

# NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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August 26, 2016

Hon. Kathleen H. Burgess  
Secretary to the Commission  
New York State Public Service Commission  
Empire State Plaza  
Agency Building 3  
Albany, New York 12223-1350

Re: Case No. 15-F-0377 - Bull Run Wind Energy Center  
Preliminary Scoping Statement Comments

Dear Secretary Burgess:

The New York State Department of Environmental Conservation (“DEC”) has reviewed the Article 10 Preliminary Scoping Statement (“PSS”) in relation to the above-referenced matter (“Project”), dated July 27, 2016, and submitted to the New York State Public Service Commission (“PSC”) by Bull Run Wind Energy Center (“Applicant”). The Project is a proposed wind powered electric generating facility located in the Towns of Clinton, Ellenburg, Altona, and Mooers, Clinton County, New York which would generate up to 449 megawatts. Please note that the following comments address both the substance of the PSS, as well as provide preliminary guidance to the Applicant as to certain DEC requirements going forward in the Project.

## **Significant Issues**

1. In general, the Applicant has not shown that the benefits of the Project outweigh the significant amount of impacts to natural resources that would occur during construction and operation thereof.
2. The Project, as proposed in the PSS, would result in impacts to DEC-regulated freshwater wetlands and the 100-foot DEC-regulated wetland adjacent areas, and the Applicant has not shown they have avoided and/or minimized impacts thereto to the greatest extent practicable.
3. The Project, as proposed in the PSS, would impact numerous DEC-protected and/or Federally-regulated small streams. The Applicant has not shown that they have avoided and/or minimized impacts to the greatest extent practicable.
4. The Project, as proposed in the PSS, would impact large areas of forested wildlife habitat, including impacts due to habitat loss and fragmentation. The analysis of the

impacts of this activity provided, thus far, is scientifically flawed and grossly underestimates the amount of impacts likely to occur and, as such should be redone.

5. The wetland benefits and functions analysis provided is flawed and not comprehensive. A complete evaluation of all of the benefits and functions provided by the wetlands within the Project area must be provided.
6. Construction and operation of this Project must comply with the requirements of 6 New York Code Rules and Regulations (“NYCRR”) Part 182.

### **Specific Concerns by Section.**

#### **Exhibit 9, Section 9.3 Advantages of Proposed Site**

The discussion on alternatives for the Project needs to include a comparison of the natural resources impacts – including those to wetlands, streams, wildlife habitat, and forest blocks – for each alternative.

#### **Exhibit 22, Section 22.1 General Plant Communities**

The summary of different types of vegetation to be disturbed during construction should include mixed evergreen/deciduous forest, and grassland/hay fields, to the extent that they occur in the project area and may be impacted.

#### **Exhibit 23, Section 22.3 Protected and Declining Species**

In addition to evaluating habitat that is known or suspected of supporting any threatened or endangered listed species or state species of special concern, the Applicant also should include an evaluation of impacts to the species themselves. DEC notes that direct impacts to bat species may occur as a result of the operation of the Project, regardless if suitable or occupied habitat is identified on site.

#### **Exhibit 22, Section 22.5 Birds and Section 22.6 Bats**

The Applicant must evaluate and discuss all potential direct and indirect cumulative impacts to birds, bats, and other wildlife as a result of the construction and operation of the Project. Such an evaluation should include an estimate of bird and bat fatalities, as well as direct habitat loss (development/clearing) and indirect habitat loss (avoidance/edge effects). The Applicant should consider all data from both operating and proposed wind energy projects located in the vicinity of the Project evaluation.

#### **Exhibit 22, Section 22.7 Post-Construction Bird and Bat Monitoring**

A post-construction monitoring plan should be developed through consultation with DEC and United States Fish and Wildlife Service (“USFWS”), and include an assessment of the indirect impacts to birds (such avoidance, habituation, and new forest edge effects created by the construction and operation of turbines) through breeding bird surveys using Before-After Control-Impact design as described in DEC’s *Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects*, June 2016.

**Exhibit 22, Section 22.8 Wetlands Mapping & Characterization**

All regulated wetlands (including those regulated by DEC and those regulated by the United States Army Corps of Engineers (“USACE”), must be delineated using the proper agency-approved methodology to show the current wetland boundaries before Project-related wetlands impacts can be adequately assessed. Mapped wetland boundaries (i.e., DEC regulatory and the National Wetlands Inventory maps), are only approximate and cannot be relied on as definitive wetland boundaries. Likewise, air photo interpretation does not provide sufficiently accurate wetland boundaries for impact review.

Once the wetland boundaries are delineated and approved by the appropriate regulatory agencies, the Applicant will need to submit air photos with the wetland boundaries overlain at a scale where the wetland boundary is clearly visible in detail. The small-scale maps included provide an overview of wetlands, but not sufficient detail for project review at each wetland and adjacent area impacted.

DEC notes it does not accept delineations that are more than five years old.

**Exhibit 22, Section 22.9 Wetland Impacts.**

The statute and regulations under Article 24 require that projects must first avoid any impacts that can be avoided, and then minimize all impacts that can be minimized. Projects must show the proposed impacts are compatible with the functions and benefits of wetlands, or that the positive economic and social need for the project clearly outweighs the potential impacts to the wetlands and adjacent areas.

The total amount of Project-related impacts to all regulated wetlands and DEC-regulated wetland adjacent area should be provided in tabular form. Said table(s) should include the following information:

- 1) Wetland name, size and class;
- 2) Agency jurisdiction;
- 3) Type of impact (i.e., road, tower, transmission line or temporary versus permanent impacts etc.); and
- 4) Written description of the impacts that includes (i) whether the impact is temporary or permanent; (ii) the type of habitat impacted, if applicable; (iii) size of the impact; (iv) a discussion of the restoration planned after construction; (v) a justification of the impacts; and (vi) the steps taken for avoiding and minimizing these impacts.

For each proposed turbine location, roadway or transmission line that (i) will impact a DEC-regulated wetland; (ii) is within 100 feet of a DEC-regulated wetland boundary; or (iii) will cross or disturb an area within 50 feet of a stream, provide a site development plan that including all of the following information:

- Existing contours (2' interval)
- Proposed contours (2' interval)
- Limits of proposed grading
- Existing features (road, stone wall, hedgerow)
- Proposed turbine location with extent of permanent base
- Proposed roadway with culvert locations
- Proposed crane area
- Proposed transmission line
- Delineation of wetland or stream (include flag number and location)
- Name of wetland (Federal or State)
- Limits of disturbance (permanent and temporary)
- Placement of erosion and sediment control

In addition, provide the following supplemental materials for each site plan:

- Wetland delineation report
- Rationale for determination of upland area within DEC mapped wetland area
- Photo log keyed to site plan
- Erosion and sediment control plan (or typical)
- Culvert placement and design (or typical)
- Description of proposed vegetation removal
- Mitigation plan for temporary impacts
- Tax map showing property owner name
- Written agreement with property owner

A functional assessment of the quality of wetlands being impacted will need to be completed for all wetlands and DEC-regulated wetland adjacent areas impacted, and compared to potential mitigation projects proposed. Note that DEC does not concur that wildlife habitat is the most dominant function, nor that mitigation should focus on only providing for lost wildlife habitat. All of the functions impacted needs to be assessed and mitigation provided for all functions and benefits.

Provision of wetland delineations must also include analysis of wetlands that are not currently mapped but that meet State criteria for jurisdiction. It is important that the applicant work in consultation with wetland regional staff early and often. It cannot be overstated that DEC wetland jurisdictional maps are an approximation and actual jurisdiction can extent significantly beyond currently mapped areas. On-site field delineations should be provided to the DEC as early as possible and include a description of the hydrologic connectivity of all delineated wetlands within the Project area including a summary of the anticipated state or federal jurisdictions, or both, of each delineated wetland. Assessments of potential state wetlands jurisdiction shall include "unmapped wetlands" that meet the DEC's 12.4-acre size threshold (including any wetlands with discernable surface hydrological connections which function as a unit in providing wetland benefits, pursuant to 6 NYCRR 664.7(b)) or otherwise meet state criteria for jurisdiction (e.g., wetlands determined to be of Unusual Local Importance, pursuant to 6 NYCRR 664.7(c)). A summary of off-site wetlands adjacent to the Project area that may be hydrologically or

ecologically influenced by development of the Project, including Significant Coastal Fish and Wildlife Habitat Areas designated by the New York State Department of State and public lands, to determine their general characteristics and relationship, if any, to the delineated wetlands within the Project area.

As mentioned above, the Applicant is required to first avoid and then minimize impacts to wetlands. Mitigation cannot be proposed to mitigate for impacts that can be avoided or minimized. If DEC concurs that avoidance and/or minimization has been achieved, then mitigation will be required for all wetland and adjacent area impacts.

**Exhibit 22, Section 22.10 Invasive Species Management**

An Invasive Species Prevention and Management Plan ("ISPMP") that incorporates methods that will be utilized to avoid and minimize the potential for spread of invasive species (including those listed in 6 NYCRR Part 575) must be submitted to, and approved by, the appropriate agency/ies. Specifically, the ISPMP will include the following:

- 1) A summary of the survey methods the Applicant used to identify existing non-native invasive plant and insect species within the Project area;
- 2) Specific methods the Applicant will use to ensure that imported fill and fill leaving the Project area will be free of non-native invasive plant and insect species to the extent practicable;
- 3) Indication whether fill materials to be placed within the Project area will be free of non-native invasive plant and insect species or only used within the areas free of non-native invasive plant and insect species infestation;
- 4) Project area grading and erosion and sediment control methods that will be used to prevent the introduction, spread or proliferation of non-native invasive plant and insect species to the extent practicable;
- 5) Details of cleaning procedures for removing non-native invasive plant and insect species from equipment and personnel, and properly disposing of infested materials;
- 6) Details of procedures for preventing the spread of invasive insects, such as the emerald ash borer, and compliance with the state quarantine on the transport of ash trees, where applicable, from the Project area ;
- 7) Implementation plans for ensuring that equipment arrives at and departs the Project area free of non-native invasive plant and insect species, and remains free of such species when moving between locations on the site;

- 8) Description of the Best Management Practices or procedures that will be implemented, and the education measures that will be used to educate workers;
- 9) Details of post-construction monitoring and survey measures and procedures for revising the ISPMP in the event that the goals of the initial plan are not met within a specified timeframe; and
- 10) Anticipated methods and procedures used to treat non-native invasive plant and insect species that have been introduced or spread as a result of the construction or operation of the Project. DEC has a zero percent allowance (no new infestations) for any invasive species that were not present prior to construction, and that occur on site after construction.

#### **Exhibit 22, Section 22.12 Forested Land**

Comparing the temporary changes in forest structure associated with timber harvesting with impacts associated with permanent clearing and filling is not well founded in science. Impacts from timber harvest are temporary as forests will regrow. Also, harvested areas continue to provide important quality habitat for early and mid-successional wildlife. Construction areas of this project will either be permanently modified to non-wildlife habitat, or permanently altered to a different habitat. The areas under powerlines may be permanently converted to different habitat, such as shrubs, but the areas filled and maintained as developed area or grass within forested areas will have minimal if any value as wildlife habitat. Impacts from occasional timber harvesting are not comparable to permanent changes and fragmentation due to development. Human development alters the forest in negative ways that occasional timber harvesting does not. The project area contains large areas of intact habitat that are utilized by a variety of wildlife, including many species of conservation need. Thus, the application needs to fully compare the habitat currently existing on site (even logged high quality habitats) to the habitats that will occur after construction.

#### **Exhibit 23, Section 23.2 Streams and Wetlands - Crossings**

On page 63 of the PSS, the Applicant states that Project impacts during construction will be “limited” and that Project “operations will not impact the streams and fish.” There is not enough information provided in the PSS to support these statements. Construction activities could have a significant impact on streams and wetlands. Permanent impacts associated with construction (culverts, sedimentation, erosion, clearing of cover, thermal changes) could impact the aquatic resources for the life of the Project.

The Applicant needs to evaluate the feasibility of using horizontal directional drilling (“HDD”) to avoid impacts at protected stream and wetlands crossings. If the Applicant finds that HDD is not feasible at any given crossing, a justification for such a finding must be provided, as well as an alternative to HDD. , the Project impacts on streams due to clearing overhead cover (temporary and permanent) must also be evaluated and the amount of crossings must be clearly set forth. A map depicting the classification of protected waters needs to be provided, and this map needs to

show the class and designation [e.g., which streams are C(t) and C(ts)]. Please note that New York State design standards for stream and wetlands crossings will apply, as well as time of year restrictions with respect to trout streams.

### Appendices

DEC has not yet received the results of any of the 2015 or 2016 bird and bat work conducted on site as described in Appendices 22-2, 22-3, and 22-4 of the PSS. DEC requests the opportunity to review and comment on these study results as soon as reports are completed.

The work plan included in Appendix 22-4 (Summer 2016 Pilot Bat Mist-Netting and Telemetry Work Plan) is dated June 23, 2016. DEC received a plan of the same name dated July 27, 2016, with updated text and the inclusion of permits for capturing, handling, and tracking listed species. The most recent work plan should be used in the PSS.

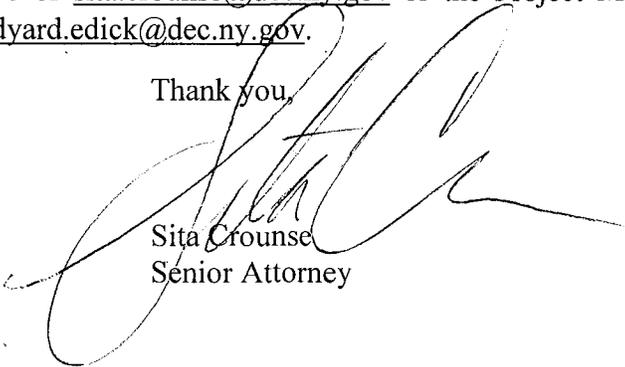
DEC also requests GIS shapefiles for use in ESRI's ArcGIS ArcMap software depicting the most current locations of the:

- Project boundary
- Turbines
- Access and maintenance roads
- Electric collection and transmission lines
- Laydown/storage areas
- Any temporary or permanent buildings constructed in support of the project
- Any other temporary or permanent Project components
- Areas to be cleared around each turbines, roads, electric lines and all other project components
- Bird and bat survey points and transects

These are preliminary comments and DEC intends to participate and comment in all subsequent phases of this proceeding. As it relates to these comments, DEC reserves its right to supplement or submit additional filings, based on (i) any additional reviews it may conduct; (ii) any other comments filed in this proceeding; and/or (iii) responses by the Applicant to the comments contained herein.

Thank you for your consideration of these important issues. If you have questions, please feel free to contact me at 518-402-9198 or [sita.crouse@dec.ny.gov](mailto:sita.crouse@dec.ny.gov) or the Project Manager, Rudyard Edick, at (518) 402-9150 or [rudyard.edick@dec.ny.gov](mailto:rudyard.edick@dec.ny.gov).

Thank you,

  
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Senior Attorney

Cc: Party List  
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