NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

In the Matter of:	:	
Application of Number Three Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Project Located in Lewis County.	:	Case 16-F-0328

PETITION OF NUMBER THREE WIND LLC FOR REHEARING OF ORDER GRANTING CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED, WITH CONDTIONS

Dated: December 12, 2019
Albany, New York

John W. Dax, Esq.
William F. McLaughlin, Esq.
THE DAX LAW FIRM, P.C.
54 State Street, Suite 805
Albany, New York 12207
Email: jdax@daxlawfirm.com
Telephone: (518) 432-1002

Attorneys for Number Three Wind LLC

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I. INTRODUCTION

Pursuant to Public Service Law Section (PSL) 170 and 16 NYCRR § 1000.15(a) Number Three Wind LLC (NTW), seeks rehearing by the Siting Board of the *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* (Order), as corrected by Errata Notice dated December 6, 2019, in order to remedy the errors of law and fact identified and described herein. The errors affect primarily the Order's certificate conditions. They fall in three broad categories:

- conditions that resolve issues that were disputed on the record but for which neither the Order nor the Recommended Decision (RD) provides a discussion of the dispute and an explanation of the Siting Board's resolution;
- conditions addressing issues on which certain parties, including DPS staff and NTW, had reached agreement in the form of proposed conditions attached to the Stipulation to Terms of Partial Settlement dated June 4, 2019 and filed on June 7, 2019, or which had been recommended in the RD, but which were implicitly rejected without discussion of the reasons for their rejection; and
- conditions and related findings that are contrary to the evidence.

Following Article 10 practice, the Order is comprised of two sections: (i) the narrative portion, which evaluates the Recommended Decision of the Presiding and Associate Examiners dated August 22, 2019 (RD) and exceptions taken by the parties to the RD and (ii) the Certificate Conditions, *i.e.*, the terms upon which the Certificate of Environmental Compatibility and Public Need (Certificate) has been granted. For applicants, Certificate Conditions are the central focus because they determine how much time will be required to complete construction; how costly construction will be; and the revenue potential of the Project once built and placed in service. Because of their central role, the Certificate Conditions appended to the Order are the focus of this Petition.

In this proceeding, proposed Certificate Conditions were offered by NTW, DPS and DEC.[1] Post-hearing negotiations resulted in agreement on the overall structure and organization of the Conditions and on the text of many Certificate Conditions.[2] The agreed-upon Certificate Conditions are included in the Stipulation to Terms of Partial Settlement, together with signature pages indicating those conditions to which signatories did not agree. The RD also included recommended certificate conditions (*see* Appendix A to RD beginning at .pdf page 180).

Many of the Certificate Conditions adopted by the Siting Board differ from those included in the RD with no explanation provided in the narrative portion of the Order. Although many of the adopted Certificate Conditions govern issues that were disputed in the exceptions phase, the Order lacks adequate explanation of the reasons for the Board's resolution. Still others were adopted following narrative explanations that reflect a failure to fully evaluate the record evidence.

[1] NTW presented Proposed Certificate conditions in the Supplemental Testimony of Eric Miller dated October 10, 2018; DPS and DEC staffs presented proposed conditions in their direct testimonies on April 2, 2019.

[2] Stipulation to Terms of Partial Settlement dated June 4, 2019 and appended to Initial Briefs of Number Three Wind LLC and DPS dated June 7, 2019.

Based on a review of the adopted Certificate Conditions, a comparison to recent Siting Board decisions on other applications and statements made at the November 12, 2019 Siting Board meeting, it appears that a policy promoting consistency among Board orders may have been elevated over the legal requirement that Siting Board decisions be based on the record before it and supported with adequate explanation.

II. STANDARD OF REVIEW

The relevant standards of review are set forth in Public Service Law §170(2):

> whether the decision and opinion of the board are:
>
> (a) In conformity with the constitution, laws and regulations of the state and the United States;
>
> (b) Supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion; [and]…
>
> (e) Arbitrary, capricious or an abuse of discretion…

III. APPLICABLE LAW

PSL §169 requires the Siting Board "In rendering a decision on an application… [to] issue an opinion stating its reasons for the action taken." The decision must be reached "upon the record before the presiding examiner, including any briefs or exceptions to any recommended decision of such examiner" (PSL § 168[1]). "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings" (State Administrative Procedures Act [SAPA] § 307[1]). Findings of fact must "be based exclusively on the evidence and on matters officially noticed" (SAPA § 302[3]). Official notice is limited to facts of which judicial notice could be taken. Parties must be given "an opportunity prior to decision to dispute" facts and their materiality where notice is taken of facts concerning which judicial notice could not be taken (SAPA § 306[4]).

The production of an adequate record for review is an essential element of due process. *See People v. David W.*, 95 NY2d 130, 139-40, (2000)(citing, US Const, 14th Amend, § 1; NY Const, art I, § 6; *Mathews v. Eldridge*, 424 US 319, 334-335 (1976); *Wisconsin v. Constantineau*, 400 US 433, 436, 91 S Ct 507 (1971). Consequently, the Siting Board's resolution of disputed issues without discussion or explanation; its implicit rejection of agreed-upon stipulations without providing adequate explanation; and its imposition of conditions which are contrary to those in record evidence is a violation of the due process rights that undergird the Article 10 process. *See*, *id*.; *Matter of Padilla v. Martinez*, 300 AD2d 96, 102 (2002) ("[t]he deferential standard of review accorded administrative determinations in article 78 proceedings presupposes administrative procedures that conform with due process requirements."). As explained more than 50 years ago, when the rights of any party to a proceeding are being determined by an administrative body, "the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." *Hecht v. Monaghan*, 307 NY 461, 470 (1954). As a consequence, any disposition of a matter that resulted from a hearing that violated an essential element of due process must be annulled. *Padilla v Martinez,* 300 AD2d 96, 102 (1st Dept 2002)(citing *Matter of Sowa v Looney*, 23 NY2d 329 (1968); *Matter of Holiday v Franco*, 268 AD2d 138 [2000], 141; *Matter of Biondolillo v Lang*, 57 AD2d 762, 762 [1977]).

IV. SUMMARY OF PETITION

The Order violates the governing law in several ways:

- by failing to make explicit the Siting Board's reasons for rejecting evidence presented by NTW;
- by failing to make explicit the Siting Board's reasons for rejecting arguments presented in NTW's Brief on Exceptions;

- by adopting certificate conditions not in evidence nor proposed by any party to the proceeding, whether in evidence or in briefs, concerning which NTW has not had an opportunity to address;

- by adopting certificate conditions adopted by other Siting Boards in other adjudicatory siting proceedings based on an articulated desire to promote "consistency" and not on record evidence; and

- by adopting findings made with an inadequate appreciation of the evidence.

V. ARGUMENT

A. Noise Modeling Settings

The Siting Board's Order includes Certificate Condition 68(d)(v): "All pre-construction noise modeling will be modeled at a 4-meter assessment point and a 2 dBA uncertainty factor will be added to the results." The Order includes no discussion of or explanation for Condition 68(d)(v). The narrative portion of the Order discusses only the regulatory limit and does not address pre-construction modeling settings in any way. It neither acknowledged nor addressed the dispute over this subject in the record.

The Recommend Decision included the same Certificate Condition. While the narrative of the Recommended Decision includes a lengthy discussion of this issue, that discussion contains many critical flaws and misstatements of the record. These errors are sufficiently significant that the RD's conclusion and the imposition of this certificate condition are unsupported and erroneous.

With respect to the receptor height used for pre-construction modeling, the RD states incorrectly that WHO 2009, ISO 9613-2 and NTW's own Noise Impact Assessment Protocol require that noise assessment be modeled at a height of four meters and that the applicant for Eight Point Wind used a noise assessment height of four meters. All four of these assertions are demonstrably incorrect, as explained in NTW's Brief on Exceptions at pages 45-46. The RD does not acknowledge that NTW's basis for not adding uncertainty was that it was following the recommendations of NARUC-2011. In concluding that Condition 68(d)(v) should be imposed on

NTW, the RD states that "NTW's modeling results do not present a robust depiction of noise impacts" (RD at 117), preceded by (and presumably based upon) false statements that the record lacks any cumulative modeling of the Maple Ridge and Copenhagen wind projects. NTW's Brief on Exceptions addresses these errors at pages 52-53. Finally, the RD erroneously states that Cassadaga and Baron had a certificate condition requiring the same modeling settings. On the contrary, NTW is the only Article 10 certificate with such a condition. No other Siting Board order includes any certificate condition requiring specific pre-construction modeling settings.

Of the ten wind projects that have filed Article 10 applications, only two (Cassadaga and Baron Winds) have used the modeling settings contained in Certificate Condition 68(d)(v), and both of those projects were proposed by the same developer and used the same noise consultant. The eight other projects used a 1.5 meter receptor height and added either no uncertainty or 2 dBA of uncertainty to results. If the Siting Board decides to impose the most conservative modeling settings used by only one developer and consultant on all other projects in the State, it will substantially reduce the potential renewable production of those projects and unnecessarily imperil the State's ability to achieve its renewable objectives. The combination of the two settings in Certificate Condition 68(d)(v) results in imposing a modeling penalty of 3.5 dBA, effectively resulting in a 41.5 dBA noise limit, despite the fact that the Siting Board intended to set a 45-dBA limit. The noise discussion in the Siting Board Order at page 70 acknowledges the legitimate need for reasonable regulatory certainty. Eliminating Certificate Condition 68(d)(v) or reducing the required level of conservatism to better match the prevailing practice of Article 10 applicants, is necessary to meet that objective.

Furthermore, Certificate Condition 68(d)(v) was not contained in the conditions proposed by the DPS Policy Panel or by the DPS noise expert in their testimony. The Siting Board may take

notice that in subsequent Article 10 cases, the DPS noise expert has acknowledged that different developers and noise consultants have used different modeling settings and proposed that those using less conservative settings should be required to reserve more noise-reduced operation (NRO) levels. Furthermore, the DPS noise expert has indicated that using a four meter receptor height for modeling purposes in place of a 1.5 meter receptor height (which adds a penalty of by 1.5 dBA), with no additional uncertainty factor, is a 'preferred' middle ground for modeling settings (*see* Case 17-F-0282, Prepared Testimony of Miguel Moreno-Caballero at page 65).

In light of the above, NTW requests that Certificate Condition 68(d)(v) be stricken in its entirety or, alternatively, amended to strike "and a 2 dBA uncertainty factor will be added to the results" so that the condition reads: "All pre-construction noise modeling will be modeled at a 4 meter assessment point."

B. <u>Grassland Birds</u>

Certificate Condition 63, which was recommended in the RD, prescribes requirements for filing a compliance filing, labeled an Endangered or Threatened Species Mitigation Plan (or ETSMP), "no more than two months after issuance of a Certificate by the Siting Board" (*i.e.,* by January 12, 2020) (Order, Appendix A at 24). The Order is the first Board order directing a renewable energy project to comply with DEC staff's interpretation of 6 NYCRR Part 182 with regard to listed grassland birds. For the reasons explained below, on rehearing the Board should reverse its "take" determination and delete Condition 63. At a minimum the requirement that NTW file an ETSMP within 60 days should be revised to 60 days prior to start of construction.

Condition 63 is flawed for several reasons. First, it improperly delegates the Siting Board's authority to DEC staff: the ETSMP must be "for the total take of northern harrier (Circus hudsonius) and upland sandpiper (Bartramia longicauda) ***as calculated by DEC Staff*** over the life of the Project" (emphasis added). Second, Condition 63's focus on the "total take" of individuals

of the species is ambiguous because it does not comport with DEC staff's concern in this proceeding which was with the "take" of "occupied habitat." Third, Condition 63 rests on an inadequate evidentiary foundation. Fourth, by relying entirely on DEC staff's interpretation of Part 182, the Siting Board has failed its duty to conduct the balancing of State policies and interests demanded by PSL § 168. Finally, the adoption of Condition 63 reflects a failure to appreciate the additional burden on and deterrent to development of renewable energy resources it will impose just when the State is embarking on an aggressive strategy to reduce carbon emissions from the electricity resources used to meet Statewide energy demand.

The Order's errors stem from in the fact that in summarizing NTW's arguments, the Order relies on the RD's misleadingly abbreviated summary (*see* Order at 51 and footnote 186). The RD failed to address most of NTW's arguments and the Order does little more. The Siting Board is obligated to explain its reasons for rejecting arguments presented by the applicant (PSL § 169; SAPA § 307[1]). NTW presented the following arguments of law and evidentiary fact which were rejected with inadequate or no explanation. Because neither the Order nor the RD fully addressed these arguments, NTW is summarizing them here and including the relevant sections of its Brief on Exceptions as an Appendix.

1. <u>DEC staff does not possess sole authority to fill in the gaps in its written regulations under its novel "original jurisdiction" theory.</u>

Under Article 10 the Siting Board stands in the place of the Commissioner of the Department of Environmental Conservation and as a result wields the power to interpret and apply the requirements of DEC's regulations (NTW Br. On Ex. at 23-24). The Order does not address this argument but appears to implicitly accept the DEC staff arguments that the Siting Board must defer to DEC staff interpretations. The manner in which the Siting Board has imposed this requirement cedes to DEC's Part 182 program personnel the prescription of program requirements

that are not found in regulations or Commissioner-issued technical guidance. Nonetheless NTW has been directed to comply with DEC staff's mandates. The Siting Board has implicitly, with no legal analysis, accepted DEC's staff's argument that because DEC has so-called "original jurisdiction" in this area (see DEC Staff Initial Brief at 27-28), it alone determines, without benefit of written regulations, or technical guidance what constitutes occupied habitat; what is required to demonstrate habitat is not "occupied;" how extensive any degradation of habitat may be; and how much land must be protected and the terms of such protection to provide mitigation.

2. <u>The finding that the Project will result in a "take" of "occupied" northern harrier and upland sandpiper habitat is not adequately supported by the evidence.</u>

Although the Order notes that NTW challenged the scientific basis for DEC's conclusions that the Project will degrade and thus "take" occupied habitat ("[w]hile we agree that more studies need to be performed in this area…" Order at 58), the Order fails to explain how the Board reached its conclusion that the Project would result in a take of habitat in light of the inadequate scientific data. Although the Order states that the Board has a duty to ensure Project compliance with the State's environmental laws, here the compliance requirements at issue are not found in written regulations or DEC guidance memoranda but rather only in the aggressive interpretations and conclusions of DEC program staff who appeared as witnesses.

3. <u>The particular areas of occupied habitat at issue were inadequately identified by DEC.</u>

As NTW explained in its briefs, DEC witnesses did nothing more than look at maps of the Project area from 2014 and, in DEC's words, "defined visually" an area of farm fields identified for turbine locations in the vicinity of bird sitings made by NTW's consultants and declared them to be "occupied habitat." *See* Hearing Exhibit 114, DEC response to I.R. NTW-DEC-02. DEC's witnesses failed to take account of the fact that those fields are currently in and will remain in

active crop rotation (Tr. 728; 971). DEC staff then dressed up its desktop assessment by purporting to calculate the area of occupied habitat down to tenths of an acre, lending its analysis a false air of precision. DEC's witnesses declined to timely disclose to NTW the actual location of the occupied habitat it had identified (Tr. 729). Because the area of occupied habitat was not identified until after the hearings, NTW had no opportunity to confirm or challenge DEC's factual guesswork, a clear due process violation (*id*.). Neither the RD nor the Order addressed these procedural flaws and analytical shortcomings.

4. The DEC staff position ignores the impacts of climate change.

The Order relies on a false narrative that NTW has called on the Siting Board to determine that climate change concerns "trump the need to protect the State's endangered and threatened species" (*id.*). To the contrary, where, as here, (i) the science is less than conclusive; (ii) the basis for reaching a "take" finding is debatable and (iii) the regulations are stated in broad terms with no guidance from the Commissioner on how to apply those broad terms, the Siting Board is obligated to consider competing State policies. NTW does not dispute that the Board must ensure the "Project will comply with all applicable State environmental laws" (Order at 57). But where the relevant environmental laws are broadly stated and leave ample room for agency interpretation and application flexibility, competing State policies should be assessed and weighed.

Importantly, the issue of climate change is not limited to its impact on the human environment. The Audubon Society has identified Northern Harriers as "climate endangered," a point raised on Exceptions and ignored in the Order. Thus, the very resource under consideration is being pressured by climate change due to human activity.

The Order appears to discharge the Board's obligation to weigh competing State policies by placing the burden on applicants to draw the "connection between a project's reductions in

carbon emissions and a benefit to a listed species or its habitat" (Order at 61-62). This approach ignores the agencies' own statutory responsibilities. The Siting Board is not merely a quasi-judicial factfinder calling balls and strikes. For example, DEC is an integral part of the Siting Board, with its staff appearing as a party and its Commissioner sitting as a Board member. The Commissioner's Policy – ***Climate Change and DEC Action*** calls for Department staff "to make greenhouse gas (GHG) reductions a fundamental goal and to integrate specific mitigation objectives into DEC programs, actions and activities, as appropriate."[3] PSL § 167(1)(b) provides that "[t]he Board may require any state agency to provide expert testimony on specific subjects where its personnel have the requisite expertise and such testimony is considered necessary to the development of an adequate record." This authority to compel participation on specific issues is

[3] NYS DEC Commissioner's Policy – Climate Change and DEC Action Summary:

> I. Summary:
> Based on overwhelming scientific evidence, the New York State Department of Environmental Conservation ("Department" or "DEC") recognizes that New York State's ("State") air and water quality, forests, fish and wildlife habitats, and people and communities, are at risk from climate change. In order to perform its core mission of conserving, improving, and protecting the State's natural resources and environment, DEC must incorporate climate change considerations into all aspects of its activities, including but not limited to decision-making, planning, permitting, remediation, rulemaking, grants administration, natural resource management, enforcement, land stewardship and facilities management, internal operations, contracting, procurement, and public outreach and education.
>
> This Policy includes five components that are intended to integrate climate change considerations into DEC activities:
>
> 1. Department staff are directed to make greenhouse gas (GHG) reductions a fundamental goal and to integrate specific mitigation objectives into DEC programs, actions and activities, as appropriate.
> 2. Department staff are directed to incorporate climate change adaptation strategies into DEC programs, actions and activities, as appropriate.
> 3. Department staff are directed to consider climate change implications as they perform their daily DEC activities.
> 4. Each Department Division, Office and Region is directed to designate an individual to act as a coordinator for climate change integration. DEC will form an internal workgroup consisting of these coordinators to assist with climate change integration and to address data, information and training needs.
> 5. As part of its annual planning process, each Department Division, Office and Region is directed to identify the specific actions that will be taken to further this Policy's climate change goals and objectives for both mitigation and adaptation, and to report progress of the prior year's climate- related actions.

(https://www.dec.ny.gov/regulations/65034.html)

particularly pertinent here where State policy intersects with the application of State law and the adjudication of private rights.

5. The application of Part 182 to wind farms proposing to locate in agricultural land threatened with abandonment presents the Board with conflicting State policies with which the Order fails to grapple.

Neither the Order nor the RD acknowledged NTW's arguments that the application of Part 182 to active farmland whose owner will benefit from hosting a wind turbine reveals the swirl of conflicting policies concerning protection of farmland and farming; protection of listed species' habitat; and promotion of renewable energy. DEC's rigid approach to Part 182's application to grasslands was revealed to be internally inconsistent: although active farmland can serve as habitat for grassland birds, its suitability is dependent on what agricultural activities are being pursued. Mowing hay and cultivating row crops are antithetical to use as breeding habitat but nonetheless are statutorily exempt from Part 182 indicating the Legislature views protection of farming to be of greater importance than protection of listed species. *See* 6 NYCRR §182.13(a)(3). Ironically, recently abandoned farmland may be the very best habitat, but will not last for very long. Within five years of agricultural use ceasing, the land will have progressed too far in the natural progression to forest cover to serve as grassland bird breeding habitat (Tr. 788-789). Leasing land to a wind farm encourages continued farming by enabling farmers to continue using their fields for agricultural purposes. The Siting Board has the authority and the obligation to account for these facts and the State's conflicting policies and to take account of NTW's argument that the Project is more likely to preserve grassland habitat than to "take" it.

The record lacks an adequate basis for the Board's take determination which, on rehearing, should be reversed and Condition 63 eliminated.

C. SEEP Specifications

NTW seeks rehearing of the Board's adoption of the Site Engineering and Environmental Plan (SEEP) Specifications[4] as mandatory requirements. The Order did not address the extensive testimony of Eric Miller addressing problems inherent in the SEEP Specifications, nor the fact that Attachment A to the Board's Certificate Conditions already incorporates many aspects of the SEEP Specifications. On rehearing the Board should clarify that the SEEP Specifications are intended to be used as guidelines in preparing the compliance filings and information reports required by the Certificate Conditions and the Attachment A packages.

The SEEP Specifications are a collection of requirements for presenting post-certificate compliance filings to demonstrate that Project construction will meet the requirements of the Certificate Conditions. The function and purpose of the SEEP Specifications were the subject of debate throughout the proceeding. DPS staff's Initial Brief acknowledged the disagreement:

> One of the primary differences between DPS Staff's Certificate Conditions and NTW Rebuttal Certificate Conditions is that the Applicant excluded Staff's SEEP Specifications and alternatively proposed the Attachment A – Additional Required Filings. Further, the Applicant removed language requiring that the SEEP be submitted as a compliance filing and deleted numerous references to the SEEP and SEEP Specifications within the Certificate Conditions.

(DPS IB at 9).

> As previously noted above in Section IV, there is a level of disagreement between the Applicant and DPS Staff on the approach for submittal of compliance filings due to the fact that the Applicant excluded Staff's SEEP Specifications and alternatively proposed Attachment A – Additional Required Filings. While DPS Staff notes that Attachment A is organized to allow for a phased filing approach regarding information reports and compliance filings, we maintain

[4] Attached as Appendix B to the Order. The cover page of Appendix B is entitled "Site Engineering and Environmental Plans." Following that is a 23-page document entitled "SEEP Specifications Requirements for the Development of Site Engineering and Environmental Plan Compliance Filings for the Number Three Wind Project (Case No. 16-F-0328)."

> that DPS Staff's SEEP Specifications should be adopted by the Siting Board as part of a Certificate to ensure that the necessary site plan details are provided prior to construction.

(DPS IB at 67). For its part, NTW explained in the testimony of Eric Miller why the SEEP specifications are an unreasonable effort at micro-managing the construction process, an effort for which the Applicant bears sole responsibility and assumes all risk.[5] As summarized in the Brief Opposing Exceptions:[6]

> NTW submitted testimony explaining why the SEEP and the SEEP Specifications are in effect an effort by DPS staff to manage the construction of the project rather than to enforce the conditions and monitor compliance (Tr. 1034-1038). Moreover, the SEEP, in certain instances is at odds with how wind farms are constructed. The level of detail required and the requirement to document details in advance including details typically left to being determined in real-time are not realistic (Tr. 1039). As with the compliance filing process, the SEEP would be reasonable for a large central-station power plant involving hundreds of millions of dollars of capital investment at a single site. It is unreasonable to apply SEEP specifications to wind projects involving much simpler construction projects but at dozens of sites. DPS staff's demands could theoretically be met but at the cost of time and resources out of proportion to their added value. Again, this level of oversight may be worth the effort for central-station power plants and where ratepayer funds are at stake, but not here.

(NTW Br. Op. Ex. at 4-5). Nevertheless, NTW recognized the value of the SEEP Specifications as guidelines. As explained in NTW's Brief on Exceptions:

> NTW does not dismiss the value of the SEEP Specifications. Attachment A to NTW's proposed Certificate Conditions is the product of post-hearing settlement conferences in which SEEP Specifications were employed as a resource for populating its contents. The substantial concessions made by NTW are evident from the extensive changes from the initial version of Attachment A provided in rebuttal testimony (Exh. 89) to the final version included in the Stipulation of Partial Settlement and included with the RD.

[5] The notion that DPS's compliance team is a "partner" in the construction effort is misplaced as a matter of law and fact.

[6] The RD did not include the SEEP Specifications as an attachment to the RD's proposed Certificate Conditions.

> Clarification by the Siting Board that SEEP Specifications will not be applied to renewable projects would help bring necessary certainty that the post-certificate compliance filing process can be administered in a timely manner.

(NTW Br. Op. Ex. at 5).

The Board's direction that "all compliance filings required by the Certificate Conditions and Attachment A, must be in compliance with the SEEP Specifications" (Order at 32), which was not recommended by the Examiners, is at odds with the Stipulation to Terms of Partial Settlement. The signatories to the Stipulation agreed that

> WHEREAS, the so-entitled document is based on, but not the same as, Hearing Exhibits 88 and 113 and reflects agreements reached by some parties to rearrange Attachment A to Hearing Exhibit 51 , the Site Engineering and Environmental Plan (SEEP), into a required set of plans, certain of which will be filed as compliance filings and certain of which will be filed as Information Reports;

Requiring compliance with both Attachment A to the Certificate Conditions and the SEEP Specifications creates redundant and ambiguous requirements because they impose inconsistent obligations on NTW with respect to its compliance filings. This inherent inconsistency is reflected in the Order itself:

> we find that [the Specifications] sets forth the minimum requirements for compliance and other filings and because it will inform the Certificate Holder's submission of required filings.

(Order at 31-32). The SEEP Specifications cannot be both a set of "minimum requirements" and a document meant simply to "inform the submission of required filings" (*id.*).

The Order provides no explanation for the decision to reject the agreement among the Stipulation signatories to rely on Attachment A to the agreed-upon Certificate Conditions as an appropriate distillation of the SEEP Specifications and to require compliance with both documents. On rehearing the Board should eliminate the SEEP Specifications from the Certificate Conditions

and clarify that they are to be used as guidelines in completing the compliance filings and information reports prescribed in Attachment A.

D. Transmission Line Undergrounding Waiver.

The Order states the following:

> With respect to Lowville's requirement in Section 100- 11(A) that NTW install transmission and collection lines underground "to the maximum extent possible," we find that the record is insufficient for granting a waiver of this requirement. In its request to Lowville, NTW sought a waiver of the undergrounding requirement for transmission lines connecting the Project substation with the POI switchyard. NTW also requested a similar waiver for all collection lines between all turbines and the substation. NTW explained that the waiver is needed because it would add significant costs to the Project as well as additional environmental impacts.[315]
>
> However, since NTW did not make the showing required for a waiver under our regulations, we find that we do not have sufficient information to determine whether the additional costs of undergrounding transmission and collection lines outweighs the benefits of applying Lowville's undergrounding requirements. Consequently, we deny the waiver request and find that NTW is required to underground both the collection and transmission lines for the Project.
>
> [315] Hearing Exh. 9.

(Order at 93-94).

On rehearing NTW asks the Siting Board to re-examine the record and determine that with respect to the 2.8 mile section of the four mile transmission line interconnecting the Project Substation with the Point of Interconnection Switchyard the record supports the findings required by PSL § 168(3)(e) that: the undergrounding requirement would be "unreasonably burdensome"; the burden should not be borne by NTW; the waiver is the minimum necessary; and any adverse impacts are minimized and mitigated to the maximum extent practicable. (*See* 16 NYCRR 1001.31[h].) NTW requests that the Board acknowledge the support of both the Town of Lowville and an affected landowner.

In the original waiver request made to Lowville, NTW reported that the cost of installing the 115 kV interconnection line underground would "exceed the cost of overhead construction by a factor of 5x" (Hearing Exh. 9, App. 31e, "Waiver Requests" at 3). No party challenged the estimated 5x cost differential estimated by NTW. Although NTW initially sought a waiver from Lowville of its undergrounding requirement with respect to all Project electric lines, NTW did not pursue the request with respect to any of the collection lines and agreed with Lowville to limit overhead installation of the transmission line to a section identified in Lowville's November 16, 2017 Town Board minutes (Hearing Exh. 11, App. 31e-2), *i.e.*, the approximately 2.8-mile segment running between the east side of New York State Route 26 to the west side of New York State Route 812. Using Project cost components depicted in Application Exhibit 14 (Hearing Exh. 6), the incremental cost for the 2.8-mile segment is estimated to be $16.8 million.[7]

In response to a DPS staff information request regarding undergrounding two portions of the interconnection line about which DPS raised visual impact concerns, NTW explained that landowner requirements, unavoidable impacts to farm drainage tile, and an incremental cost estimated to be over $4,000,000.00 were justification for not undergrounding the relevant segment of the line (*see* Hearing Exh. 77). DPS witness Davis testified that those concerns as well as visibility of existing overhead electric lines "were considered [by NTW] in proposing overhead line installation" (Tr. 339-340). Mr. Davis also testified that the location for the crossing of Route 26 "is not particularly scenic" (Tr. 342). At the location of the crossing of Route 812, Mr. Davis proposed, and NTW has agreed, that a row of maple trees be planted as mitigation.[8] Based on the

[7] Total cost of transmission line from Application Exhibit 14 x 0.7 [2.8/4.0] x 5.0.

[8] *See* Condition 58.

material in the record reviewed here, NTW asks that the Board, on rehearing, determine that NTW has met its burden.

E. The Order Lacks Justification for Numerous Certificate Conditions that are Inconsistent with those Included in the Recommended Decision.

In their testimony, NTW, DPS and DEC proposed Certificate Conditions.[9] Post-hearing negotiations resulted in agreement on the overall structure and organization of the Conditions and on the text of many Certificate Conditions.[10] The agreed upon Certificate Conditions are included in the Stipulation to Terms of Partial Settlement, together with signature pages indicating those conditions to which signatories did not agree.

The agreed-upon Certificate Conditions identified below, were accepted and recommended for adoption in the Recommended Decision. Presented below are Certificate Conditions adopted by the Siting Board which differ from those conditions included in the agreement reached by NTW, DAM, DEC and DPS, conditions which were also recommended in the RD, but for which the Order includes no explanation of the Siting Board's "reasons for the action taken," *i.e.*, rejecting the agreed-upon conditions (PSL § 169).

Condition 7: The Signatory Parties agreed to delete this term and the Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. NTW filed the application for a Water Quality Certificate on May 17, 2018, together with a copy of the ACOE permit application (DMM 65).

[9] NTW presented Proposed Certificate conditions in the Supplemental Testimony of Eric Miller dated October 10, 2018; DPS and DEC staffs presented proposed conditions in their direct testimonies on April 2, 2019.

[10] Stipulation to Terms of Partial Settlement dated June 4, 2019 and appended to Initial Brief of Number Three Wind LLC dated June 7, 2019.

Condition 12: The Signatory Parties agreed to delete this term and the Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Siting Board Order for the contrary result, thus violating the requirement of PSL § 169.

Condition 16: Signatory Parties agreed to define "emergency" to mean a condition with a high likelihood of creating a "significant adverse risk to human health or safety or damage to a sensitive environmental resource." No party opposed or urged a contrary result. There is no discussion in the Order for rejecting the definition, thus violating the requirement of PSL § 169.

Condition 18: The Signatory Parties agreed to delete this term and the Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169.

Condition 31: The Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. Condition 31 was replaced by Package 6 of Attachment A to the Certificate Conditions ("Wind Turbine Information Package"), which was recommended for adoption in the Recommended Decision. The Order adopts Package 6 of Attachment A as well, so the addition of Condition 31, which is unexplained in the Order, would subject the Certificate Holder to inconsistent and redundant obligations.

Condition 32: The Signatory Parties agreed to delete this term and the Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169.

Condition 36: The Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. Condition 36 was replaced with Package 27 of Attachment A to the Certificate Conditions ("Economic Benefits Report"), which was recommended for adoption in the Recommended Decision. The Order adopts Package 27 of Attachment A, so the addition of Condition 36, which is unexplained in the Order, would subject the Certificate Holder to inconsistent and redundant obligations.

Condition 41: The Recommended Decision recommended it be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. The topic of as-built plans is addressed by Package 26 of Attachment A ("As-Built Package").

Condition 42: The text of this condition was not sponsored by any party and does not appear in the record or in the Recommended Decision. Condition 42 introduces an undefined term ("final design phase"), adds a requirement no party advocated ("a survey of exact locations of water supply wells in the Project area") and is unnecessary in light of Package 15 of Attachment A ("Water Wells Package"). The Order does not provide an explanation for the revised text in violation of PSL § 169.

Condition 80: The Recommended Decision recommended this condition be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. The topics of environmental monitoring and stop work authority are addressed in Condition 78 and Package 17 of Attachment A ("Construction Management Package"). No reasons are explained in the Order

for adding this condition or for adding the undefined and unexplained term "all aspects of the Project."

Condition 82: The Recommended Decision recommended this condition be left as "intentionally omitted." No party urged otherwise on Exceptions. There is no discussion in the Order for the contrary result, thus violating the requirement of PSL § 169. This condition is also unnecessary in light of 16 NYCRR § 1002.2.

F. ADDITIONAL ERRATA

In addition to the errors corrected in the December 6 Errata Notice, the following errors require correction:

1. Public Statement Hearings

On page 13, the Order mistakenly states that "At the public statement hearing, many local residents spoke in opposition to the Project… ." In fact, a total of thirteen individuals spoke, seven in opposition and six in favor. *See* NTW Br. On Exc. at 9-10*; see also* DPS Staff Initial Brief at 4.

2. Road Use Agreements

NTW has a fully executed road use agreement with the County of Lewis and the Towns of Denmark, Harrisburg and Lowville. Conditions 3(b) and 27.B(f) should be amended accordingly.

3. Grassland Bird Impact Avoidance

The Order at page 61 directs DEC staff to

> give consideration to NTW's suggestion that commencing construction before and continuing construction into the breeding season avoids the need to further mitigate for the take of listed species as a result of those activities (see Certificate Condition 95[b]).

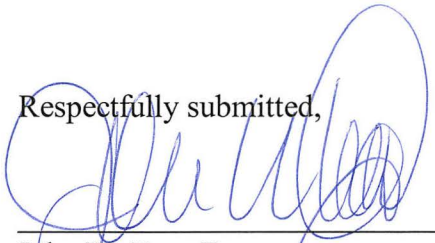
However, Condition 95(b) includes no reference to this direction. The omission should be addressed by adding the text from page 61 of the Order.

VI. CONCLUSION

For the reasons explained herein, the Order suffers from errors, omissions and erroneous conclusions which together have led to the adoption of Certificate Conditions compliance with which would be impracticable and unreasonably and unnecessarily costly. In the case of many of these flaws the Order does not adequately explain the reasons for the Board's decision including the reasons for rejecting arguments and evidence sponsored by NTW. In some cases, the Order appears to rely on material not in the record. For these reasons, the Order is affected by errors of fact, is not based on substantial record evidence and is arbitrary and capricious.

Dated: December 12, 2019
Albany, New York

Respectfully submitted,



John W. Dax, Esq.
THE DAX LAW FIRM, P.C.
54 State Street, Suite 805
Albany, New York 12207
Email: jdax@daxlawfirm.com
Telephone: (518) 432-1002

Attorneys for Number Three Wind LLC

facts are not, by definition, "opinion", "ideas", or "advice" of any sort (*Matter of Smith v New York State Off. of the Attorney Gen*., 116 AD3d 1209, 1211 [2014]["[T]he exemption for intra-agency material does not cover explanations of final agency decisions already made."][citing *Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d 176, 182 [1979], *lvs denied* 48 NY2d 606, [1979], 48 NY2d 706 [1979] and *Matter of Ramahlo v Bruno*, 273 AD2d 521, 522 [2000], *lv denied* 95 NY2d 767 [2000]; *see e.g*. *Matter of Rose v Albany County Dist. Attorney's Off*., 141 AD3d 912, 915 [3d Dept 2016][finding that information about policy matters was not within the deliberative process privilege.]). No justification has been offered why the occurrence of "input" would be a privileged fact, and no judgment may be rendered on the quality of that "input" until it is described.

For the reasons explained, the May 10, 2019 Ruling should be reversed.

VI. FINDINGS AND RECOMMENDATIONS RELATED TO SUBSTANTIVE ARTICLE 10 ISSUES

A. ENVIRONMENTAL IMPACTS

1. Intentionally Omitted

2. Intentionally Omitted

3. Intentionally Omitted

4. Intentionally Omitted

5. Wildlife and Habitat

a. Grassland Birds

i. Introduction.

DEC staff for the first time proposed that its Part 182 regulatory program for Threatened and Endangered Species be applied to a wind project alleged to be "taking" occupied grassland bird habitat. The Siting Board must carefully evaluate the consequences for the State's Clean Energy goals, not just as the DEC staff proposal would apply to NTW but to other wind (and solar)

projects which are planned to be located in areas of the State that DEC staff has designated as Grassland Focus Areas as depicted at www.dec.ny.gov/pubs/32975.

ii. The Examiners' Uncritical and Unquestioning Adoption of DEC Staff's Unprecedented Application of Part 182 Should be Rejected.

The Examiners' recommendations regarding Grassland Birds are found in the RD at recommended certificate conditions 63, 64 and 94-97 and Attachment A, Package 24. Package 24 of Attachment A in the RD calls for a "Net Conservation Benefit Plan for Listed Grassland Birds," if "deemed to be required by the Siting Board" (RD at App. A, Attachment A at 12). The Examiners recommend just such a requirement: recommended Condition 63 would require NTW to file (no later than two months after Certificate issuance) as a compliance filing a "final Endangered or Threatened Species Mitigation Plan (ETSMP) for the total take of northern harrier… and upland sandpiper… as calculated by DEC staff over the life of the Project" (*Id.* at App. A at 19). Condition 63 requires that the ETSMP first be accepted by DPS and DEC. The recommended ETSMP contents are identified in items "a" through "m" in Condition 63 and include, if full avoidance cannot be demonstrated, creation of a mitigation plan involving the preservation of habitat, including conservation easements, best management practices for maintenance of the conserved land, and a life-of-project letter of credit to fund mitigation maintenance costs. NTW assumes the RD is referring to DEC staff's position that the proposed facility as updated will result in the loss of exactly 570.4 acres of occupied habitat, which NTW would be required to mitigate by creating a protected grassland bird preserve occupying land at a 3:1 ratio and protect it for the life of the Project.

The justification for recommended Condition 63 is provided in the RD at pages 70-80. There the Examiners concluded that nine turbines are slated to be located in fields identified (by DEC staff) as occupied habitat with the consequence that, unless the nine turbines are removed

from the project, NTW will not have achieved full avoidance, and their location will result in a "take" of protected species.

In contrast, NTW reasoned that the facility will enable the continuation of farming in an area that supports habitat in the form of actively used agricultural land and therefore, rather than resulting in a "take" of occupied habitat, the facility will promote and protect habitat. In addition, NTW presented a plan for ensuring that facility construction would avoid actively used habitat and minimize the temporal duration of any habitat disruption. Although the Examiners acknowledged NTW's positions in one paragraph (RD at 75-76), they offered no analysis for rejecting them in favor of a wholesale adoption of DEC staff's novel and unprecedented advocacy. And, while the Examiners summarized NTW's alternative minimization proposal (RD at 76-78), the RD provides no rationale for rejecting it.

The Examiners acknowledged the uncertainty of the scientific evidence and the inconsistent study results: "DEC Staff and the Applicant agree that the issue of impacts to grassland birds by wind facilities is understudied" (RD at 79), and "[s]tudies have also shown evidence of grassland birds nesting close to operating wind turbines" (RD at 80). Despite this acknowledgement, the Examiners adopted DEC staff's advocacy position in its entirety. They made no attempt to resolve the obvious conflict between achieving the State's renewable energy goals and providing protection for threatened species or to grapple with the internal inconsistencies that plague the DEC staff's novel application of Part 182 to a wind energy project employing active agriculture lands.

In adopting the DEC staff position the Examiners, like DEC staff, have lost sight of the fact that, rather than posing a threat to the bird species of concern to DEC, the Project will promote their protection in both the near-term and the long-term. In contrast, the recommendation would be

a short-term band-aid, at best, a proverbial finger-in-the-dike effort against the inexorable forces of farmland abandonment and climate change.

The species in question in their current New York State range do indeed face threats to their breeding habitat. In the immediate future, as DEC staff testifies, the threat is from the abandonment of farms, not from the installation of wind farms (Tr. 751, lines 13-18). The reduction in active farm fields is a trend DEC testifies has been underway since the mid-20th Century: NOHA was "a wide-spread and common breeder in New York until the mid-1950s" (*id.*, Tr.754) and, in 2008 UPSA was observed to have experienced "a 65% decline over the past 20 years." (*id.*, Tr. 753). In the near- and longer-term future, the threat these species face is from climate change, a threat strangely unaddressed by DEC staff (Tr. 808).

DEC staff's proposed application of the Part 182 regulatory scheme risks the successful development of the NTW Project, a project that will: (i) preserve farming (Wells, Tr. 971) and the habitat that DEC staff says depends on the continued use of the 570.4 acres in question for farming (DEC GLBP Tr.751, lines 16-18) and (ii) aid in the State's effort to combat climate change (DPS Policy Panel, Tr. 426; Hearing Exh. 1, Application Exhibit 10, p. 10-12 [280 GWh of renewable energy annually]), likely the biggest threat to these species following the abandonment of agricultural land. NTW excepts to the recommended requirements of the RD concerning grassland birds, including all of proposed Condition 63, but not to Conditions 64, 96 or 97.

iii. The Siting Board Has the Same Authority As That Held by the DEC Commissioner to Decide How Best to Apply Part 182

NTW argued that because the Siting Board stands in the shoes of the Commissioner of Environmental Conservation, the Siting Board has the same authority as the Commissioner to determine how to interpret and apply in a particular case the requirements of the State's Threatened

and Endangered Species Act. DEC in opposition argued that where a state agency, like DEC, has so-called "original jurisdiction" over a regulatory program, the Siting Board is obliged to adopt and adhere to agency staff interpretations (*see* DEC Initial Brief at 27, 34). DEC staff's argument would elevate a staff determination over the Siting Board's authority to apply applicable State law. Where, as in the case of grassland birds, the agency staff determination is novel and unprecedented, the effect would be to remove even the Commissioner of Environmental Conservation from the decision making. In effect, in Article 10 proceedings, concerning matters over which DEC staff claims DEC has "original jurisdiction," applicants need only ask DEC staff what it would prefer and can forego litigating the issues before the Siting Board since by DEC's argument, DEC staff's is the last and final word.

This legal issue is not addressed explicitly in the RD. However, on the issues presented by Grassland Birds, the RD adopted the DEC staff position "lock, stock and barrel" with no analysis of (beyond acknowledging) NTW's evidence and arguments in opposition, thereby indicating its de facto adoption of DEC staff's alarming legal position that the Siting Board is deprived of its authority under PSL § 168(3) over matters the Legislature has delegated in the first instance to the DEC Commissioner. Accordingly, NTW here repeats in summary form the evidence and arguments briefed earlier and refers the Siting Board to those briefs for the broader discussion.

The Siting Board has the authority and obligation to take a broader view than taken by DEC staff or the Examiners. It is not tethered to DEC staff's rigid advocacy of its program goals. The Siting Board should reject the Examiners' recommendation and find that the Project will not adversely impact grassland bird habitat, will not result in a "take" and will require no mitigation. Adequate safeguards are supplied by NTW's proposal described *infra* and proposed certificate conditions regarding construction precautions and monitoring by the Environmental Monitor.

The Examiners' recommendations should be rejected for the following reasons:

(i) the recommendation to declare proposed turbine locations to be "occupied habitat" is not supported by science;

(ii) DEC staff failed to present convincing justification for its conclusion that any habitat, let alone 570.4 acres, will be impacted;

(iii) The recommendations ignore the State's interest in stemming climate change – a major threat to grassland bird habitat;

(iv) the impact on the State's renewable energy policy is potentially devastating; and

(v) the application of Part 182 to NTW conflicts with other State policies and is untested as applied to renewable facilities.

The Siting Board should approach the recommendations concerning the application of Part 182 to NTW's turbine locations with a great deal of caution. In particular, the Siting Board must use its authority to account for all State interests – in both habitat protection and climate change reversal. The Examiners declined to even consider climate change, ignoring a serious threat these species face according to a widely accepted authority on birds (NTW Initial Brief at 47-48). In lieu of issuing a take permit and requiring a mitigation plan pursuant to 6 NYCRR 182.12, the Siting Board should adopt NTW's plan to: (i) commence and sequence construction activities so as to deter the two bird species from temporarily occupying the areas in which construction will occur during the breeding season; (ii) restore those areas to a condition suitable for habitat, and (iii) conduct a three-year post-restoration study on the re-habituation of those two species to areas then occupied by turbines.

– <u>The Science Behind DEC's Recommendation is Far From Certain and is Undeveloped on the Record.</u>

DEC staff testified that construction activities "are likely to prevent individuals from utilizing the area to perform critical life functions" such as "breeding, foraging or wintering" (DEC GLBP, Tr. 756), a position which NTW does not dispute. Indeed, NTW proposes a common sense

solution: to commence any construction activity in the fields in question until after August 15 and then to continuously conduct construction activities in those fields that will host Project infrastructure so as to deter birds from occupying them for breeding purposes in the following year until construction and restoration are completed. There is no evidence that the Project Area lacks sufficient habitat for the birds in question to find alternatives to the locations while they are involved in construction.

DEC staff also testified that the presence of operating turbines in fields occupied by NOHA and UPSA will disturb their preference for unobstructed views of the horizon and displace suitable habitat (Tr. 756). DEC staff failed to present a persuasive case for that concern. The opinion that the mere presence of operating turbines will "take" habitat is not borne out by reports from operating wind farms. NTW reported in Exhibit 22 of the Application the results of post-construction surveys undertaken at operating New York State wind farms, including the adjacent Maple Ridge Wind Farm. As reported in Exhibit 22 at pages 9-10:

> Displacement effects of wind turbines have been studied at several New York wind projects, including at Invenergy's Orangeville Wind Energy Project in Wyoming County, New York.[2] In May-June 2015, breeding bird surveys were conducted at 43 300-meter transects, 29 originating at operating turbines and 14 at control locations away from turbines. Mean avian abundance was similar between turbine transects (32.0 birds/transect) and control transects (30.2 birds/transect). Mean avian abundance was 28% lower at turbine transects than control transects located in forest habitat while no difference was observed in other habitats. No significant differences were found between turbine and control transects for mean species richness. Also, birds did not increase in abundance or species richness with increasing distance from turbines. So, for this one example study there was little evidence of displacement.
>
> Other displacement studies have been conducted in New York State with similar results, but there has also been some evidence of

[2] Post-Construction Monitoring Report, 2015. Orangeville Wind Energy Project, Wyoming County, New York. Prepared by Stantec Consulting Services, Inc. for Stony Creek Energy LLC. April 2016.

> displacement. At the Wethersfield Windpark in Wyoming County, New York, Curry and Kerlinger studied this potential impact over a series of surveys conducted in 2010, one year after the 84-turbine project began operating.[3] The study found that one species, bobolink, appeared to avoid areas within 75 m (246 ft) of the wind turbines. One other species, savannah sparrow, was found in numbers significant enough to test for displacement, and the data suggest these birds were not avoiding areas near the wind turbines. The report surmises the impact on the bobolink population is small compared to the impact of regular mowing of the hayfields the bobolinks normally inhabit, and is not significant because the amount of impacted area (~4.5 acres per turbine) is small compared to the amount of hayfields in the area.
>
> A bird displacement study was also conducted at the Howard Wind Farm in Steuben County, New York.[4] At the 25-turbine Howard project, West, Inc. studied bird avoidance in 2012 and 2013 by surveying transects at 13 turbines and 6 reference areas away from turbines. West reported no significant differences in major bird type use or species composition between the turbine transects and the reference transects in either year. No patterns of avoidance were detected, although a trend of greater use with distance from a turbine was identified.
>
> Given that terrain and land use in the proposed Project Area are similar in nature to those at the Orangeville, Wethersfield, and Howard projects as a mix of agricultural and forested habitats, and that the NTW layout is largely in agricultural areas, NTW expects similar results and no significant displacement or avoidance impacts will occur at the Project. NTW set up its pre-construction Breeding Bird Surveys following the before-after-control-impact (BACI) study design, so it will conduct a bird habituation study as described in Appendix 22.h-2.

This evidence was not acknowledged in the RD. Collectively, these reports from operating wind farms in New York belie the Examiners' un-ascribed conclusion that "it is known that occupied habitats will be impacted by construction and placement of structures in grasslands suitable for NOHA and UPSA habitats" (RD at 78). If anything, the studies NTW reported in Exhibit 22, as

[3] Curry & Kerlinger, LLC, Grassland Nesting Bird Displacement Study – 2010, Noble Wethersfield Windpark, Wyoming County, New York, August 2010.

[4] 2012 and 2013 Breeding Bird Avoidance and Habituation Studies for the Howard Wind Project, Steuben County, New York. Final Report May 2012-July 2013. Western EcoSystems Technology, Inc. March 2014.

well as those cited by DEC staff, demonstrate that more research is required and not the dispositive conclusion reached in the RD. Indeed, DEC staff acknowledges that: "Multiple years of post-construction monitoring over the course of a wind project's lifetime are required to sufficiently evaluate the long term and direct and indirect impacts on breeding and wintering grassland birds, particularly State-listed T&E species" (Tr. 758).

The science behind the conclusion that observations of specimens in 2016 and 2017, justifies the "occupied habitat" declaration and the application of Part 182 to the Project is shaky. While several observations were reported by NTW in its Large Bird and Breeding Bird Surveys, DEC witnesses acknowledged that those observations would not have been made if those fields were planted in corn or soybeans at the time of the surveys (Tr. 785). Nevertheless, DEC staff illogically insisted that "Based on the way we review these projects…[w]e would consider that occupied habitat until sufficient survey effort has been undertaken at the site, to indicate the birds are no longer there." (Tr. 827-828).

By means of this attenuated concept − that one season of use by the species in question qualifies even a field subject to regular crop rotation as "occupied habitat" − DEC justifies continuing to regulate such fields indefinitely. Whether and to what extent the Project's operation will result in the taking of habitat is far from demonstrated in the record. As DEC's witnesses concluded, "Long-term impacts of wind energy projects on the persistence of breeding and wintering grassland bird species on the landscape is understudied" (Tr. 757).

"Occupied habitat" is defined in 6 NYCRR 182.2(o) as:

> a geographic area in New York within which a species listed as endangered or threatened in this Part has been determined by the department to exhibit one or more essential behaviors. Once identified as occupied habitat, the department will continue to consider that area as occupied habitat until the area is no longer

> suitable habitat for that species or monitoring has indicated that reoccupation by that species is unlikely.

DEC staff witnesses added a gloss to the effect that once determined to be "occupied," a field will continue to be considered "occupied habitat" until shown to be unoccupied for a period of three continuous years (Tr. 827-829). In other words, the way DEC implements Part 182 requires one to prove, through a sustained absence of the birds, that potential habitat is unoccupied rather than requiring proof of occupied habitat from the sustained presence of the birds. The Siting Board is not bound by DEC's approach.

Because this interpretation is not supported by the regulatory definition, it is not binding on the Siting Board. Moreover, DEC staff's "3-year" gloss is inconsistent with normal agricultural practices in use in the Project Area, which are exempt from take permit requirements. See 6 NYCRR 182.13(a)(3).[5] DEC witnesses agreed that were these same fields to be planted in corn or soybeans – typical plantings in normal crop rotation (Wells, Tr. 969-971) – they would not be suitable breeding habitat (Tr. 785). Under such conditions they would not meet the regulatory definition of "occupied habitat" within the meaning of § 182.2(o). Nevertheless, under DEC staff's three-year qualification, the fields in question could be forever "occupied habitat" due to crop rotation cycles.

In the locations at issue, these species pose fundamental questions for the Siting Board to consider. Whether the fields in question provided natural habitat for these birds in their natural state (*i.e.,* pre-agricultural use) is known. They did not. The fields provide habitat only through the human intervention of agriculture. DEC staff's witnesses agreed that the fields in question and

[5] Although the DEC testified that they are "familiar with the regulations" (Tr. 791) and stated that the scope of their testimony was to address how Part 182 regulations apply to the Project (Tr. 749), they nonetheless were either not aware that Part 182 expressly exempts routine agricultural activity or because of their attorney's objection simply avoided having to answer the question (Tr. 790-796).

similar fields, if left alone with no human intervention, provide suitable habitat for no more than four to six years (Tr. 788-789). In addition to short-term considerations of agricultural uses affecting the eligibility of the fields in question as "occupied habitat," the abandonment of farms and natural progression of shrub and forest cover pose naturally occurring, long-term considerations the Board must account for. The inevitability of farm economics resulting in the reversion of agricultural fields will, left alone, result in these birds leaving the Project Area. In short, by preserving fields in a condition useful for agriculture and by providing income to farmers, wind projects will aid in sustaining grassland bird habitat.

– The Areas Claimed by DEC to be "Occupied Habitat" Are Inadequately Defined.

DEC staff attempted to explain how they calculated that 570.4 acres of occupied habitat would be taken (Tr. 764, line 17 – 766, line 17).[6] The explanation is lacking the rigor and precision the Siting Board should demand. DEC staff "defined visually" (*i.e.*, eye-balled) on maps the locations where NTW's biologists had observed NOHA and UPSA during bird surveys undertaken in 2016 and 2017, and then applied a concept labeled "core habitat" (Hearing Exh. 165). "Core habitat" is not defined in the regulations and was not defined by DEC's witnesses. DEC then added to each area of "core habitat" an area with a radius of one-half mile plus all grassland acreage greater than 25 acres within each "core occupied habitat" (*id.*) a confusing formulation at best. In an information request, NTW requested GIS shape files that would disclose the areas claimed to be occupied habitat. In its response, DEC witnesses stated:

> No shapefiles or GIS layers were created. Using information provided in the Application pertaining to NOHA and UPSA observations in the Project area, core occupied habitat areas were defined visually on 2014 ortho-imagery maps, and as described in

[6] DEC staff loosely identified the Project's 10 eastern most turbine locations as being in grassland bird habitat, comprised of 570.4 acres of agricultural fields. NTW witness Marguerite Wells testified that of the ten, one (Turbine 7) was identified by NTW as an alternate (Wells, Tr. 971), which is not a turbine NTW is seeking a certificate to construct.

> testimony. Acreage of core occupied habitat areas were measured based on area-calculations of appropriate habitat shown on ortho-imagery maps where the locations of Applicant-provided NOHA and UPSA observations were made.

(Hearing Exh. 165.) The process by which DEC staff "defined visually" the 570.4 acres of habitat are known only to DEC. NTW has had no way to verify DEC's calculations and results. The use of acreage expressed in tenths gives the claim a false sense of accuracy, belied by DEC's acknowledgement that the acreage was simply "defined visually" from maps.

The record lacks an adequate evidentiary basis to confirm DEC's claims that 570.4 acres will be adversely impacted.

− <u>The DEC Staff Recommendation Ignores the Impacts of Climate Change.</u>

The NTW Project is proposed as an element of New York State's program to counter climate change (Application Exhibit 10; DPS Policy Panel, Tr. 426). NTW's production will reduce state-wide carbon dioxide emissions. Climate change poses an existential threat to habitat range for grassland birds in New York, a topic DEC witnesses could not address (DEC GLBP, Tr. 808. According to the Audubon Society, Northern Harriers are "climate endangered," such that the Audubon Society projects that, by 2050, the Project Area will no longer support their summer range and, by 2080, will no longer support either their winter or summer range (<u>climate.audubon.org/birds/norhar/northern-harrier</u>).[7] DEC staff did not have an opinion on whether climate change poses a threat (Tr. 808), but the Siting Board cannot ignore the topic.

[7] NTW requests that judicial or administrative notice be taken of this report. DEC witnesses acknowledged the report's existence and indicated their awareness of it (Tr. 810).

− DEC Staff's Proposed Approach to Applying Part 182 to Agricultural and Other Open Landscapes Poses a Significant Threat to the State's Renewable Energy Program.

The Siting Board should take notice that other pending applications for CECPNs for renewable energy facilities, including both wind and solar, seek to locate infrastructure in landscapes that meet the DEC witnesses' description of suitable habitat for these and other listed species.[8] Requiring developers of such facilities to limit construction activities to fall and winter months and even fewer months where winter habitat is an issue, and to acquire and maintain conservation easements of otherwise suitable agricultural land at a three-to-one ratio will impose new and unexpected hurdles and costs for developing renewable energy facilities. Based on Application Exhibit 9, Section 9, Table 9.h, 1,200 acres would need to be taken out of agricultural production for a solar project with annual production equivalent to NTW's. Assuming application of DEC staff's recommended three-to-one ratio, an additional 3,600 acres would be required to also be taken out of agricultural production as mitigation. Though a decision to adopt DEC's recommendation here would not be binding on other applicants, the precedential nature of such a decision could prove devastating for the State's clean energy goals as project developers choose out-of-state options for investing their development efforts and dollars.

− DEC Staff's Proposal Raises the Need for the Siting Board to Reconcile Conflicting State Policies.

As discussed above, DEC acknowledges that grassland habitat is disappearing from New York State due to natural forces of forest succession following abandonment of agricultural use. In other siting proceedings, DEC staff has raised concerns about forest fragmentation, urging wind farms to locate turbines at least 300 feet from forest edges, *i.e.*, out in the same fields DEC also

[8] *E.g.*, *see* Case 16-F-0205 Canisteo Wind, Pre-Filed Testimony of DEC Grassland Bird Panel) (DMM 266).

seeks to protect for grassland birds! DEC staff's position regarding agricultural lands is inconsistent as well. DEC staff identifies the abandonment of agriculture as the primary cause of habitat loss but also identifies normal agricultural practices – such as hay mowing and mono-crop rotation -- as detrimental to grassland birds. However, in an irony lost on DEC staff, its own regulations exempt agriculture activities from Part 182 permit requirements.[9] As a result, DEC staff's preference is to conserve open grass lands as bird habitat and bar all but the least intrusive agricultural uses (Tr. 814). But, New York State policy also favors keeping agricultural lands in agricultural use (Saviola, Tr. 950). The Siting Board has been left to select among these conflicting priorities. Though not reflected in the RD, just as agriculture can be supportive of habitat, NTW will be supportive of agriculture. The abandonment of farming is leading to habitat loss according to DEC's witnesses. Wind projects lease land from farmers providing them with a steady and predictable income stream, enabling them to continue farming in the face of economic challenges. It may be obvious but needs to be said that a farmer-owner having abandoned farming will not be spending any effort to mow the now unused fields. Rather, the fields will be allowed to revert unless a different user, such as a housing developer, offers to buy. Either way, the birds lose.

iv. NTW's Proposal Will Avoid Conflicts With Breeding Grassland Birds

NTW proposes to avoid conflicts with breeding grassland birds by deterring use of otherwise suitable fields by breeding birds by commencing construction activities in the fall, continuing those activities so as to deter breeding birds from using those fields throughout the construction period and restoring the fields to suitable habitat conditions once construction is completed. Thereafter, NTW proposes to conduct studies for up to three years following protocols prepared in

[9] 6 NYCRR § 182.13(a)(3).

consultation with DEC staff to better understand the habituation and abundance of grassland birds in fields with wind turbines.

The Siting Board should reject the recommended take finding and mitigation requirements.

b. Bats

The record includes conflicting estimates of protected bat species fatality between NTW's experts and DEC staff. The record also reveals a dispute over how best to measure expected bat impacts with DEC staff using a per MW metric and NTW's experts a per turbine metric. These disputes were not litigated beyond the hearings because, post-hearing, all-party settlement negotiations resulted in a Stipulation to Terms of Partial Settlement (Settlement) (copy attached as Appendix A). The Stipulation included the following terms, which had been discussed among the parties and agreed to in email exchanges by NTW, DEC staff and DPS staff:

> 60. The Certificate Holder shall implement a curtailment regime at all turbines during the period July 1 through October 1 requiring curtailment when wind speeds are equal to or less than 5.5 m/s, beginning at astronomical dusk and ending at astronomical dawn, when temperatures are greater than 10 degrees Celsius.
>
> 61. The Certificate Holder shall submit a review of curtailment operations every five years to DPS and DEC. The first five-year review will include the results of research conducted of testing a bat deterrent system at the Orangeville Wind Farm in the Town of Orangeville, NY, which will also be filed as an information report to the Siting Board or PSC, as applicable. The review will assess if changes in technology or knowledge of impacts to bats supports modification of the existing curtailment regime. Modifications to the existing curtailment regime that further decrease mortality may be proposed or negotiated. Any such modifications shall be acceptable to DEC, DPS, and the Certificate Holder.
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> 62. The Certificate Holder shall propose for Siting Board or PSC approval as a compliance filing a final Net Conservation Benefit Plan (NCBP) for the total calculated take of 12.9 Northern Long Eared Bats (NLEB) over the life of the Project. The NCBP shall be prepared in consultation with and accepted by DEC and DPS Staff (such acceptance not to be unreasonably delayed or withheld as