STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF RENEWABLE ENERGY SITING

COMMENTS ON
Draft Regulations
Chapter XVIII, Title 19 of NYCRR Part 900
Subparts 900-1 – 900-14

On Behalf of Save Ontario Shores, Inc.
and named signatories across upstate, western and
the Southern Tier of New York

Appendix E

- Comment on ORES's obligations under New York's State Environmental Quality Review Act ("SEQRA") when proposing new regulations. Prepared by Gary A. Abraham, attorney.
- Comment on draft regulations and uniform standards conflicts with the State's policies for the preservation of agricultural and natural resources, set forth in the State Constitution. Prepared by Gary A. Abraham, attorney.

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Draft ORES regulations, to implement Section 94-c of the New York State Executive Law
Comments on behalf of Save Ontario Shores, Inc.

THE ORES DRAFT PROPOSALS VIOLATE SEQRA

Uniform standards and conditions adopted by ORES must "apply to those environmental impacts the office determines are common to each type of major renewable energy facility".[1] To satisfy this mandate requires an environmental impact review pursuant to the State Environmental Quality Review Act, ECL § 8-0101 et seq. and its implementing regulations at 6 NYCRR Part 617 ("SEQRA"). However, ORES has not conducted any such review.

ORES is not exempt from the environmental impact review procedures required by SEQRA. The adoption of agency regulations is an "action" subject to SEQRA's procedures.[2] These procedures require ORES, among other things, to prepare an environmental impact statement ("EIS") demonstrating that "to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided."[3] Because ORES has not complied with SEQRA's procedures, including the preparation of an EIS, the Draft proposals are in violation of SEQRA.

SEQRA also applies to "projects or activities involving the issuance to a person of a . . . permit".[4] However, there is no provision in the Draft regulations or the Draft uniform standards for complying with SEQRA's provisions when issuing a permit. The Draft proposals are therefore also in violation of SEQRA on this ground.

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1 Accelerated Renewable Energy Growth and Community Benefit Act, L. 2020, ch. 58, Part JJJ §3(c).
2 ECL § 8-0105(4)(ii). See also 6 NYCRR § 617.2(b)(3) ("actions" subject SEQRA include "adoption of agency rules, regulations and procedures" if they "may affect the environment").
3 ECL § 8-0109(8).
4 ECL § 8-0105(4)(i). *See also* ECL § 8-0109(4).

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Draft ORES regulations, to implement Section 94-c of the New York State Executive Law
Comments on behalf of Save Ontario Shores, Inc.

CONFLICT WITH STATE CONSTITUTION PROTECTIONS

The Draft regulations and uniform standards conflict with the State's policies for the preservation of agricultural and natural resources, set forth in the State Constitution.

Draft regulation §900-2.16 (Exhibit 15: Agricultural Resources), at subsection (c), requires applicants to prepare a plan to "avoid, minimize, and mitigate agricultural impacts to active agricultural lands", and limits measures in the plan to "the maximum extent practicable", that is, to what might be feasible for project sponsors. Subsection (e) requires a plan for "agricultural co-utilization" that "demonstrate[s] that the proposed agricultural co-utilization will be feasible." These provisions do not comport with the State Constitution.

Forest and wildlife conservation are policies of the state.[1] State conservation lands "shall not be leased, sold or exchanged, or be taken by any corporation, public or private."[2] Outside the Adirondack and Catskill parks, these lands "constitute the state nature and historical preserve" and require the Legislature to enact law "by two successive regular sessions of the legislature" before these lands may be "taken or otherwise disposed".[3]

It is also the policy of the state "to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products."[4] It is not the policy of the state to develop agricultural lands for non-agricultural purposes. In fact, the state policy in this regard requires "abatement" of water pollution and "unnecessary noise" on protected conservation lands or state forest lands.[5]

Most rural communities have land use laws and regulations specifically protecting scenic beauty. To comport with the State Constitution, the Draft regulations and uniform standards should require compliance with local laws protecting scenic beauty.

The proposed regulations conflict with these constitutional policies because they require no more than, "to the maximum extent practicable," a plan "to avoid, minimize, and mitigate agricultural impacts to

1 NYS Const. Art. 14 §3(1).
2 *Id.*
3 NYS Const. Art. 14 §4.
4 *Id.*
5 *Id.*

active agricultural lands",[6] do not specifically protect scenic beauty of rural land, and do not protect lands within the state nature and historical preserve from unnecessary noise, as mandated by the State Constitution. There is no authority for relaxing mandated protections in order to achieve protections that are no more than "the maximum extent practicable" for a developer of large-scale renewable energy projects. That is, the State Constitution prohibits the degradation of the state nature and historical preserve, scenic rural areas, and protected state recreational lands by means of renewable energy siting. Before such action could be allowed, the Legislature would need to authorize it in two consecutive legislative sessions.

Accordingly, "agricultural co-utilization" is not authorized if it would impair agricultural use, nor does the law authorize "remediation" of natural resource damages within the state nature and historical preserve. Agricultural co-utilization may be feasible for a wind farm, where it is shown that "the development and improvement of [the State's] agricultural lands for the production of food and other agricultural products" would not be impaired.[7] Agricultural co-utilization would not generally be feasible or even possible where a solar farm is sited on "agricultural lands", since such projects will impair "the development and improvement of [the State's] agricultural lands for the production of food and other agricultural products."[8]

ORES has not demonstrated a necessity to allow wind turbine noise on protected conservation lands or state forest lands. Because the ambient sound level on these lands can be expected to be very low, about 25 dBA, and because modern wind turbines emit over 100 decibels, without a required minimum setback from these lands wind turbine noise can easily result in very objectionable to intolerable project noise.[9] The proposed design goal for wind turbine noise of 45 dBA will not avoid this result, it will ensure it. Without a demonstration of the necessity to do so, allowing this level of project noise within the state nature and historical preserve would violate the State Constitution's requirement that "unnecessary noise" be abated.[10]

Accordingly, Draft regulation §900-2.16(c) should be revised to require applicants to prepare a plan to "avoid impacts to active agricultural lands". In addition, the Draft regulations should include a provision requiring applicants to avoid siting wind turbines within one kilometer of the border of any state nature and historical preserve lands.[11]

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6 Draft ORES regulations, §900-2.16(c).
7 NYS Const. Art. 14 §4.
8 *Id. See also* Draft ORES regulations, §900-15.1(m) (referencing different siting guidelines to protect agricultural resources for wind and solar projects, respectively).
9 New York State Department of Environmental Conservation, Program Policy DEP-00-1, *Assessing and Mitigating Noise Impacts* (rev. February 2, 2001), at 15. *See* SOS comments provided within, "Noise".
10 Reliance on the standard noise propagation model, ISO 9613-2 (1996), (*see* Draft ORES regulations, §900-15.1(g)(1)), to predict the distance required to abate wind turbine noise requires consideration of the model's error rate. In the first instance, the model's accuracy cannot be established for noise sources elevated higher than 30 meters. For noise sources at a height of less than 30 meters, and a distance of 100 meters from sensitive receptors, predictions have an error rate of ±3 dB. ISO 9613-2, Table 5.
11 An environmental impact review, were it to be conducted, would likely support these avoidance measures. *See* SOS comments provided within, "The ORES Draft Proposals Violate SEQRA". *See also* Vaclav Smil, *Power Density: A Key to Understanding Energy Sources and Uses* (2015), 68-69 (reviewing acoustic literature and setbacks in various jurisdictions, and applying a 1 km. setback for wind turbine noise in order to reasonably estimate power density for wind energy projects).