

STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING

ORES DMM Matter Number 21-00748 - Application of HEMLOCK RIDGE SOLAR, LLC, for a Siting Permit for a Major Renewable Energy Facility Pursuant to Section 94-c of the New York State Executive Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 200 MW Solar Energy Facility Located in the Towns of Barre and Shelby, Orleans County.

RULINGS OF THE ADMINISTRATIVE LAW JUDGES ON ISSUES AND PARTY STATUS, AND ORDER OF DISPOSITION

(Issued August 19, 2022)

MICHELE M. STEFANUCCI and ANTHONY BELSITO, Administrative Law Judges:

Background and Proceedings

On July 20, 2021, Hemlock Ridge Solar LLC (applicant) applied pursuant to Executive Law § 94-c to the New York State Office of Renewable Energy Siting (Office or ORES) for a permit that would authorize it to construct and operate a solar energy facility (facility or project) in the Towns of Barre and Shelby, Orleans County.¹ The proposed project would be a solar electric

¹ Applicant, under the name Orleans Solar LLC, previously submitted a public involvement program plan to the New York State Board on Electric Generation Siting and the Environment (Siting Board) pursuant to Public Service Law (PSL) article 10. On February 4, 2021, applicant informed the Siting Board that pursuant to Executive Law § 94-c(4)(f), it elected to be subject to Executive Law § 94-c and that it intended to submit its application to the Office. Accordingly, the

generation facility with a generation capacity of up to 200 megawatts (MW). The facility site would be located on private lands totaling approximately 2,094 acres, of which approximately 1,268 will be occupied by facility infrastructure.

After receiving a notice of incomplete application on September 20, 2021, applicant supplemented its application on January 14, 2022, and March 10, 2022. On March 11, 2022, ORES staff declared the application complete and in compliance with Executive Law § 94-c(5)(b) and 19 NYCRR 900-4.1(c) and (g).²

On April 26, 2022, ORES staff issued a draft siting permit, and a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of issues determination procedure (combined notice). Both the draft permit and the combined notice were posted to the Department of Public Service's Document and Matter Management System (DMM) that same day.³ Applicant published the contents of the combined notice and supplemental combined notice

Siting Board closed the pending PSL article 10 proceeding. See DPS Case 20-F-0037, Matter of Orleans Solar LLC, DMM Item No. 9, Notice of Closure of the Proceeding, Oct. 19, 2021.

² DMM Item No. 22, notice of incomplete application, Sept. 20, 2021; DMM Item No. 26, applicant response to notice of incomplete application, January 14, 2022; DMM Item No. 34, applicant response to additional ORES comments, March 10, 2022; DMM Item No. 35, notice of complete application, March 11, 2022.

³ DMM Item No. 39, combined notice of draft permit conditions, public comment period and public comment hearing, and commencement of issues determination procedure; DMM Item No. 38, draft siting permit.

in *The Daily News*, on May 12, 2022, and *The Lake Country Pennysaver*, on May 15, 2022.

The combined notice advised that a public comment hearing on the draft permit would be conducted in person at the Barre Town Hall on June 29, 2022, at 5:00 p.m., with written comments accepted until July 5, 2022. It also indicated that applicant's statement of issues, municipal statements of compliance with local laws and regulations, and petitions for party status were due on or before July 5, 2022. The combined notice also advised that, in accordance with 19 NYCRR 900-8.3(b), the assigned ALJs would conduct a pre-adjudicatory issues determination procedure to determine party status for persons who properly filed for party status and to determine which issues, if any, will be adjudicated in this matter.

In accordance with the combined notice, an in-person public comment hearing was convened on June 29, 2022, at the Barre Town Hall in Barre, New York. Six individuals were in attendance and provided comment at the hearing. Four individuals spoke against the project and expressed concerns with the project's location and scope, potential impacts to water resources and farmland, and applicant's failure to comply with local solar laws. Two individuals spoke in favor of the project citing job creation for local union members and the economic benefits to the community.

On July 5, 2022, applicant filed comments on the draft siting permit, the Town of Shelby submitted comments and a statement of compliance with local laws, and the Town of Barre submitted a statement of compliance with local laws and a

petition for full party status and issues for adjudication.⁴ On July 20, 2022, in accordance with applicable rules, ORES staff and applicant filed responses.⁵

Issues Determination Procedure

As is more fully discussed below, neither applicant nor the Town of Shelby has requested the adjudication of any issue. Accordingly, the instant issues determination procedure is limited to whether the Town of Barre has raised a substantive and significant issue in its petition, and is consequently entitled to party status.⁶

An issue is substantive if it raises sufficient doubt regarding an applicant's ability to satisfy applicable statutory or regulatory criteria, such that a reasonable person would inquire further.⁷ To determine whether a potential party has demonstrated the existence of a substantive issue, the proposed issue is evaluated in the context of the application and related

⁴ DMM Item No. 48, applicant comments on draft permit, July 5, 2022; DMM Item No. 47, Town of Shelby statement of compliance with local laws and regulations and additional comments, July 5, 2022; DMM Item No. 46, Town of Barre statement of compliance with local laws and regulations, July 5, 2022; DMM Item No. 46, Town of Barre petition for party status and issues for adjudication, July 5, 2022.

⁵ See 19 NYCRR 900-8.3(b)(4)(i), (ii); DMM Item No. 52, applicant response; DMM Item No. 53, ORES staff response.

⁶ See 19 NYCRR 900-8.3(b)(2), (c)(1)(iv); 900-8.4(d), (f)(1)(ii).

⁷ See 19 NYCRR 900-8.3(c)(2).

documents, including the draft permit, the statement of issues filed by the applicant and any petitions for party status, as well as any responses thereto.⁸ An issue is significant if it could result in the denial of a siting permit, a major modification to the proposed facility, or the imposition of significant permit conditions beyond those proposed in the draft permit.⁹

Where, as here, ORES staff has reviewed the application and determined that the facility, as proposed and conditioned in the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion rests on the potential party asserting the issue to demonstrate that it is both substantive and significant.¹⁰ Such an assertion must be supported by “[a]n offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which it is made;”¹¹ general criticisms, expressions of concern, speculation or conclusory statements are insufficient to raise an adjudicable issue.¹²

⁸ Id.

⁹ See 19 NYCRR 900-8.3(c)(3).

¹⁰ See 19 NYCRR 900-8.3(c)(4).

¹¹ See 19 NYCRR 900-8.4(c)(2)(ii).

¹² See ORES DMM Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Decision of the Executive Director, July 25, 2022, at 11; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 8.

The issues determination procedures outlined at 19 NYCRR subpart 900-8 (Hearing Process) are modeled after similar provisions in the permit hearing procedures of the New York State Department of Environmental Conservation (DEC) under 6 NYCRR part 624 (Permit Hearing Procedures). Accordingly, administrative decisions issued by DEC under part 624 are instructive in the interpretation and application of the issues determination provisions under 19 NYCRR subpart 900-8. In that regard, the Commissioner of Environmental Conservation recently held:

A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues. . . . Judgments about the strength of the offer of proof must be made, among other things, in the context of the Department staff's analysis.

An issues conference is not meant to merely catalogue areas of dispute, but rather is used to make qualitative judgments as to the strength of the offers of proof and related arguments. . . .

With respect to the offer of proof, any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration at this stage, including for example their background and expertise with respect to the specific issue area(s). 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, Department staff's analysis, or the record of the issues conference, among other relevant materials and submissions. In areas of Department staff expertise, its evaluation of the

application and supporting documentation is important in determining the adjudicability of an issue.¹³

Applicant's Statement of Issues

On July 5, 2022, applicant filed a letter on the draft siting permit which did not raise any substantive and significant issues.¹⁴ Applicant generally finds the terms of the draft permit acceptable, but requests that ORES staff respond to minor comments and corrections set forth in its letter.

Applicant comments that section 6(a)(2)(i) of the draft permit regarding setbacks to oil and gas wells appears to require more restrictive setbacks and wider access points than those required by § 900-2.4(u)(2). Applicant also claims that site-specific condition (SSC) 6(b) concerning an agricultural co-utilization plan exceeds the regulations by requiring such a plan when the regulations provide applicant the option of submitting a plan.

In addition, applicant suggests a new SSC authorizing a phased notice to proceed with construction. Applicant also requests a modification to the draft permit at subpart 5.4(o)(5) to make payment into the Endangered and Threatened Species Mitigation Bank Fund inapplicable to grassland birds, suggesting that current language could be

¹³ Matter of Roseton Generating LLC, Decision of the Commissioner, March 29, 2019, at 10-11 (NYSDEC) (quotation marks and citations omitted). See also Heritage Wind, Interim Decision at 7-9.

¹⁴ See applicant comments on draft permit at 1.

interpreted as requiring double mitigation. Finally, applicant notes a typographical error in the project description.

In response to applicant's comments, ORES staff recommends modifying the draft permit to provide for a conditioned or phased notice to proceed. ORES staff also recommends modifying SSC 6(a)(2) with regard to setbacks for oil and gas wells to provide for a 20-foot-wide access corridor. ORES staff objects to applicant's request to modify the draft permit to avoid alleged ambiguity regarding mitigation fee requirements, stating that the fee requirement is not applicable to applicant's proposed net conservation benefit plan. ORES staff continues to recommend a SSC requiring an agricultural co-utilization plan and claims that the condition is necessary to protect agricultural and environmental resources.

We agree that allowing for phased construction will provide beneficial flexibility to applicant without diminishing the compliance review requirements. In addition, correction of the typographical error and providing for 20-foot-wide access corridors is also appropriate. Applicant did not seek to raise any substantive and significant issues regarding SSC 6(b)(2).

The Town of Shelby's Statement of Compliance with Local Laws and Regulations and Comments on the Application and Draft Permit

The Town of Shelby has not filed a petition for party status and, therefore, is not proposing any issues for adjudication.¹⁵ Accordingly, the Town's statement of compliance

¹⁵ See 19 NYCRR 900-8.4(d) ("Any municipality, political subdivision or an agency thereof that proposes to adjudicate any issues related to a facility's compliance with local laws and regulations shall file a petition for party status as

with local laws and regulations constitutes comments on the draft siting permit. For purposes of a complete record, the Town's comments and the responses to those comments are summarized here.

In its statement, the Town notes that applicant has requested a waiver of Town of Shelby Zoning Law § 787(G) (2) limiting the maximum lot coverage area of a solar system to no more than 50 acres and that ORES staff has concluded the provision should not apply.¹⁶ The Town argues that allowing the placement of panels on over 50 acres will cause a permanent conversion of active agricultural acres and result in significant visual impacts.¹⁷

The Town also notes applicant's request for partial waiver of § 787(G) (3) (b) of the zoning law which establishes a 100-foot setback from property lines for large-scale solar energy systems to the extent that it applies to internal lot lines between participating parcels.¹⁸ The Town comments that it prefers that all substantive provisions of the zoning law be applied but, in the alternative, suggests requiring applicant to obtain agreements from all property owners within the project

provided for in subdivision (c) of this section, and shall include the statement of compliance with local law and regulation in the petition.").

¹⁶ Shelby statement at 2.

¹⁷ Id.

¹⁸ Id.

site acknowledging that the setback requirements in § 787(G) were not applied.¹⁹

The Town acknowledges that the draft permit includes the decommissioning security requirements established by State law and regulation, but contends that the higher contingency contained in local law § 787(E)(10) is warranted.²⁰

The Town also comments that financial assurance should be provided in the form of a bond or letter of credit and that an annual factor should be applied to decommissioning cost estimates to account for inflation.²¹ In the alternative, the Town suggests that decommissioning costs should be updated every five years and with assurances adjusted accordingly.²² The Town claims that no negotiations regarding a host community or decommissioning agreement have occurred and suggests that applicant be required to finalize an agreement prior to receiving a permit.

Finally, the Town comments that the stormwater management design for the project does not comply with the New York State Department of Environmental Conservation (DEC) Stormwater Management Design Manual and that modifications required to comply could significantly impact the layout of the project.²³

¹⁹ Id.

²⁰ Id. at 3.

²¹ Id. at 2-3.

²² Id. at 4-5.

²³ Id. at 5.

In their responses to the Town's submissions, both ORES staff and applicant observe that the Town has not requested party status or the adjudication of any issues raised in its statement.²⁴ Applicant and ORES staff both recommend continuation of relief from the 50-acre solar facility maximum coverage area limitation, indicating that applying the lot coverage restriction effectively bans the project.²⁵ Citing precedent under Public Service Law (PSL) article 10, ORES staff also disagrees with the claim that the use of agricultural land for a solar facility constitutes a permanent conversion of agricultural lands to a non-agricultural use. ORES staff states that visual impacts of the proposed project were appropriately addressed by project design including applicant's proposed visual impact and minimization and mitigation plan (VIMMP) and associated landscape mitigation planting plan.

Applicant states that it has obtained essentially the agreement recommended by the Town regarding setbacks from internal lot lines by virtue of its leases, easements, or other agreements with landowners. Similarly, ORES staff recommends the continuation of partial relief from § 787(G)(3)(b) of the Shelby Zoning Law, to the extent that the 100-foot setbacks are applicable to lot lines, as unreasonably burdensome in light of

²³ See applicant response at 13; ORES staff response at 41.

²⁵ See applicant response at 13; ORES staff response at 42, citing DPS Case 17-F-0597, Matter of High River Energy Center, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, March 11, 2021, at 110 (NYS Siting Board).

CLCPA targets and the environmental benefits of the proposed project.

Applicant and ORES staff agree that relief from Town setbacks restrictions from unoccupied "structures" in § 787(G)(3)(c) and (d) of the Shelby Zoning Law is unreasonably burdensome in view of CLCPA targets and the environmental benefits of the project. ORES staff states significant visual impacts are appropriately avoided or minimized by compliance with Town of Shelby setbacks from occupied buildings, dwellings, and structures (including garages, agricultural structures such as barns, and sheds). Applicant adds that the owner of a fence, billboard, retaining wall or other unoccupied structure would not be impacted by waiver of the setback.

ORES staff and applicant agree that compliance with the 125% security requirement in Shelby Zoning Law § 787(E)(10) is unreasonable. They both note applicant's agreement to remove salvage value from the calculation of net decommissioning and site restoration security amounts. ORES staff acknowledges the Town's comments regarding the intended purpose of the local law deferring to higher alternative security requirements, not lower requirements, and suggests that, to the extent necessary, subpart 4(b)(4) of the draft permit be revised to waive application of the Town's 125% security requirement.

ORES staff and applicant respond to the Town's concern regarding compliance with stormwater management requirements by explaining the extensive filings and review process that will ensure the project is consistent with applicable federal, State and local laws regarding stormwater management. They both note that the draft permit requires applicant to demonstrate compliance with the applicable stormwater permitting processes.

As noted by applicant, the Town's disagreement with ORES staff's recommendation to waive local laws is insufficient to raise a substantive or significant issue for adjudication. Without waiver of the 50-acre minimum the project could not be built, and such limitation is unreasonably burdensome. We agree that visual impacts will appropriately be avoided or minimized and that waiving setback as to internal lot lines and unoccupied structures will not cause significant visual impacts. Similarly, to the extent they are applicable, waiver of the Town's security requirements is reasonable particularly given applicant's agreement to forgo salvage value in the security estimate. We are also assured that the requirements regarding submissions and review related to stormwater management are sufficient to ensure compliance with applicable federal, State, and local laws. Finally, applicant acknowledges the requirement to demonstrate host community benefits in a compliance filing and notes ongoing discussions with the Town concerning host community agreements and related issues.

The Town of Barre's Statement of Compliance with Local Laws

The Town of Barre identifies sections of its local code related to setbacks, decommissioning, parking, and the fire code with which the project would not comply.²⁶ Of the above local law compliance issues, the Town seeks only to raise the one related to fire code compliance as a substantive and significant issue for adjudication. Analysis of the fire code issue is addressed in the section below on the Town of Barre's

²⁶ See Barre statement.

petition for party status. Because the remaining issues are not raised in the Town's petition, they constitute comments on the draft siting permit. For the sake of a complete record, the Town's comments on the remaining issues and the responses to those comments are summarized here.

The Town notes that applicant has requested a waiver of setback requirements as they apply to unoccupied structures, but states that it prefers the setback requirements be enforced as to all structures.²⁷ The Town further notes that the requested waiver only need be applicable to two encroachments, but that ORES staff recommends a broader waiver applicable to any unoccupied structures.²⁸

The Town states that the six-month deadline for decommissioning to be completed in its local law is meant to limit the impact of decommissioning on the community and that the timeframes committed to by applicant are too long and will result in negative impacts to the Town. The Town also notes that its code requires a decommissioning security of 125% of decommissioning cost estimates and requirements of the draft permit are not as stringent. The Town contends that the project does not include plans for off-street parking and therefore does not comply with local zoning requirements.²⁹ Finally, the Town states that the proposed project does not comply with access road requirements in the fire code, as discussed above.

²⁷ Barre statement at 3-4.

²⁸ Barre statement at 4-6.

²⁹ Id.

In response, ORES staff and applicant both contend that the project will comply the Town's parking requirements. Applicant and ORES staff agree that waiver from Town setback requirements related to unoccupied structures is appropriate. Similarly, they agree that application of State decommissioning standards, as opposed to the Towns' more stringent requirements are proper.

Town of Barre Petition for Party Status and Issues Adjudication

In its petition for party status and issues for adjudication, the Town of Barre requests full-party status and an adjudicatory hearing to address two issues in the draft permit.³⁰ First, the Town claims that the stormwater management design for the project does not comply with design guidance outlined in the DEC Stormwater Management Design Manual (January 2015) (2015 Design Manual) and that modifications to the project that could be required for compliance with applicable stormwater requirements could create significant impacts due to increased spacing between access roads and solar arrays.³¹ Exhibit B to the Town's petition is a professional opinion provided by Mary Barker Steblein, PE, CPSESC, on the project's compliance with the storm water pollution prevention plan (SWPPP) requirements and the potentially significant impact of this non-compliance on the project layout.

³⁰ Barre petition at 3-4.

³¹ Barre petition at 5.

Second, the Town argues that the access road design for the project does not comply with the requirements of the New York State Fire Code for road width, turnaround size, and the required distance from the access roads to areas of the project and that compliance may significantly impact the facility layout or require a fire marshal approved alternative means of access.³² Exhibit C to the Town's petition is a professional opinion provided by Robert Steehler, P.E., on the project's compliance with fire code access requirements.

-Stormwater Pollution Prevention Plan Issue

The Town of Barre proposes for adjudication the issue of whether substantial changes to the layout of the project may be required for the project's SWPPP to comply with the 2015 Design Manual.³³ Specifically, the Town notes that in the preliminary SWPPP submitted in June 2021, applicant included "solar panel racking overlapping the access road vegetated filter strips throughout the project."³⁴ The Town is concerned that in reviewing the final SWPPP, DEC could interpret the "overlap," the use of the same vegetated area used for solar panel treatment and access road treatment, as potentially exceeding the capacities of the filter strips in contravention of design guidance outlined the 2015 Design Manual.³⁵

³² Id.

³³ Id.

³⁴ Barre petition at 5.

³⁵ Barre petition, Steblein affidavit at 5.

In response, ORES staff explains the SWPPP review process and the relationship of that process to the application and permitting process under § 94-c. ORES staff explains that pursuant to § 402 of the federal Clean Water Act (CWA), stormwater discharges from certain construction activities are unlawful unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit, or by an approved state permit program and that in New York State, compliance is through a federally approved, or federally delegated, State permit program.³⁶ That program, the State Pollutant Discharge Elimination System (SPDES) permitting program, is administered by NYSDEC in accordance with the New York State Environmental Conservation Law.³⁷ A SPDES permit is classified as a "delegated permit," under ORES regulations.³⁸ Owners and operators of a construction activity must operate under an individual SPDES permit or obtain coverage through New York's general permit.

ORES regulations require applicants to obtain approval under this federally delegated program prior to beginning construction and the requirement is enforced through a uniform site condition requiring "copies of all federal and federally delegated permits and approvals for construction and operation of the Facility simultaneously with other required pre-construction compliance filings."³⁹

³⁶ ORES staff response at 68-71.

³⁷ ECL article 17, titles 7, 8; ECL article 70.

³⁸ 19 NYCRR 900-1.2(o).

³⁹ See draft permit at 2.

ORES staff notes that applicant submitted preliminary design plans and a preliminary SWPPP as required by 19 NYCRR 900-2.14(c) and that the site plans and the SWPPP together define how stormwater discharges will be collected and managed. ORES staff also notes the requirement in the draft permit that final plans, profiles, and detail drawings be submitted for review prior to beginning construction.⁴⁰ ORES staff explains that if a final siting permit is granted, applicant will need to consult with NYSDEC and ORES regarding acceptable methods during final design and will need to complete the SPDES/SWPPP permitting process and file in order to commence any construction. ORES staff also notes that it, in consultation with NYSDEC and other State agencies, will review the required final plans, profiles and detail drawings. Moreover, ORES regulations and the draft permit also contain controls ensuring that any proposed modification to the project based on the final SPDES and approved SWPPP would require review and approval pursuant to 19 NYCRR 900-11.1.⁴¹

Based on this process, ORES staff concludes that ORES regulations and the draft permit include sufficient controls to ensure that the review of applicant's final design, and potential construction of the project, would proceed in a manner consistent with applicable federal, State, and local laws.

Similarly, applicant acknowledges its obligations to obtain a SPDES permit and approved SWPPP and to submit them,

⁴⁰ ORES staff response at 70, citing draft permit, site specific condition 6(a).

⁴¹ ORES staff response at 71-72.

along with final plans, profiles, and detailed drawings prior to beginning construction of the project. Applicant further argues that compliance with federally-delegated SPDES requirements is not appropriately litigated in a § 94-c permitting process and that ORES does not have jurisdiction to adjudicate compliance with the stormwater regulations and guidelines. Applicant also disputes the Town's claim that its preliminary SWPPP is noncompliant or that compliance will require significant revisions to project design, and provides a *Technical Memorandum on Stormwater* with its response. Applicant notes that solar facilities are not treated in the same manner as "traditional commercial or industrial" construction or other activities subject to SPDES requirements, and that the project will not create significant impervious surfaces. Applicant specifically notes narrower access roads and that the vegetation underneath solar arrays are not considered impervious and can provide areas to aid in stormwater management.

Fire Code Compliance Issue

The Town of Barre also proposes for adjudication the issue of whether substantial changes to the layout of the project will be required for compliance with the New York State Fire Code requirements for road width, turnaround size, and the required distance from the access roads to project areas.⁴² The Town argues that compliance with applicable standards could lead to substantial expansion of the project footprint or

⁴² Barre petition at 5.

material changes to conditions of the draft permit.⁴³

Alternatively, the Town argues that an alternative means of emergency response access would have to be approved by the local fire marshal.⁴⁴

In response, ORES staff states that its primary concern is the health and safety of New Yorkers and agrees that the project is required to comply with applicable substantive provisions of the New York State Uniform Fire Prevention and Building Code including the 2020 Fire Code of New York State.⁴⁵ ORES staff also agrees that compliance with fire access road requirements in the 2020 Fire Code is necessary to ensure that emergency response personnel can respond timely and safely to emergencies at the project site.⁴⁶ ORES staff also agrees that the 2020 Fire Code provides for a flexible approach, allowing for exemptions or modifications of access road requirements for solar photovoltaic generation facilities based on consultation with and approval by the fire code official.⁴⁷ However, ORES staff disagrees that such consultation will necessarily require substantial expansion of the project footprint.

ORES staff argues that the Town has not established that the Town's fire code official will require full applicability of the fire access road requirements in § 503 of

⁴³ Id.

⁴⁴ Barre petition at 8-9.

⁴⁵ ORES staff response at 75.

⁴⁶ ORES staff response at 76.

⁴⁷ Id.

the 2020 Fire Code or whether the official will allow for exemption or modification of the requirements.⁴⁸ ORES staff further argues that the Town has also not established that compliance with applicable fire apparatus access road requirements will necessarily increase the facility's footprint. Staff also notes that the draft permit requires submission of final plans and drawings including applicable fire apparatus access road requirements as an enforceable permit condition pursuant to 19 NYCRR 900-6.1(a).⁴⁹ ORES staff concludes that ORES regulations and the draft permit include sufficient controls to ensure that the review of applicant's final plans, and potential construction of the project, would proceed in a manner consistent with the Fire Code.⁵⁰

Applicant states that ORES has previously ruled that fire access road issues are not substantive or significant issues for litigation because the Fire Code itself expressly allows for flexibility for solar generation facilities based on consultation with the local fire code official.⁵¹ Applicant notes that it is currently consulting with the Barre Fire Company, the volunteer fire department closest to the facility site, regarding the size of its equipment and the suitability of the proposed access roads to accommodate the department's needs

⁴⁸ ORES staff response at 76.

⁴⁹ ORES staff response at 77.

⁵⁰ ORES staff response at 78.

⁵¹ Applicant response at 7.

in safely responding to potential incidents at the facility.⁵² Applicant further notes that its proposed 40-foot diameter turnarounds may be sufficient to accommodate the Barre Fire Company's largest active truck which is less than 30 feet long.⁵³ Applicant concludes that if a suitable agreement cannot be reached with the local fire code officials, only minor changes will be necessary.⁵⁴

Discussion

Viewing the concerns raised by the Town in the context of the application and related documents, including the draft permit, the statement of issues filed by applicant and any petitions for party status, as well as any responses, the issues of SWPPP compliance and compliance with the Fire Code are neither substantive nor significant. The primary concern raised by the Town regarding SWPPP compliance is a potential for DEC to interpret a preliminary design feature, the overlapping vegetative strips, as inadequate for stormwater control, and for such an interpretation to require significant design modifications to the project. The Town offers no support concerning the likelihood of such an interpretation. ORES staff, in consultation with DEC staff, has reviewed applicant's preliminary SWPPP and expresses confidence that the project will comply with applicable federal stormwater management

⁵² Applicant response at 8.

⁵³ Id.

⁵⁴ Id.

requirements.⁵⁵ To the extent that other design features are required in the final SWPPP, applicant has already considered such possibility⁵⁶ and will consult with DEC in developing the final SWPPP. Further the terms and conditions of the draft permit require the permittee to submit all final plans, profiles, and details as a pre-construction compliance filing.⁵⁷ Finally, the record is clear that applicant intends to comply with the SPDES General Permit for Stormwater Discharges from Construction Activity.⁵⁸

Similarly, the concerns raised by the Town regarding the Fire Code and road width, turnaround size, and the required distance from the access roads to facility areas are neither substantive nor significant. The Town's concerns fail to consider the flexibility inherent in the Fire Code as applied to solar generation facilities. Moreover, the Town has not provided support for its concern, other than speculation, that a strict application of the fire code would require substantial modification of the project resulting in increased impacts.

Rulings and Order of Disposition

Pursuant to 19 NYCRR 900-8.3(b), the purpose of the issues conference is to determine party status for any person or individual who has filed a petition, and to narrow and define

⁵⁵ ORES staff response at 68-73.

⁵⁶ DMM Item No. 8, Preliminary SWPPP, Appendix 13-B, June 2021.

⁵⁷ ORES staff response at 72.

⁵⁸ Id.

those issues, if any, that will require adjudication. As noted above, no substantive and significant disputes exist between ORES staff and applicant over a proposed term or condition of the draft siting permit.⁵⁹

Further, as detailed in the rulings above, the Town of Barre's proposed issues are neither substantive nor significant. In the absence of any substantive and significant issues, we deny the Town's request for party status.⁶⁰

Therefore, an adjudicatory hearing in this matter is not necessary. Accordingly, the matter is remanded to ORES staff, which is directed, pursuant to 19 NYCRR 900-8.3(c)(5), to continue processing the application to issue the requested siting permit as modified by our decision above.

(SIGNED)

MICHELE M. STEFANUCCI
Chief Administrative Law Judge
Department of Environmental
Conservation
625 Broadway, 1st Floor
Albany, New York 12233-1550
(518) 402-9003
Michele.stefanucci@dec.ny.gov

(SIGNED)

ANTHONY BELSITO
Administrative Law Judge
Department of Public Service
3 Empire State Plaza
Albany, New York 12223-1350
(518) 473-5277
Anthony.belsito@dps.ny.gov

⁵⁹ See 19 NYCRR 900-8.3(c)(i).

⁶⁰ See 19 NYCRR 900-8.4(f)(1)(ii).