedure, and any subsequent written or oral arguments authorized by the ALJ.¹⁹ Any assertions a potential party makes in its offer of proof must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. Moreover, the qualifications of the expert witness that a petitioner identifies may also be examined, including the proposed expert's background and expertise with respect to the specific issue area concerned. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, ORES staff's analysis, or the record of the issues determination procedure, among other relevant materials and submissions. Where staff has expertise in an area, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue.²⁰

¹⁹ See 16 NYCRR 1100-8.3(c)(2).

²⁰ See Mill Point Solar I, Decision at 14-15; Bear Ridge Solar, Decision at 14-15; Horseshoe Solar, Decision at 12-13; Cider Solar, Decision at 11; Heritage Wind, Interim Decision at 8-9 (citing Matter of Roseton Generating LLC, Decision of the Commissioner, March 29, 2019, at 11-12 [NYSDEC]); see also Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006, at 5-10 (NYSDEC).

Finally, in addition to issues raised by an applicant or other potential party, public comments, including comments provided by a municipality, on a draft permit condition published by the Office may also identify an adjudicable issue provided those comments meet the substantive and significant standard for adjudication.²¹

B. Review on Appeal

The issues determination procedure results in a ruling by the ALJ that: (i) determines which factual issues satisfy the requirements for being adjudicable issues as set forth in 16 NYCRR 1100-8.3(c), and defines those issues as precisely as possible; (ii) determines which persons will be granted party status; (iii) rules on the merits of any legal issue where ruling does not depend on the resolution of disputed issues of fact; (iv) decides any pending motions to the extent practicable; and (v) summarizes comments received on the application and draft permit conditions or intent to deny.²² On administrative appeal from an issues ruling, the Executive Director reviews the ruling for any errors of law or fact, or abuses of discretion by the ALJs. However, the Executive Director may review the record of the issues determination procedure, including the public comments filed, to determine that all adjudicable issues have been identified, and to offer guidance on legal and policy issues to optimize the permitting

²¹ See 16 NYCRR 1100-8.3(c) (1) (ii) .

²² See 16 NYCRR 1100-8.3(b) (5) .

process and focus any hearing, if such is warranted.²³ The foregoing standards continue to apply to this decision as this matter remains on appeal from the issues determination process as the record exists supplemented by the hearing on remand.

V. Discussion

In today's ruling I address two separate issues: (1) floodplain and community protection and Local Law Chapter 135 and (2) identification of and protection of wetland resources. My analysis on each of these separate issues leads me to conclude that I am not able to affirmatively certify and determine that the project application satisfies the criteria for a permit under PSL Article VIII.

a. Chapter 135 and Floodplain

The Hearing Report confirms the recommendation first made in the Issues Ruling that Chapter 135 is not preempted by Article VIII. Additionally, the Hearing Report notes that inasmuch as Chapter 135 was enacted as part of an integrated federal, State, and local statutory scheme for the protection of public health, safety and economic interests it is not implemented by the Office and cannot be waived.²⁴

²³ See Mill Point Solar I, Decision at 16; Bear Ridge Solar, Decision at 16; Horseshoe Solar, Decision at 14; Cider Solar, Decision at 12-13; Heritage Wind, Interim Decision at 9-10, citing Matter of Crossroads Ventures, Interim Decision at 10-11.

²⁴ Hearing Report at 54.

During the September 2026 hearing process, DEC provided evidence as to its understanding and treatment of the NFI Program and its relation to Environmental Conservation Law (ECL) Article 36.²⁵ ECL Article 36 requires all local governments with land use jurisdiction over areas of special flood hazard to comply with the requirements of the NFI Program. As the Hearing Report affirmatively recounts, DEC's position is that ECL Article 36 grants the Town exclusive authority to determine compliance with Chapter 135, which was enacted to implement the NFI Program, preserve the Town's eligibility for participation, and protect the community.²⁶ DEC also testified that a local government's failure to adopt and enforce provisions implementing the NFI Program could jeopardize its ability to obtain flood insurance through the Federal-subsidized NFI Program.²⁷

I concur with DEC's position and adopt a similar position pursuant to the requirements of the PSL.²⁸ Chapter 135 is a local law pursuant to a legislative requirement in ECL Article 36 that the local government take action to ensure its ability to participate in the NFI Program. Chapter 135 contains substantive requirements regardless of any procedural requirements Article VIII may preempt. The Applicant contends in its comments on the Hearing Report that the finding that the

²⁵ Hearing Report at 56-57.

²⁶ Hearing Report at 57.

²⁷ Hearing Report at 57.

²⁸ See PSL §§136, 144.

Town is solely responsible for determining compliance with Chapter 135 should end the analysis. Article VIII, however, does not distinguish its required finding of local law compliance based on enforcement jurisdiction once a project is under construction and operation. Rather, ORES has an obligation under Article VIII to determine the Applicant's ability to comply with the substantive standards of Chapter 135 and make an affirmative finding of such in any permit issued pursuant to Article VIII.²⁹ My finding here is that the record in this proceeding has not demonstrated the Applicant's ability to comply.

Given the significant gaps in the evidentiary record resulting from the Applicant's submissions in this proceeding, I also cannot make the finding that the project is able to comply with the substantive requirements of Chapter 135.³⁰ In summary, the evidence required to demonstrate compliance is absent in the topic areas of identifying base flood elevations, establishing the reliability of inputs for the Applicant's hydrology modeling, the ability of facility components to avoid being inundated by flooding, the reliability of the design and operation of measures intended to control panel operation during a flood event, and the avoidance of siting of facility components near or within a floodway.

Having reviewed the record and application materials, I adopt the Hearing Report's evidentiary findings and conclusions on this topic. As such, and based on the record in

²⁹ PSL §142(5).

³⁰ See Hearing Report at 58-71.

this proceeding, I find that the proposed project fails to demonstrate the project's ability to comply with the substantive requirements of Chapter 135.

Having addressed the floodplain issue, I now turn to the second and separate issue: the sufficiency of the record concerning the identification and protection of wetland resources.

b. Wetlands

The Hearing Report contains a comprehensive examination of the wetlands impact analysis for the proposed project. In their Issues Ruling, the ALJ's determined that ORES improperly relied on a Jurisdictional Determination³¹ the Office had provided to the Applicant in connection with a previously dismissed application for a similar proposed project, referred to hereafter as Shepherd's Run I.³² In the Hearing Report, the ALJs comprehensively detail the events leading from the initial collection of data underlying the Applicant's Shepherd's Run I wetlands application materials up to and including the testimony and exhibits submitted during the hearing on remand in this present matter.

The record demonstrates that the Applicant engaged technical experts to provide a wetlands mapping and area analysis in preparing a Wetlands Delineation Report for its

³¹ See 16 NYCRR 1100-1.3(e).

³² See DMM Matter No. 21-02553, Matter of Hecate Energy Columbia County 1 LLC, Decision of the Executive Director, February 6, 2024.

Shepherd's Run I filing. The Applicant's experts first visited the project site in September 2019 and again in July 2020. After those site visits, the Applicant's experts prepared an initial draft of Shepherd's Run I's Wetlands Delineation Report which was subsequently amended in April 2021 to add an additional 0.17 acre of Federally regulated wetland.³³

In December 2021, the Office issued a wetlands jurisdictional determination for Shepherd's Run I.³⁴ By decision of the Executive Director, Shepherd's Run I was dismissed in February 2024.³⁵ A part of its pre-application submissions for the proposed project under review in this proceeding, the Applicant filed two Wetland Delineation Reports used in Shepherd's Run I, dated May 2021 and January 2023.³⁶ In April 2024, the Office issued its second Wetlands Jurisdictional Determination in this proceeding (April 2024 Wetlands JD).³⁷ The April 2024 Wetlands JD acknowledges that it is based on the Applicant-provided January 2023 Wetland Delineation Report and "associated photographs and GIS shapefiles."

³³ See Hearing Report at 29.

³⁴ See ORES DMM Matter No. 21-02553, DMM Item No. 40, Shepherd's Run I, December 20, 2021 Jurisdictional Determination.

³⁵ See n.32 supra. The Executive Director's dismissal, which was expressly stated to be without prejudice to file an amended project proposal, was based on reasons not relevant to the present discussion.

³⁶ DMM Item No. 3.

³⁷ DMM Item No. 21.

In December 2024, Applicant formally filed its application including Application Exhibit 14 pertaining to Wetlands.³⁸ Application Exhibit 14 details, among other things, the Applicant's delineation survey report process and the wetlands that the Applicant identified through the survey process.³⁹ Application Exhibit 14 also explains the Applicant's project designs and considerations used to avoid and minimize project impacts to the identified wetlands.⁴⁰ Application Exhibit 14 concludes with the Applicant's proposed restoration and mitigation plan.⁴¹

The Hearing Report, in considering the evidentiary record, finds that errors were committed by the Applicant in surveying the project area and compiling the wetland delineation reports and by ORES in issuing the April 2024 Wetlands JD.⁴² The Hearing Report finds that the Applicant, as reflected by the application exhibits, improperly proposed to place or construct project components in jurisdictional wetlands and that such siting is not compliant with ORES and DEC regulations that protect Class I wetlands.⁴³

The Hearing Report also determines that wetlands that do not meet the jurisdictional size threshold may, if they

³⁸ DMM Item No. 32.

³⁹ Application Exhibit 14 at 1-4.

⁴⁰ Application Exhibit 14 at 6-14.

⁴¹ Application Exhibit 14 at 17-18.

⁴² Hearing Report at 28-38.

⁴³ Hearing Report at 39-40.

satisfy certain criteria, be deemed of "unusual importance," entitling those wetlands to protection.⁴⁴ The Hearing Report notes that some unspecified number of wetlands qualify as being of unusual importance but are absent from the Applicant's submissions and therefore are also absent from the Office's April 2024 Wetlands JD.⁴⁵ I agree with the Hearing Report's conclusion that the site conditions in this proceeding should have had more information regarding wetlands of unusual importance. In fact, I remanded this case, in part, for a hearing specifically to gather evidence on the existence of, and the potential environmental impacts to, such wetlands prior to any permit issuance.⁴⁶ Without such information being presented at the hearing, the Applicant has failed to carry its burden of proof as expressly explained in the Interim Decision.⁴⁷ As such, the Applicant should have undertaken an analysis of wetlands of unusual importance in the area if only to submit that the existence of such wetlands was immaterial to the adverse environmental impacts conclusion such that the draft permit conditions avoided and minimized those impacts to the maximum extent practicable.⁴⁸

⁴⁴ Hearing Report at 40-42 (citing ECL 24-0105(7)(a)-(k) (effective April 9, 2022)).

⁴⁵ Hearing Report at 42-44.

⁴⁶ Interim Decision at 14-15.

⁴⁷ Interim Decision at 12-13 (citing 16 NYCRR 1100-8.8(b)).

⁴⁸ See Hearing Report at 45.

As an initial matter, I find and conclude that the record in this proceeding is not clear as to the full extent of wetland resources in the project area. This lack of clarity precludes an affirmative finding that the project would avoid or minimize environmental impacts to the maximum extent practicable. With that ultimate conclusion concerning the record on wetland resources and impacts, I provide additional observations on the other issues raised in the issues determination phase, as well as the hearing on remand and the Hearing Report.

DEC's comments on the Hearing Report indicate that at the time DEC prepared the December 2021 Wetlands JD, ECL Article 24 did not define wetlands of unusual importance as jurisdictional. Thereafter, in 2022, Article 24 was amended to define wetlands of unusual importance.⁴⁹ As amended, ECL §24-0107 defines "freshwater wetlands" as including waters of the state that if "less than twelve and four-tenths acres in size, are of unusual importance," so long as they contain any or all identifying characteristics specified in that statute.⁵⁰

⁴⁹ L. 2022, ch. 58, Part QQ, section 2 (April 9, 2022) (amending provisions of ECL Article 24); see also id., section 1 revising ECL § 24-0105 (statements of public policy).

⁵⁰ ECL §24-0107(1)(a). Such defining characteristics include lands and submerged lands with wetlands trees; wetlands shrubs; emergent vegetation; rooting, float-leaved vegetation; free-floating vegetation; wet meadow vegetation; bog mat vegetation; submergent vegetation; lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period; lands and waters

Additionally, the 2022 amendments to ECL §24-0107(9)(a)-(k) specifically defined the term “unusual importance” as those freshwater wetlands containing eleven characteristics, among which include wetlands that are located within a watershed that has experienced, or can be expected to experience, significant severe storm flooding events; is located in FEMA designated floodway; was previously defined as a wetland of unusual local importance; or otherwise has wetlands functions of local or regional importance.⁵¹ Although DEC did not issue regulations on the amended Article 24 until January 2025, DEC’s comments indicate that the 2022 amendments intended and worked to provide clarity on the importance and functionality of wetlands that did not meet size requirements prior to the amendments to be mapped but that should be considered important contributors to the wetlands ecology of the state. The defining characteristics of wetlands of unusual importance were included in the statute prior to submittal of the application in this proceeding. Notwithstanding the amendments, the application materials provided to ORES do not include any discussion of the amended definition or indicate that a further on-site review had been completed despite evidence that characteristics included in the new definition exist within the site. For example, the section above discusses the proposed construction of project components in a recognized floodplain.⁵²

substantially enclosed by aquatic or semi-aquatic vegetation; and waters overlying statutorily defined areas.

⁵¹ See ECL §24-0107(9)(a)-(k).

⁵² In addition, testimony solicited at the hearing on remand indicates that the Applicant was, or should have been, aware

The Applicant's wetlands delineation report was submitted on February 27, 2024. The report is dated May 2021 and "Updated January 2023." Despite the indication that it was "updated," in its discussion regarding DEC's state regulated wetlands interest in ECL Article 24, no mention is made of the 2022 amended definition of freshwater wetlands. Instead, the delineation report merely notes that DEC's regulations for Article 24 were promulgated in 16 NYCRR parts 663 and 664.⁵³ DEC further notes that the regulations implementing the amendments were not issued until 2025. Notwithstanding the Legislature's public policy determination that additional wetland resources merited protection, no information appears in the wetlands delineation report to provide a basis for a finding that the project's potential adverse impacts were considered with regard to the amended definition. Because the Legislature had amended Article 24 between the December 2021 Wetlands JD and the time of application filing in this proceeding, the Applicant should have included some discussion of the of the impact of the ECL Article 24 amendments, the State's wetland policy, and the defining characteristics included in the amended statutes.⁵⁴ Accordingly,

that previously defined wetlands of unusual local importance existed at the project site irrespective of their existence on the DEC maps. See Hearing Transcript at 363-367; see also L. 2022, ch. 58, Part QQ, section 1 (revising ECL § 24-0105).

⁵³ DMM Item No. 3 "Sheperd's Run Solar Wetlands Delineation Report January 2023" at 3.

⁵⁴ See Comments of DEC, filed October 13, 2026, at 2. Although ORES exercised professional judgment in reliance on the December 2021 Wetlands JD prepared by DEC and the representation in the application exhibits that site conditions had not substantively changed, I believe

DEC's clarifying comments reinforce the determination on the particular facts of this proceeding that the record is incomplete with regard to wetlands impacts. Thus, contrary to the Applicant's charge that the Hearing Report recommends permit denial based on regulations not in effect at the time the application was filed,⁵⁵ the application does not clearly address statutory changes that were in effect at the time of filing. In any event, the Applicant's failure to address the legislator's policy change in law leaves in question whether all potential adverse environmental impacts have been identified and have been avoided or minimized to the maximum extent practicable consistent with Article VIII's requirements.

Given the foregoing, the evidentiary record currently before me in this proceeding is insufficient requiring permit denial, particularly when considered in addition to the Hearing Report's identification of project components appearing in the Class I wetland and 100-foot adjacent area.⁵⁶ Considering the foregoing, I am unable to determine the full extent of the potential adverse environmental impacts as required by Article VIII.

additional guidance is necessary for similar circumstances. In a similar future situation, ORES best practice should be to conduct a site visit to determine whether changes in law may change the impacts analysis and whether more information is necessary.

⁵⁵ See Applicant's Comments In Response to Hearing Report and Recommended Decision at 4-17.

⁵⁶ Hearing Report at 39-40.

Separate and apart from this conclusion, I also find it important here to further comment on certain related comments, findings, and discussions in the Hearing Report to provide guidance. The Hearing Report notes that the Town's expert was precluded by the Applicant from visiting the site for some period of time prior to the hearing, and then when the Town's expert was allowed to visit, at best left it ambiguous as to the rights of the Town's expert to test the area consistent with a normal wetlands analysis.⁵⁷ Regardless of the reason for the confusion, the Applicant's decisions and actions as reported are both inexplicable and unacceptable. The avoidance and minimization of adverse environmental impacts to wetlands is specified by the Article VIII regulations applicable to this project review⁵⁸ and was documented as an evidentiary concern in the Issues Ruling and Interim Decision based in large part on the Town's proposed evidentiary submissions.⁵⁹ As an entity granted full party status, the Town had a right to certain pre-hearing disclosure and discovery and to petition the ALJs for additional permissions.⁶⁰ The Hearing Report details that the ALJs granted the Town's request for a pre-hearing site investigation to prepare its case-in-chief.⁶¹ That the Applicant did not immediately work to accommodate the judges' ruling is

⁵⁷ See Hearing Report at 52-53.

⁵⁸ 16 NYCRR 1100-1.3(e).

⁵⁹ Interim Decision at 12-15 (citing Issues Ruling at 142-145).

⁶⁰ 16 NYCRR 1100-8.4(g) and 1100-8.6.

⁶¹ Hearing Report at 52.

unacceptable, frustrates and undermines the administrative review process, and redounds to the detriment of the proposed project's application.

Based on the foregoing, the ALJs indicate that an adverse inference may be made that the project's adverse environmental impacts to wetlands have not been avoided or minimized to the maximum extent practicable.⁶² Such an adverse inference is not necessary as I have already determined that the Applicant failed to meet its burden of proof to provide sufficient evidence regarding the full extent of the project site wetlands and the draft permit conditions avoidance and minimization of potential adverse impacts. However, under the circumstances presented, an adverse inference is appropriate and, while not primary, provides further rationale for permit denial.

Unlike the pre-hearing discovery and adverse inference issue, I am not persuaded by the Hearing Report's conclusion and treatment regarding the Office's issuance of the April 2024 Wetlands JD.⁶³ As an initial matter, the applicable regulations confirm that the applicant must prepare and submit information regarding wetlands delineation and the project's potential impacts.⁶⁴ Although the regulation requires the Applicant to consult with ORES and, as necessary, DEC, the burden of information production unequivocally falls on the Applicant.

⁶² See Hearing Report at 52-53.

⁶³ See Hearing Report at 46 - 52.

⁶⁴ 16 NYCRR 1100-1.3(e).

This assignment of responsibility recognizes that the Applicant shoulders the burden of proof on the evidentiary record supporting permit issuance and that it has an affirmative duty to provide true and accurate information to ORES in its application.⁶⁵ As this decision demonstrates, the Applicant bears the risk that incorrect or incomplete information may result in an inadequate evidentiary record problem and a permit denial. Accordingly, this assignment of obligation informs my review of the Office's decision to issue the April 2024 Wetlands JD. Given the foregoing, I disagree that the decision to adopt the bulk of the December 2021 Wetlands JD was in error. The decision, at the time it was made and given the information available, was not unreasonable as a matter of law, nor was it an abuse of discretion. The Hearing Report appears to assume or import an obligation in the Office for some type of independent active verification process. Deciding the amount of and the process for verification is a matter of professional judgment and, by necessity, can only be measured at the time such decision was made and under the circumstances surrounding the decision, as well as the information available to it. That the

⁶⁵ In addition to professional licensing considerations of the experts preparing application material, misrepresentations may be reflected in the character and fitness of an applicant seeking a permit and undermine the veracity and reliability of the entire application. See Case 15=F-0327, Article 10 Permitting - Galloo Island Wind LLC, Ruling Denying Maurer/Schneider Motion to Dismiss and Granting the Motion to Postpone Proceeding - ALJ Michael Caruso, concurring (issued October 26, 2018).

issue is defined by the exercise of professional judgment is supported by several reasons.

As an initial matter, beyond the burden of proof and risk of an adverse determination, the Applicant has reason and motive to engage competent and experienced professionals. The creation of a wetlands delineation and impacts analysis is a technical matter as demonstrated by the qualifications of the experts enlisted by the various parties for the hearing.⁶⁶ That those experts may disagree as to the conclusions to be drawn from the available evidence is the defining feature of the issues determination process. The issues determination process, again as demonstrated by how it was resolved in this very matter, is the source of comprehensive independent factual verification. In summary, the issues determination works as follows: the applicant makes a prima facie showing of permit entitlement; ORES staff reviews the submission for reasonableness and makes decisions relying on professional judgment and experience to request additional information or further investigate claims; ORES Staff uses the compiled information to produce a draft permit; potential parties then have an opportunity to review the draft permit and its inclusion of uniform and site-specific conditions and then produce competent testimony where those parties disagree with the conclusion that the draft permit avoids and minimizes impacts to the maximum extent practicable; and the matter is then set for

⁶⁶ See DMM Item Nos. 252 (curriculum vitae of Johanna E. Duffy, CWB, PWS); 253 (resume of Jason Zoladz and resume of Kip J. Smith, P.E.); and 254 (curriculum vitae of Timothy T. DePriest).

hearing where the ALJs or the Executive Director agree that a substantive and significant issue exists. The other concern I have with the Hearing Report's discussion regarding the extent of the investigation is that the obligation appears to be open-ended in that it is difficult to discern when it would be satisfied. To the extent that any question as to the completeness of information submission or ORES review is later raised by a third-party observer in the issues determination phase, the Hearing Report appears to imply that ORES should have noticed the issue prior to its being raised and taken steps to address it. This construct appears to charge ORES with having foreknowledge of any and all issues that may come to light in the issues determination phase. I do not agree that such standard applies and note that the Hearing Report discounts any evidence demonstrating that Office's action fell within industry and regulatory standards of reasonable conduct.

Having determined that the issuance of the April 2024 Wetlands JD was not an erroneous exercise of professional judgment nor an abuse of discretion, I note my concern about the amount of attention the issuance of the April 2024 Wetlands JD receives in the Hearing Report. The focus of the Hearing Report on the wetlands jurisdictional determination incorrectly implies that resolution of the issues surrounding the production of a wetlands jurisdiction determination are dispositive to a final determination in a permit proceeding. This construct misconstrues the effect of the JD on the permit review process. The JD is merely evidence that ORES has reviewed the material wetlands submissions of an Applicant and has determined that for the application filing, any potential adverse impacts to the

wetlands identified in the JD should be addressed in the application materials. While it may be the case that the JD ultimately provides substantial evidence that impacts to wetlands have been avoided or minimized to the maximum extent practicable that is only because in those proceedings contrary competent evidence either was not submitted by potential parties or the proposed evidence was determined not to have raised a substantive and significant issue. Here, that was not the case and the issues raised over the issuance of the April 2024 Wetlands JD were essentially rendered moot once the determination was made that substantial evidence existed indicating the overall evidentiary record on impacts to wetlands was incomplete due to the lack of the Applicant's accounting for wetlands of unusual importance.

Correspondingly, I note my concern with the Hearing Report's treatment of the ORES and Applicant's technical experts. The Hearing Report examines two issues of note. The first issue relates to the Office's reliance on its December 2021 Wetlands JD in Shepherd's Run I for the April 2024 Wetlands JD and the lack of any identified wetlands of unusual importance in the Applicant's delineation report and the subsequent ORES April 2024 Wetlands JD.⁶⁷

As noted, the production of the April 2024 Wetlands JD is an exercise of professional judgment which includes the determination that the December 2021 Wetlands JD remained valid

⁶⁷ 16 NYCRR 1100-8.3(c)(2)&(3). Under the regulations, where a substantive and significant factual issue is demonstrated, a pre-permit issuance evidentiary hearing is proper, not a post-issuance compliance process.

under its very terms and industry standards. While the Town's expert took issue with the length of time that had passed between the data collection underlying the December 2021 Wetlands JD and the April 2024 Wetlands JD, the measuring standard by the Hearing Report's express language is the time between the two jurisdictional determination issuances.⁶⁸ In her testimony, the Town's expert provided evidence of a reason not to rely on the previous jurisdictional determination despite the industry standard five year window, in other words a difference of professional judgment. She did not contest the actual date by which the five-year window was intended to be measured. To be clear, however, my denial is not based on the testimony on whether wetlands of unusual importance should have been considered in the April 2024 Wetlands JD. Instead, my conclusion, as noted previously, rests on the basis that the evidentiary record does not adequately demonstrate that the potential adverse environmental impacts to wetlands were properly avoided or minimized.

⁶⁸ See ORES Matter No. 21-02553 Shepherd's Run I, DMM Item No. 40 Appendix 14-3 ORES Jurisdictional Determination (issued December 20, 2021) (stating "This determination is valid for a period of five years from the date of this letter"). Additionally, it is unclear why the Hearing Report discusses the issue of a hypothetical effective extension of eight years of the December 2021 Wetlands JD, an issue that has no relevance to any determination in this proceeding. The five-year period under which the December 2021 Wetlands JD expires is December 2026. Because the final decision in this matter is due by October 19, 2026, and cannot be extended beyond that date, the valid duration of the December 2021 Wetlands JD would never be exceeded before a final decision was made even if the Hearing Report's interpretation is correct.

My underlying concern, however, is that when the respective experts for the Applicant and ORES sought to provide rebuttal testimony, the ALJs excluded it as not being provided by legal experts. In my view, this is an incorrect application of rules of evidence given that the experts were trying to explain their understanding of their job requirements and the rationale for their conduct, not the offer of a controlling legal opinion to the trier of fact. My determination on the substantive finding remains, however, as it does not rest on the motive underlying the Applicant's or the Office's actions in the initial wetlands jurisdictional determination and analysis in this proceeding.

VI. Conclusion

Having determined that I am unable to make the required PSL §142(5) finding that the project will comply with the substantive standards of the applicable laws and regulations and that the record does not support a conclusion that the draft permit together with its uniform and site-specific conditions avoids or minimizes the project's adverse environmental impacts to the maximum extent practicable, the requested Article VIII permit is denied.



Jason Zehr
Interim Executive Director
Office of Renewable Energy Siting
and Electric Transmission
Department of Public Service

Dated: October 14, 2026
Albany, New York

cc: Party List - ORES DMM Matter No. 24-03041