

STATE OF NEW YORK  
OFFICE OF RENEWABLE ENERGY SITING AND ELECTRIC TRANSMISSION

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Application of Fort Edward Solar, LLC for a Major Renewable Energy Facility Siting Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 100-Megawatt (MW) Solar Energy Facility Located in the Town of Fort Edward, Washington County.

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Matter No. 23-03023

**APPLICANT’S RESPONSE TO  
ISSUES STATEMENTS, PARTY STATUS REQUESTS,  
AND  
PUBLIC COMMENTS ON  
DRAFT PERMIT**

Dated: October 27, 2025

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**A) INTRODUCTION**

In accordance with the *Combined Notice of Availability of Draft Permit Conditions*, issued by the Office of Renewable Energy Siting and Electric Transmission (“ORES” or the “Office”) on July 28, 2025 (“Combined Notice”), Fort Edward Solar, LLC (“Fort Edward” or “Applicant”) hereby submits its response to Grassland Bird Trust’s (GBT) *Petition for Full Party Status, and Statement of Issues for Adjudication* filed on October 6, 2025.

In support of this response, the Applicant submits the following memoranda prepared by WSP, on behalf of the Applicant, each of which provides a detailed, evidence-based rebuttal to the expert reports submitted by GBT. These memoranda are grounded in professional expertise and are submitted to assist in evaluating the sufficiency and credibility of the issues raised in the reports and demonstrate that the expert reports do not give rise to substantive and significant issues warranting adjudication.

**Attachment A: Avian Memorandum****Attachment B: Facility Location Figure****Attachment C: Conservation Easements****Attachment D: Public Comment Responses**

In addition, the Applicant’s responses to public comments submitted during the public comment period and at the Public Statement Hearing are included in **Attachment D: Public Comment Response** and discussed in Section V below.

As explained further below, no substantive and/or significant issues were raised in GBT’s Petition, or public comments and therefore, the Administrative Law Judges (“ALJs”) should find that no adjudicatory hearing is warranted.

**B) PROCEDURAL BACKGROUND**

On August 22, 2024, Fort Edward submitted an Application to the Office pursuant to Article VIII of the New York State Public Service Law and the Office’s regulations<sup>1</sup>

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<sup>1</sup> 16 NYCRR § 1100-3.2(a) *et seq.*

(“Application”).<sup>2</sup> On February 3, 2025, ORES issued a Minor Application Amendment Determination.<sup>3</sup> Supplemental material was submitted by Fort Edward on March 28, 2025, and May 23, 2025, to address the *Notice of Incomplete Application*<sup>4</sup> issued by ORES on October 21, 2024. On May 27, 2025, ORES issued a *Notice of Complete Application*.<sup>5</sup>

On August 26, 2024, ORES issued a *Notice of Application Filing and Availability of Local Agency Account Funds*, indicating that \$100,000.00 in local agency account dollars that had previously been deposited by the Applicant were available for local agencies and potential community intervenors to request. On November 15, 2024, the Administrative Law Judges (“ALJs”) in this proceeding awarded the Town of Fort Edward \$75,000.00 and GBT in the amount of \$24,897.50.

During the pendency of the Application review by ORES, and as a result of the migration of the electronic case file in this matter from the ORES Permit Application Portal to the DPS Document and Matter Management (“DMM”) system, the case number was changed from ORES Permit Application No. 23-00085 to ORES DMM Matter No. 23-03023. Accordingly, effective January 27, 2025, the caption for this matter was modified to reflect the matter number change.

On July 28, 2025, ORES issued a *Draft Permit*<sup>6</sup> to Fort Edward pursuant to Article VIII of the Public Service Law (“PSL”) and its implementing regulations at 16 NYCRR Parts 1100-1 through 1100-15. A *Combined Notice*<sup>7</sup> was also issued with the *Draft Permit*, instructing potential parties to submit requests for Party Status, including identification of the substantive and significant issues each proposed Party sought to adjudicate. The Applicant responds to these submissions below.

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<sup>2</sup> Application, Record DMM Item Nos. 24-41.

<sup>3</sup> *Response to Amendment Request*, Record DMM Item No. 67.

<sup>4</sup> *Notice of Incomplete Application*, Record DMM Item No. 54.

<sup>5</sup> *Notice of Complete Application*, Record DMM Item No. 78.

<sup>6</sup> *Draft Permit*, Record DMM Item No. 80.

<sup>7</sup> *Combined Notice*, Record DMM Item No. 81.

To ensure the public was informed regarding the *Draft Permit*, the Applicant arranged for the Combined Notice to be published in full in the *Post Star* and *The Eagle Newspaper*. The *Combined Notice* was also posted to the dedicated project website.<sup>8</sup>

An in-person Public Statement Hearing was held on September 30, 2025, at the Durkeetown Church, 2 Durkeetown Road, Fort Edward, New York 12828. Opportunities for public comment remained open past October 3, 2025, and members of the public wishing to comment were able to submit comments to the ORES DMM docket for this proceeding. **Attachment D**, Public Comment Response, and Section E of this submission respond to the public comments received during the public comment period. Public comments were due by October 3, 2025. The Applicant has responded to each of the comments submitted by October 3, 2025, and has also responded to comments submitted afterwards to the point possible reasonable for this submission.

## **C) PARTY STATUS AND SUBSTANTIVE AND SIGNIFICANT ISSUES**

### **A. Standards for Party Status and Adjudicable Issues Under Article VIII**

Article VIII requires an adjudicatory hearing to resolve substantive and significant disputed issues; if no such issues are raised, no hearing is required.<sup>9</sup> An issue is subject to adjudication at an evidentiary hearing where it is both “substantive and significant”.<sup>10</sup> The burden is on a potential party to demonstrate that the issues raised are substantive and significant.<sup>11</sup> An issue is substantive “if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry”.<sup>12</sup> An issue is significant “if it has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the *Draft Permit*, including uniform standards and conditions”.<sup>13</sup> Importantly, issues

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<sup>8</sup> Affidavits and Proofs of Service, Record DMM Item No. 89.

<sup>9</sup> 16 NYCRR § 1100-8.3(c)(5).

<sup>10</sup> 16 NYCRR § 1100-8.3.

<sup>11</sup> 16 NYCRR § 1100-8.3(c)(4).

<sup>12</sup> 16 NYCRR § 1100-8.3(c)(2).

<sup>13</sup> 16 NYCRR § 1100-8.3(c)(3).

for adjudication at a hearing must be questions of **fact**—questions of law or policy are not factual issues appropriate for an evidentiary hearing.<sup>14</sup> Accordingly, the standard limits adjudication to genuine factual disputes where resolution is necessary to determine whether the Applicant has met the requirements of Article VIII and the Office’s regulations.

ORES has stressed that the purpose of the issues determination procedure is to identify whether disputed factual issues exist; under 16 NYCRR § 1100-8.3(b)(2), this process is intended:

“(i) to receive argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and (v) to decide any pending motions.”<sup>15</sup>

Furthermore, “[a]n issues conference is not meant to merely catalogue areas of dispute, but rather is used to make qualitative judgments as to the strength of the offers of proof and related arguments.”<sup>16</sup> Where a party seeks adjudication of a proposed factual issue, the issues determination procedure is similar to a summary judgment proceeding, wherein “the proponent of an issue has the burden of persuading the ALJs that a disputed issue of fact exists.”<sup>17</sup> Importantly, “where [ORES] staff has determined that a component of the proposed project, as proposed or as conditioned by the draft siting permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.”<sup>18</sup> This requires that the issue proponent “provide an offer of proof that raises sufficient doubt about

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<sup>14</sup> *Application of Heritage Wind, LLC* (Matter 21-00026) Ruling on Issues and Party Status at 5, (July 8, 2021), DMM Item No. 47 [hereinafter “Heritage Issues Ruling”].

<sup>15</sup> *Id.*

<sup>16</sup> *Application of ConnectGen Chautauqua County, LLC* (Matter 21-00750) Ruling of the Administrative Law Judges on Issues and Party Status, (October 12, 2022) [hereinafter “South Ripley Issues Ruling”], *citing Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, pp. 10-11 (NYSDEC), DMM Item No. 87.

<sup>17</sup> South Ripley Issues Ruling at 10, DMM Item No. 87.

<sup>18</sup> Heritage Issues Ruling at 7, DMM Item No. 47.

whether applicable statutory and regulatory criteria have been met or the challenged condition is required by law and supported by the record such that a reasonable person would inquire further.”<sup>19</sup>

When considering whether a proposed issue meets the standards for adjudication, the ALJs will consider the factual or technical foundation provided for claims made by the proposed party.<sup>20</sup> Generalized but unsubstantiated claims, such as claims made without any evidence or the requisite offer of proof, are insufficient—the potential party must provide a factual or scientific foundation for the assertions made.<sup>21</sup> “Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. . . . Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the *Draft Permit* and proposed conditions, [Agency] staff’s analysis, or the record of the issues conference, among other relevant materials and submissions.”<sup>22</sup> Importantly, with respect to local laws, where a proposed party does not identify any concern with the Applicant’s ability to meet the statutory or regulatory criteria in the *Draft Permit*, but rather takes issue with ORES staff’s decision to waive a local law, no adjudicable issue has been raised.<sup>23</sup>

Where a potential party seeks full party status, it must file a petition in accordance with the provisions of 16 NYCRR § 1100-8.4 (c)(1) and (c)(2). Pursuant to 16 NYCRR § 1100-8.4 (c)(2), a petition must identify an issue that meets the standards for adjudication under 16 NYCRR § 1100-8.3(c) and must include an offer of proof “specifying the witness[es], the nature of the evidence the person expects to present and the ground upon which the assertion is made with respect [to] each issue identified.”

Based on these standards, and as discussed in greater detail below, GBT has failed to identify substantive and significant fact issues for adjudication, as required by 16 NYCRR § 1100-8.3(c)(1)(ii) and (iv), 8.4-(c)(2)(i) and (f)(1)(ii). The issues raised in the petition are (1) issues

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<sup>19</sup> South Ripley Issues Ruling at 11, DMM Item No. 87.

<sup>20</sup> South Ripley Issues Ruling at 10, DMM Item No. 87.

<sup>21</sup> South Ripley Issues Ruling at 8, citing *Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, pp. 10-11 (NYSDEC), DMM Item No. 87.

<sup>22</sup> *Id.*; Heritage Issues Ruling at 8, DMM Item No. 47.

<sup>23</sup> Heritage Issues Ruling at 34-35, DMM Item No. 47.

which are not substantive or significant; (2) legal issues for which adjudication at an evidentiary hearing is unnecessary, and which can be resolved by the ALJ through a ruling on the merits under 16 NYCRR § 1100-8.3(b)(5)(iii); (3) general objections to the Facility, Article VIII and its implementing regulations, including uniform standards and conditions; and/or (4) bare claims unsupported by facts or testimony insufficient to satisfy the burden under 16 NYCRR § 1100-8.3(c)(4). Therefore, as outlined in greater detail below, GBT has not achieved the prerequisite step of identifying substantive and significant issues sufficient to support the granting of Full Party Status under 16 NYCRR § 1100-8.4(f)(1)(ii), let alone warrant an evidentiary hearing.

### **B. Standards of Proof, Witnesses and Scientific Credibility**

A proposed party seeking Full Party Status is required to make an offer of proof “specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect each issue identified”.<sup>24</sup> The offer of proof requires that a proposed party present competent evidence that makes a “credible showing that such a defect is present and likely to affect permit issuance in a substantial way”.<sup>25</sup> “[A] conclusory statement without a factual foundation is not sufficient to raise issues” for adjudication.<sup>26</sup>

Conclusory statements and speculative allegations unsupported by the offered proof do not raise adjudicable issues.<sup>27</sup> “Although a potential party is not required to present proof of its allegations sufficient to prevail on the merits, conclusory or speculative statements without a factual foundation are not sufficient to raise an adjudicable issue.”<sup>28</sup> “Conducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, or where such a hearing would dissolve into an academic debate is not the intent of the . . . hearing process.”<sup>29</sup> “Offers of proof

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<sup>24</sup> 16 NYCRR § 1100-8.4(c)(2)(ii).

<sup>25</sup> *Custom Compost, Inc.*, 2004 NY ENV LEXIS 18 (N.Y. Dept. Env. Conserv., Mar. 25, 2004).

<sup>26</sup> *Id.* at 10-11, *citing* Halfmoon Water Improvement Area No. 1, 1982 NY ENV LEXIS 34 (N.Y. Dept. Env. Conserv., Apr. 2, 1982).

<sup>27</sup> *Custom Compost, Inc.*, 2004 NY ENV LEXIS 18 (N.Y. Dept. Env. Conserv., Mar. 25, 2004), *citing* Matter of Halfmoon Water Improvement Area No. 1 1982 NY ENV LEXIS 34, 4 (N.Y. Dept. Env. Conserv., Apr. 2, 1982).

<sup>28</sup> *Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 11 (N.Y. Dept. Env. Conserv., Nov. 17, 2008), *citing* Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2.

<sup>29</sup> *Seneca Meadows, Inc.*, 2012 NY ENV LEXIS 76, 4 (NY Dept. Env. Conserv., Oct. 26, 2012).



may take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application.”<sup>30</sup>

Generalized comments and observations of non-expert lay witnesses are not sufficient to raise issues for adjudication; potential parties are required to submit evidence of qualified experts which factually supports the allegations made in a petition for Party Status.<sup>31</sup>

*“If a potential party cannot adequately explain the nature of the evidence that it expects to present and the grounds upon which its assertions are made, no issue is raised. Furthermore, the issues conference is not the point where a potential party should be deciding what experts or qualified witnesses it will need to substantiate the allegations that it has made in its petition (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). The potential parties' offer of proof should be based upon the opinions of experts or other qualified witnesses already identified.”*<sup>32</sup>

As discussed below, the issues identified by GBT in this proceeding are unsupported by sufficient offers of proof. Instead, their submissions are largely comprised of policy arguments, anecdotal observations, generalized concerns, speculative assertions, or hypothetical future scenarios. Overall, the submissions amount to “mere conclusions, expressions of hope or unsubstantiated allegations or assertions” which ORES precedent has routinely rejected as insufficient to raise a triable issue of fact for hearing. “A shadowy semblance of an issue, or bald conclusionary assertions, even if believable are not enough to raise a triable issue of fact.”<sup>33</sup>

In conclusion, the issues raised by the potential party are not accompanied by competent evidence, raise policy concerns with the regulations not triable issues of fact, amount to academic

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<sup>30</sup> *Frontier Stone, LLC.*, 2016 NY ENV LEXIS 46, 20-21 (N.Y. Dept. Env. Conserv., July 27, 2016); *Matter of Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 6 (N.Y. Dept. Env. Conserv., Nov. 17, 2008); *see also* *Halfmoon Water Improvement Area No. 1*, 1982 NY ENV LEXIS 34 (N.Y. Dept. Env. Conserv., Apr. 2, 1982).

<sup>31</sup> *Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 12 (N.Y. Dept. Env. Conserv., Nov. 17, 2008).

<sup>32</sup> *Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 12 (N.Y. Dept. Env. Conserv., Nov. 17, 2008).

<sup>33</sup> *Application of Horseshoe Solar Energy*, (Matter No. 21-02480) Ruling on Issues and Party Status and Order of Disposition at 9-10, (June 13, 2022), DMM Item No. 56, citing *Metropolitan Bank of Syracuse v Hall*, 52 AD2d 1084 (4<sup>th</sup> Dept.1976).

debates, fail to identify who would testify regarding the issues raised or fail to present the grounds upon which the identified expert's assertion is made, and amount to conclusory or speculative statements without a factual foundation, all of which are not sufficient to raise a triable issue of fact in this proceeding.

### **C. Amicus Status**

The Applicant acknowledges and does not dispute that GBT has a general interest in matters affecting the community. However, as discussed above, having an interest in a proceeding is not sufficient in and of itself to obtain party status. To obtain Full Party status, a petitioner must raise a substantive and significant issue warranting adjudication. Here, as further explained below, GBT has failed to do so.

A potential party who cannot demonstrate entitlement to Full Party Status may nevertheless be permitted to participate in proceedings by showing entitlement to Amicus Status. To be granted Amicus Status, a party must submit an acceptable petition for Amicus Status under the regulations; must identify a “legal or policy issue which needs to be resolved by the hearing”; and must demonstrate that it has “sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue”<sup>34</sup> The rights of Amicus parties are different than Full Parties, and primarily involve the right to brief issues and, at the discretion of the ALJ, present oral argument, but not the right to submit fact evidence or testimony, or to engage in disclosure or examination of witnesses.<sup>35</sup>

Applying these standards, GBT should not be granted either Full or Amicus Party status. The requests for Full Party status must be denied because they have failed to identify substantive and significant fact issues for adjudication, nor have they demonstrated that they can contribute to a substantive and significant issue raised by another party, as required by 16 NYCRR § 1100-8.3(c)(1)(ii) and (iv), 8.4-(c)(2)(i) and (f)(1)(ii). Amicus status should likewise be denied as they have not identified a substantive or significant legal or policy issue requiring resolution in this

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<sup>34</sup> 16 NYCRR § 1100-8.4(f)(2)(i)-(iii).

<sup>35</sup> 16 NYCRR § 1100-8.4(g)(2).

proceeding, nor established that they possess the necessary interest, expertise, or unique perspective to contribute materially to the record.

#### **D. Scope of Required Studies and Impacts**

Article VIII establishes a comprehensive and exclusive framework for the review and permitting of major renewable energy facilities. The statute and implementing regulations identify with specificity the studies, surveys, and assessments that an applicant must conduct and submit in support of its application. These requirements include, *inter alia*, detailed environmental, wetlands and waterbodies, protected species, visual, noise, cultural, and agricultural impact analyses, each conducted in accordance with defined methodologies and study areas.<sup>36</sup> These mandated assessments are designed to capture all impacts that ORES has determined are relevant to its permitting decision.

The Legislature deliberately centralized siting authority within ORES to ensure that renewable energy projects are reviewed under a uniform, statewide process. Public Service Law § 144(2) expressly provides that no municipality or political subdivision may require any “approval, consent, permit, certificate, contract, agreement, or other condition” for the development, design, construction, operation, or decommissioning of a major renewable energy facility. This preemptive language makes clear that the *only* studies and information that an applicant is required to provide are those specified in Article VIII and its regulations.

The adjudicatory process under Article VIII is similarly limited in scope. An evidentiary hearing is only required where substantive and significant factual disputes arise. An issue is “substantive” if it raises sufficient doubt that the applicant can meet *statutory or regulatory* criteria. An issue is “significant” if it could result in permit denial, a major modification to the project, or the imposition of additional permit conditions. Importantly, these criteria tie directly back to the statutory and regulatory requirements under Article VIII. Because the scope of Article VIII defines the relevant statutory and regulatory criteria, issues premised on studies or impacts that Article VIII does not require cannot be substantive or significant.

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<sup>36</sup> Subpart 1100-2 Application Exhibits.

If Article VIII does not mandate a particular analysis, an applicant's failure to perform it cannot create doubt as to whether the project complies with Article VIII standards. For example, demanding additional environmental assessments beyond those identified in ORES regulations cannot, by definition, establish a substantive deficiency.

Similarly, impacts that are not identified in the statute or regulations as relevant for review cannot form the basis of a significant issue. If the Legislature or ORES determined that certain impacts (e.g., broad socio-economic or grassland bird habitat speculative effects) need not be assessed, their absence from the record does not undermine the validity of the project review.

It follows that issues based on studies or information outside the scope of Article VIII cannot be substantive or significant. If the Legislature and ORES regulations do not require a particular analysis, then an applicant's failure to provide it does not create doubt as to whether the project meets statutory or regulatory criteria. In other words, *a requirement that does not exist under Article VIII cannot be the basis for a substantive or significant issue.*

Allowing municipalities or intervenors to demand studies or analyses not required under Article VIII would defeat the Legislature's purpose in consolidating and streamlining the siting process. It would invite endless collateral challenges, impose unbounded evidentiary burdens, and frustrate the State's climate and energy mandates under the CLCPA. Courts have consistently held that local governments cannot impose additional procedures or conditions where the State has established a comprehensive regulatory regime.

In order to obtain a permit under Article VIII, an applicant must conduct and present the studies required by Article VIII and its implementing regulations, no more and no less. Information and studies outside of that scope are not required and therefore cannot form the basis of a substantive or significant issue for adjudication. Any attempt to elevate such extraneous demands into adjudicable issues is contrary to the plain language of the statute and the regulatory framework. Issues premised on extra-statutory requirements must therefore be dismissed as beyond the scope of the Article VIII proceeding.

**D) RESPONSE TO PARTY STATUS REQUESTS AND MUNICIPAL STATEMENTS OF COMPLIANCE**

**A. Response to Grassland Bird Trust (GBT)**

GBT seeks party status to adjudicate various alleged issues with the Facility. GBT's primary issues are that they believe the Facility is sited in a unique area with special environmental features and that because of this, the area requires additional protections for grassland birds. GBT raises concerns including: (i) the draft permit's ability to avoid, minimize, or mitigate significant adverse impacts to grassland birds; (ii) the adequacy of the proposed mitigation ratio and whether it can achieve a net conservation benefit; (iii) the Applicant's ability to achieve the proposed mitigation ratio; and (iv) the appropriateness of the regulatory mitigation ratio. As set forth in detail below, none of GBT's identified issues meet the regulatory standard for "substantive and significant" issues under 16 NYCRR § 1100-8.3(c). Many of GBT's claims are policy level disagreements with the USCs established by ORES and general disagreements with siting solar near grassland birds and in open fields generally.

**(1) The Draft Permit Adequately Avoids, Minimizes, or Mitigates Adverse Impacts to Grassland Birds, Despite the Facility's Location Near the Environmental Areas.**

GBT argues that the Applicant and Draft Permit failed to adequately review or mitigate the impacts to grassland birds as a result of the Facility's location in and around the Washington County Grassland Bird Conservation Center (Washington County GBCC), the Audubon-designated Fort Edward Grasslands Important Bird Area (IBA), the New York National Heritage Program (NYNHP) Raptor Winter Concentration Area (RWCA), the Wildlife Management Area (WMA) which the Facility is not sited in at all, and the GBT properties (together, the Environmental Areas).<sup>37</sup> GBT's position is incorrect and the presence of the Facility in and around the Environmental Areas alone does not create such a unique grassland bird habitat that invalidates the Uniform Standards and Conditions (USCs) in the Draft Permit after taking into consideration the mitigation efforts proposed by the Applicant. To support this argument, GBT offers an assessment by GBT drafted with the assistance of Joel Merriman from Avian Consulting Services, Inc. (GBT Assessment).<sup>38</sup>

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<sup>37</sup> Grassland Bird Trust (GBT) Petition, pg. 31, Record DMM Item No. 84.

<sup>38</sup> GBT Petition, Exhibit A, Record DMM Item No. 84.

According to the GBT Assessment, the Application contains an incomplete characterization of the value of the Project site, the grassland bird species on the Project site and surrounding area, the impacts on the grassland birds, an inaccurate prediction of collision mortality, insufficient support that the Project will achieve a net conservation benefit, and an inadequate mitigation ratio all due to the Project's location in and around the Environmental Areas. Through the GBT Assessment, GBT argues that the Facility will negatively alter the remaining grassland bird habitat. However, the GBT Assessment merely provides generalized assertions without any substantive evidence that the proposed Facility will create edge effects, reduce the habitat patch size, impact habitat connectivity, and increase collision fatalities.<sup>39</sup>

As further discussed below, GBT refers to studies as authoritative when arguing that the Facility will result in significant habitat loss for grassland birds. Due to the substantial differences between vegetation types, land management practices, and the presence of local bird species, the results observed elsewhere do not accurately reflect those in New York, especially the grassland habitat in Washington County and the particular Facility Site.<sup>40</sup> This includes GBT's misleading argument that the Facility does not sufficiently address grassland habitat fragmentation. The Applicant designed the Facility in a way that incorporated habitat connectivity by prioritizing that the Facility Site maintain large, contiguous grassland fields, specifically those exceeding 25 acres in size, the very size that the NYSDEC and ORES indicated as the minimum threshold required for most grassland bird species to successfully breed and forage.<sup>41</sup> The Applicant removed project components that were adjacent to the WMA, and the proposed mitigation area identified in the NCBP would effectively expand the 478-acre WMA to 694 acres (a 31 percent increase in size) while maintaining corridors between the WMA and surrounding Washington County GBCC. Each of these efforts address and preserve habitat connectivity. There are also numerous studies that suggest additional research is necessary to fully understand the interactions between solar energy infrastructure, particularly photovoltaic (PV) panels and grassland bird species.<sup>42</sup>

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<sup>39</sup> GBT Petition, Exhibit A, Record DMM Item No. 84.

<sup>40</sup> Attachment A: Avian Memorandum, pg. 7.

<sup>41</sup> Attachment A: Avian Memorandum, pg. 10.

<sup>42</sup> Attachment A: Avian Memorandum, pg. 11.

Therefore, as discussed in the NCBP, the Applicant is committed to conducting post-construction bird surveys to better understand how solar development influences grassland bird species and their habitat use.<sup>43</sup> One example of this is that in 2024, Cornell University's United States Geological Survey New York Cooperative Fish and Wildlife Research Unit began efforts to monitor grassland bird habitats prior to and after construction.<sup>44</sup>

Additionally, GBT discusses the potential for bird collisions with solar panels at the Facility Site. GBT references a study estimating 11.6 bird fatalities per megawatt per year that took place in the southern California desert.<sup>45</sup> Similar to the other studies referenced by GBT, this estimate and study cannot be directly applied to the Facility, let alone to solar projects in New York due to the differences in habitat, bird species composition, and site-specific conditions.<sup>46</sup> The lack of published data on the impacts of solar facilities in New York and the broader eastern U.S. means that assumptions about collision risks are largely speculative.<sup>47</sup> The Applicant has addressed potential collisions through the Facility's design, such as using underground collector lines rather than overhead transmission due to the potential mortality overhead transmission can contribute to, construction work windows for grassland bird breeding and wintering habitats, and offering an onsite biologist if necessary.<sup>48</sup>

GBT also argues that the Facility will result in the displacement of grassland birds. Displacement as a result of development is unavoidable. However, this is exactly why ORES requires developers to submit NCBPs as part of the Article VIII process to address unavoidable impacts that demonstrate the project will result in a net conservation benefit and not simply avoid harm. This is also precisely why the Applicant drafted the NCBP approved by ORES to include a mitigation property directly adjacent to the WMA that is known to support the Short-eared Owl and Northern Harriers as witnessed by the Applicant and GBT biologists during a field visit to the

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<sup>43</sup> Application, Appendix 12-E, NCBP, Revision 1, Record DMM Item No. 70.

<sup>44</sup> Attachment A: Avian Memorandum, pg. 9.

<sup>45</sup> GBT Petition, Exhibit A, pg. 11, Record DMM Item No. 84.

<sup>46</sup> Attachment A: Avian Memorandum, pg. 8.

<sup>47</sup> Attachment A: Avian Memorandum, pg. 8.

<sup>48</sup> Attachment A: Avian Memorandum, pg. 11.

property in April 2024.<sup>49</sup> This same line of reasoning also disproves GBT's argument that the proposed Facility is likely to displace more birds than predicted based on home range calculations as their claim is highly speculative and lacks any empirical support. Ecological response to solar infrastructure is complex and varies depending on factors such as species behavior, habitat quality, and project design.<sup>50</sup> Without site specific data, these claims are nothing more than unfounded assertions. However, some studies have shown very low wildlife mortality from solar projects, while also showing that many species can co-exist with solar facilities.<sup>51</sup> This occurs as a result of the many benefits solar has on wildlife and wildlife habitat including a reduction in air pollution, greenhouse gas emissions, and overall pollution.<sup>52</sup> Potential negative impacts from solar projects such as the Facility are limited, especially when compared to global climate change and taking into consideration the Applicant's compliance with the approved NCBP and conditions of the *Draft Permit*.<sup>53</sup>

GBT's reliance on Merriman's speculative assertions does not raise a substantive and significant issue. The Applicant has completed all required wildlife studies and surveys in strict accordance with Article VIII regulations and protocols established by ORES. Exhibit 12 demonstrates that the Applicant prepared a Wildlife Site Characterization Report, Grassland Breeding Bird Survey, and Wintering Grassland Raptor Survey, all conducted pursuant to ORES protocols, reviewed and ultimately approved by ORES through a series of multiple consultations.<sup>54</sup>

Following these surveys, ORES issued a formal Determination of Occupied Habitat and Incidental Take confirming that the Applicant's studies were sufficient to characterize site conditions and quantify impacts.<sup>55</sup> After the initial ORES determination, the Facility's design was modified to reduce impacts to wetlands, threatened and endangered avian species, and other

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<sup>49</sup> Attachment A: Avian Memorandum, pgs. 9; 12.

<sup>50</sup> Attachment A: Avian Memorandum, pg. 13.

<sup>51</sup> Attachment A: Avian Memorandum, pg. 13.

<sup>52</sup> Attachment A: Avian Memorandum, Pg. 9.

<sup>53</sup> Attachment A: Avian Memorandum, pg. 13.

<sup>54</sup> Application, Exhibit 12: Threatened or Endangered Species, Version 1, Record DMM Item No. 70.

<sup>55</sup> Revised Take Determination, Record DMM Item No. 53.



impacts.<sup>56</sup> The modification eliminated three panel array areas and associated infrastructure such as roads, fences, inverters, and collection lines while also relocating the proposed laydown yard.<sup>57</sup> The Applicant redesigned the Facility to reduce the overall impacts while maintaining the same generation capacity of 100 MW and the modification significantly reduced impacts to the occupied breeding and wintering habitats for Northern Harrier, the occupied wintering habitat for Short-eared Owl, and eliminated all impacts to the occupied breeding habitat for Sedge Wren.<sup>58</sup> After the modifications made to the Facility, to address unavoidable impacts, the Applicant developed and submitted an ORES-approved NCBP to ensure compliance with § 1100-6.4(o) and to achieve a net conservation benefit for the affected grassland birds.<sup>59</sup>

In contrast, the GBT Assessment's criticisms rest on speculative extrapolations, such as the Facility's impacts on grassland bird habitats, that are based on generalized literature rather than field-verified data. These claims disregard the fact that ORES already determined that the Applicant's mitigation efforts were sufficient, the impacts were properly quantified, and the required and appropriate mitigation and net conservation benefit measures were incorporated into the *Draft Permit*. These claims also do not take into consideration the site-specific design changes and efforts that the Applicant implemented while designing the Facility. As such, GBT's expert report does not provide project-specific evidence capable of altering the outcome of the proceeding.

Additionally, Joel Merriman's experience is largely based on ecosystems in the Pacific Northwest and the Mid-Atlantic, which raises questions about the applicability of his findings to the ecology and regulatory context of New York, specifically upstate New York.<sup>60</sup> Although Mr. Merriman has conducted research in Washington, Maryland, and Washington D.C., the regions, climate, and topography are significantly different than the natural landscape and vegetation in New York. His background is also primarily with wind energy projects, and Mr. Merriman notes himself that, "there are differences between wind and solar energy facilities and how they might

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<sup>56</sup> Application, Amendment Request, Record DMM Item No. 61.

<sup>57</sup> Application, Amendment Request, Record DMM Item No. 61.

<sup>58</sup> Revised Take Determination, Record DMM Item No. 69.

<sup>59</sup> Appendix 12-E, Net Conservation Benefit Plan, Record DMM Item No. 70.

<sup>60</sup> GBT Local Agency Account Fund Request, Exhibit 3, Record DMM Item No. 50.

affect birds.”<sup>61</sup> Impacts to grassland birds, and other species in general are reviewed differently between solar and wind projects because of the various differences in how the projects are constructed, sited, and operated.

When discussing the Facility’s impacts to the Environmental Areas, the GBT Assessment merely provides generalizations about why each Area is unique, rather than providing site specific data that requires additional analysis. The Applicant has addressed each Environmental Area in this response and has prepared a memorandum that directly responds to the GBT Assessment (Avian Memorandum).<sup>62</sup>

One generalization that is a significant mischaracterization is the Facility’s footprint and size in comparison to the Environmental Areas. GBT references a map they drafted demonstrating their interpretation of the location of the Facility relative to the Environmental Areas.<sup>63</sup> However, this map gravely misrepresents the location of the Facility in a way that depicts the Facility occupying a much larger space of the Environmental Areas than it does. In response, the Applicant has created a figure, Attachment B, that accurately depicts the location of the Facility components in relation to the Environmental Areas.<sup>64</sup> This figure clearly shows that the Facility is not sited in the WMA at all, whereas the figure created by GBT has a large red circle falsely depicting the Facility as being sited in the entirety of the WMA. In fact, and as further discussed below, the Applicant carefully designed the Facility to avoid the WMA. The map created by GBT not only incorrectly shows the location of the Facility, but it also overstates the impacts of the Facility by using a large red circle, rather than the actual Facility components, to falsely inflate the Facility’s footprint and impacts. It is unclear what GBT based their Exhibit C and the red circle on, because it does not align with the actual Facility’s design as detailed by the site plans drafted by certified engineers. Attachment B displays the actual locations of Facility components in relation to the Environmental Areas, as well as Appendix 5-A of the Application.<sup>65</sup> The Applicant will now address each of the Facility’s potential impacts to the Environmental Areas individually.

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<sup>61</sup> GBT Petition, Exhibit A, pg. 13, Record DMM Item No. 84.

<sup>62</sup> Attachment A: Avian Memorandum.

<sup>63</sup> GBT Petition, Corrected Exhibit C, Record DMM Item No. 87.

<sup>64</sup> Attachment B: Facility Location Figure.

<sup>65</sup> Application, Appendix 5-A, Revision 1, Record DMM Item Nos. 71-72.

*(a) The Washington County GBCC Does Not Require Additional Environmental Protections as a Result of the Proposed Facility.*

The Washington County GBCC is a 102,000-acre area established by the New York State Department of Environmental Conservation in an effort to preserve grassland bird habitats.<sup>66</sup> The Facility is projected to impact approximately 567 acres of listed bird species occupied habitat.<sup>67</sup> The acreage of impacts constitutes only 0.6% of the Washington County GBCC and are also mitigated through the effective execution of the proposed NCBP, which will provide a net conservation benefit to affected grassland birds.<sup>68</sup>

The GBT Assessment does not offer any scientific support to describe why the Washington County GBCC is unique enough that the *Draft Permit* does not properly address impacts to grassland birds. The GBT Assessment merely offers the purpose for establishing the Washington County GBCC and lists what birds are located within its boundaries.<sup>69</sup> According to GBT, the grassland bird species in the Washington County GBCC are the Short-eared Owl, Northern Harrier, Sedge Wren, Upland Sandpiper, and the Grasshopper Sparrow.<sup>70</sup> Of the five, the Facility is only expected to impact two listed species and through mitigation will achieve a net conservation benefit as discussed below. Of the other three listed species, the Facility was redesigned to completely avoid impacts for two of them, and the remaining species was never determined to be impacted in the first place.

However, although the Facility is located on a small portion of land within the boundaries of the Washington County GBCC, the components themselves are sited in primarily active agriculture fields such as pasturelands, hay fields, and cultivated croplands.<sup>71</sup> As active agricultural fields, they have been subject to agricultural practices determined by each landowner or crop type regardless of their location in or outside of the Washington County GBCC. This

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<sup>66</sup> GBT Petition, Exhibit A, pg. 6, Record DMM Item No. 84.

<sup>67</sup> Application, Appendix 12-E, Revision 1, Record DMM Item No. 70.

<sup>68</sup> Attachment A: Avian Memorandum, pg. 2.

<sup>69</sup> GBT Petition, Exhibit A, pg. 6, Record DMM Item No. 84.

<sup>70</sup> GBT Petition, Exhibit A, pg. 8, Record DMM Item No. 84.

<sup>71</sup> Attachment A: Avian Memorandum, pg. 4.

farming schedule aligns with agricultural lands outside the GBCC, as both involve active agricultural practices, including those with ORES-identified habitats, diminishing the uniqueness of Washington County GBCC lands. As a result, agricultural lands inside the GBCC should be treated the same as agricultural lands outside of the GBCC. Therefore, the Applicant has addressed the potential impacts to the Washington County GBCC through the development of the approved NCBP, which includes the management of a 216-acre conservation easement for grassland birds located within the GBCC and the area of the GBCC where the Facility is sited does not require additional protections.<sup>72</sup>

Ultimately, GBT does not offer any sort of explanation on how the Facility will negatively impact the Washington County GBCC other than generalizations, such as collision mortality, habitat effects, and other effects as discussed above. Therefore, any adverse impacts from the Facility will be effectively mitigated through the conditions of the *Draft Permit* and the execution of the NCBP, and the Washington County GBCC does not require additional environmental protections.

*(b) The Applicant Has Already Addressed Any Potential Impacts to the WMA by Siting the Facility Outside of the WMA*

The WMA is a 478-acre area of Washington County that is managed by NYSDEC. The Applicant understood the importance of this area early on and therefore purposefully designed the Facility to avoid any disturbance to the WMA. This included the removal of proposed Facility components from parcels adjacent to the WMA, relieving any potential edge effects, and to ultimately ensure that the Facility would not impact the WMA at all.<sup>73</sup> A major project redesign undertaken in late 2024 in response to stakeholder and Notice of Incomplete Application response removed 144 acres of LOD that were closest to the WMA, thereby increasing the setback between the WMA and the closest panel array area from 70 feet to approximately 980 feet. Distances from the WMA hiking trail were increased from approximately 100 feet to more than a ½ mile. As discussed in Exhibit 8 Visual Impacts and Appendix 8-A, at this extended distance, views of the

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<sup>72</sup> Attachment A: Avian Memorandum, pg. 4.

<sup>73</sup> Attachment A: Avian Memorandum, pg. 5.

solar arrays will be substantially screened by existing intervening hedgerows and scrub vegetation during both leaf-on and leaf-off seasons. The Applicant's redesign in the Fall of 2024 included removal of two fenced arrays totaling 87 acres approximately 100 feet east of the WMA, and one 53 acre fenced array approximately 100 feet southwest of the WMA.

As a result of several modifications made by the Applicant that reduced the Facility's overall impact, the closest component to the WMA is the security fence, situated approximately 900 feet west of the southwest corner.<sup>74</sup> After the fence line, the nearest components are located 2,300 and 1,630 feet to the west and east respectively.<sup>75</sup> There are no Facility components sited to the north of the WMA.<sup>76</sup> By removing the proposed panel areas, inverters, access roads, and collector lines, the Applicant preserved existing grassland and forested habitat corridors between the WMA and surrounding Washington County GBCC on all sides. The proposed mitigation area identified in the NCBP will also increase the 478-acre WMA to 694 acres of protected grassland habitat within the Washington County GBCC, essentially increasing the size of the WMA by 31 percent.<sup>77</sup> Therefore, the location of the Facility near the WMA alone does not create a unique environmental sensitivity issue that requires additional environmental protections.

*(c) The Audubon IBA Does Not Require Additional Environmental Protections Due to the Proposed Facility*

The Audubon IBA is a 13,000-acre area located withing the Washington County GBCC and characterized by the Audubon Society as "an exceptional grassland bird breeding and wintering area."<sup>78</sup> The 567 acres of impacts from the Facility are only 4.4% of the IBA.<sup>79</sup> Any potentially adverse impacts will be mitigated through the implementation of the NCBP. According to the National Audubon Society, the IBA is home to Bobolink, Savannah, Vesper, and Grasshopper Sparrows, Horned Lark, and Eastern Meadowlark, as well as threatened and

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<sup>74</sup> Attachment A: Avian Memorandum, pg. 4.

<sup>75</sup> Attachment A: Avian Memorandum, pg. 4.

<sup>76</sup> Attachment A: Avian Memorandum, pg. 4.

<sup>77</sup> Attachment A: Avian Memorandum, pg. 4.

<sup>78</sup> GBT Petition, Exhibit A, pg. 7, Record DMM Item No. 84.

<sup>79</sup> Attachment A: Avian Memorandum, pg. 2.

endangered species such as the Short-eared Owl, Sedge Wren, and Northern Harrier.<sup>80</sup> Of the eight, the Facility is only expected to impact two listed species and through mitigation will achieve a net conservation benefit that will also apply to the other species.

Modifications to the Facility's design have eliminated several parcels containing Facility components such as panels, inverters, collection, and other associated Facility components that were located near the center of the IBA. By removing these parcels, the Facility preserved connectivity between the WMA and IBA grasslands in all directions.<sup>81</sup> Similar to the Washington County GBCC, the agricultural lands within the IBA where the Facility is sited are also subject to agricultural schedules in the same way agricultural lands outside of the IBA are. Therefore, any remaining potential impacts to the IBA will be effectively mitigated through the conditions of the *Draft Permit* and the execution of the NCBP.

Similar to the other Environmental Areas, GBT does not provide a scientific reason why the IBA requires additional protections or why the Facility needs an enhanced mitigation ratio due to its location that occupies a very small portion of the IBA. The only reasoning GBT provides is the Audubon Society's own characterization of the area, which does not provide a scientific reason why the *Draft Permit* and NCBP are not enough.<sup>82</sup> Therefore, any adverse impacts from the Facility will be effectively mitigated through the conditions of the *Draft Permit* and the execution of the NCBP, and the IBA does not require additional environmental protections.

*(d) The RWCA Does Not Require Additional Environmental Protections Due to the Proposed Facility*

According to the GBT, the Facility is located "almost entirely" in the RWCA and the RWCA is a critical wintering ground for the Short-eared Owl and Northern Harrier.<sup>83</sup> However, the GBT Assessment offers nothing more about what makes the area unique, nor does it provide scientific information about why or how the Facility will negatively impact the RWCA other than

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<sup>80</sup> GBT Petition, Exhibit G, pg. 2, Record DMM Item No. 84.

<sup>81</sup> Attachment A: Avian Memorandum, pg. 5.

<sup>82</sup> GBT Petition, Exhibit A, pg. 6, Record DMM Item No. 84.

<sup>83</sup> GBT Petition, Exhibit A, pg. 8, Record DMM Item No. 84; GBT Petition, Exhibit C, Record DMM Item No. 87,

the generalized assertions discussed above. Additionally, although the RWCA is a part of the New York National Heritage Program, it is not ranked on a state, federal, or global level.<sup>84</sup>

The RWCA is smaller than the IBA but has similar environmental features as the IBA and is in similar proximity to the Facility. Like the Washington County GBCC and the IBA, the agricultural lands in the RWCA should be treated the same as the agricultural lands outside the RWCA. As a result, the Applicant's modifications to the Facility's design that benefitted the IBA similarly benefit the RWCA.<sup>85</sup> Therefore, any adverse impacts from the Facility will be effectively mitigated through the conditions of the *Draft Permit* and the execution of the NCBP, and the RWCA does not require additional environmental protections.

The GBT Assessment introduces each of the Environmental Areas but does not provide scientific or site-specific reasons why the *Draft Permit* fails to address potential adverse impacts to the Environmental Areas. GBT's arguments are nothing more than generalized assumptions about what may happen as a result of the Facility's construction and operation without a discussion on what specifically about the Facility, other than a general discussion about habitat loss, and the *Draft Permit* will harm the Environmental Areas. Finally, GBT's philosophical disagreement regarding the potential impact of utility scale solar on grassland birds does not raise a substantive and significant issue for adjudication and amounts to an academic debate about the impact of solar on grassland bird species generally. The approach and methodology used by the Applicant to assess impacts to wildlife are consistent with the applicable sections of the Article VIII regulations, scientifically justifiable, and supported by peer reviewed literature.

Ultimately, the Draft Permit includes conditions to minimize impacts to threatened and endangered species during operation and construction. This includes requiring an environmental monitor to search for threatened and endangered species and coordinate with DPS and the Office if species are found, adherence to construction windows within occupied habitat, and restoration of all temporary disturbance or modification of established grassland vegetation communities by utilizing a native herbaceous seed mix or the pre-existing grassland vegetative conditions by re-

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<sup>84</sup> New York National Heritage Program Guide, <https://guides.nynhp.org/status/2.735991/>.

<sup>85</sup> Attachment A: Avian Memorandum, pg. 6.

grading and re-seeding with an appropriate native seed mix after disturbance activities are complete. The GBT Assessment fails to meet the standard for a substantive issue because it does not establish a triable issue of fact or cause serious doubt on the Applicant's ability to comply with the ORES regulations. The GBT Assessment simply disagrees with the ORES regulations. It also fails to meet the standard for significant issues because it would not result in permit denial, major project redesign, or materially different permit conditions. As such, GBT has failed to raise an adjudicable issue with respect to impacts to grassland birds due to the Facility's location in and near the Environmental Areas and the *Draft Permit*'s ability to avoid, minimize, and mitigate those impacts.

**(2) The Mitigation Ratio Set in the Draft Permit Will Achieve a Net Conservation Benefit**

GBT argues the *Draft Permit*'s use of the standard mitigation ratios of 0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat and 0.2 acres of mitigation for every acre of occupied grassland bird wintering is inappropriate for the Facility.<sup>86</sup> Relying on the GBT Assessment, GBT claims that the USCs are not appropriate due to the Facility's location in and around the Environmental Areas. GBT, through their Assessment, concludes that the regulatory 5-year timeframe for habitat succession is inapplicable, the regulatory mitigation ratios do not account for impacts arising from the Environmental Areas, and that the Audubon, along with other public commenters, support an enhanced mitigation ratio.<sup>87</sup> GBT contends this evidence is sufficient to raise substantive and significant issues and requests full party status and a hearing.

GBT's reliance on the GBT Assessment does not raise a substantive and significant issue. The Applicant conducted all required wildlife surveys and impact assessments in accordance with Article VIII regulations and ORES protocols, including grassland bird and raptor surveys, habitat characterizations, and the preparation of a NCBP. As discussed above, the Facility's location in and around the Environmental Areas does not invalidate these efforts nor does it mean the Environmental Areas require additional protections due to the Facility. The studies were reviewed

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<sup>86</sup> GBT Petition, pg. 36, Record DMM Item No. 84.

<sup>87</sup> GBT Petition, pg. 36-40, Record DMM Item No. 84.



and approved by ORES, and the *Draft Permit* already incorporates enforceable conditions to ensure avoidance, minimization, and mitigation of impacts, as well as the achievement of a net conservation benefit for affected species.

The Applicant provided ORES a draft NCBP, that was consistent with the requirements under the Article VIII regulations to properly inform ORES' determination of the mitigation required.<sup>88</sup> The Applicant will also prepare a Final NCBP to be submitted as a Pre-Construction Compliance Filing and as required by Site Specific Condition 5(d) of the *Draft Permit*.<sup>89</sup> The Final NCBP will include the final approved mitigation required for the development of the Facility. GBT, through the GBT Assessment, has not advanced any rational reasons other than Mr. Merriman's statements that he disagrees with ORES's findings and the regulatory standards, that would support a finding that the Facility and USCs as proposed present a unique or site-specific environmental impact to grassland birds that would require additional site-specific conditions beyond what is required by the regulations.

Ultimately, GBT's criticisms largely reflect disagreement with ORES's regulatory standards and survey protocols, and how they apply to the specific Facility's location, not with the Applicant's adherence to them. The Applicant addresses each of the regulatory standards below.

*(a) The Regulatory Assumption of a 5-year Timeframe is Appropriate.*

GBT argues that the 5-year succession timeframe is inapplicable due to the Facility's location in and around the Environmental Areas.<sup>90</sup> According to the GBT Assessment, the 5-year succession timeframe is erroneous because not all grasslands are the same, and the grasslands located at the Facility Site are agricultural hayfields rather than scrub-shrub or forest.<sup>91</sup> This timeframe, as noted by GBT<sup>92</sup>, was set by ORES and in consultation with NYSDEC as part of the mitigation requirements that will help solar projects like the Facility's construction and operation result in a net conservation benefit.<sup>93</sup> When ORES drafted the USCs and related mitigation

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<sup>88</sup> Appendix 12-E, Net Conservation Benefit Plan, Record DMM Item No. 70.

<sup>89</sup> Draft Permit, pg. 37, Record DMM Item No. 80.

<sup>90</sup> GBT Petition, pg. 37, Record DMM Item No. 84.

<sup>91</sup> GBT Petition, Exhibit A, pgs. 18-19, Record DMM Item No. 84.

<sup>92</sup> GBT Petition, pg. 36, Record DMM Item No. 84.

<sup>93</sup> Assessment of Public Comments on the ORES regulations, pgs. 131-132.

requirements, they did so after reviewing the many certificate conditions developed throughout the previous Article 10 process, and after consulting with various state agencies that provided both substantive expertise and experience with siting large scale renewable energy projects across the various environmental landscapes in New York State.<sup>94</sup> The agencies with both substantive expertise and experience include the NYSDEC as mentioned above, as well as the New York State Department of Public Service (NYSDPS), the New York State Department of Agriculture and Markets (NYSAGM), and the Office of Parks, Recreation and Historic Preservation (OPRHP).

The 5-year timeframe is based on the scientifically determined understanding that, without active management, grassland areas naturally progress toward woody vegetation dominance within approximately five years.<sup>95</sup> According to the NYSDEC, areas that have woody vegetation dominance have reduced suitability for grassland-dependent species.<sup>96</sup> Without active management practices such as mowing, grazing, or prescribed burns, open grassland areas tend to undergo natural succession and reduce the habitat's suitability for grassland-dependent bird species.<sup>97</sup> The Facility ensures the land remains in grassland habitat rather than transitioning into successional forest or being converted for housing or warehouse development. By maintaining open, herbaceous cover through scheduled mowing and habitat management, the site preserves critical breeding and wintering grounds for grassland bird species. For a 30-year project, such as the Facility, the 5-year timeframe is appropriate based on NYSDEC's analysis. NYSDEC made this calculation by dividing the life of the project by the years of habitat suitability to determine the number of successional lifecycles during a project's lifetime.<sup>98</sup> The number of successional lifecycles is then reduced by one to account for the absence of a net conservation benefit during the first lifecycle.<sup>99</sup> The Applicant's mitigation efforts incorporate these determinations, and the claims by the GBT that the 5-year timeframe does not work with the mitigation ratio for renewable

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<sup>94</sup> Assessment of Public Comments on the ORES regulations, pg. 7.

<sup>95</sup> Attachment A: Avian Memorandum, pg. 15.

<sup>96</sup> Attachment A: Avian Memorandum, pg. 15.

<sup>97</sup> Attachment A: Avian Memorandum, pg. 14.

<sup>98</sup> Attachment A: Avian Memorandum, pg. 15.

<sup>99</sup> Attachment A: Avian Memorandum, pgs. 14-15.

energy projects such as the Facility to achieve a net conservation benefit go against science and years of practice implemented by the NYSDEC and ORES.<sup>100</sup>

GBT and Mr. Merriman's assertions also do not take into consideration the fact that ORES has the opportunity to deviate from the USCs if the Office determines that due to a proposed Facility or unique environmental factors about a proposed site, additional protections are required. As evidenced by Exhibit 12 and the many consultations leading to the development and revision of Exhibit 12, ORES has reviewed the proposed Facility, the agricultural lands it is sited on as well as the surrounding area and determined that the mitigation ratios including the 5-year habitat succession timeframe are sufficient.

Notably, despite GBT and the GBT Assessment's staunch opposition to the 5-year timeframe, GBT proposes a higher mitigation ratio, but retains the 5-year timeframe in their settlement offer.<sup>101</sup> For the reasons outlined above, GBT's disagreement with ORES's use of the 5-year timeframe does not raise a substantive and significant issue.

*(b) The Regulatory Mitigation Ratios Are Sufficient and Include Any Potential Impacts to the Environmental Areas*

As previously addressed, the Environmental Areas do not create unique enough environmental concerns that impact mitigation calculations require a deviation from the regulatory mitigation ratios included in the *Draft Permit*. GBT's assertions are merely generalized statements that do not raise site-specific issues but rather discuss potentially negative impacts from the Facility based on solar studies conducted in California, Wisconsin, and wind projects in the United Kingdom. Each of these studies took place in significantly different environmental landscapes, topography, weather patterns, and grassland bird species composition than upstate New York. Additionally, the mitigation ratios established in the Article VIII USCs were set after consulting with the NYSDEC, the very state agency that GBT continues to reference throughout their Petition and Exhibits.

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<sup>100</sup> Attachment A: Avian Memorandum, pg. 15.

<sup>101</sup> GBT Petition, Exhibit J, pg. 3, Record DMM Item No. 84.

GBT proposes a mitigation ratio that is significantly and unnecessarily larger than the proposed 0.4 for breeding and 0.2 for wintering ratios established by the USCs. The ratios proposed by GBT are 1:1 for breeding and 1:1 for wintering.<sup>102</sup> These proposed ratios are 2.5 times the breeding ratio and 5 times the wintering ratio that ORES has already determined to be sufficient to protect grassland birds as a result of the Facility's construction and operation. GBT also refers to the letter from the Audubon Society that requests a 3:1 ratio for breeding and a 1:1 ratio for wintering.<sup>103</sup> The mitigation ratio proposed by Audubon is 7.5 times the breeding ratio established by ORES. Neither the GBT nor the Audubon provide scientific site-specific information to justify the proposed ratios other than a general decline in grassland bird species population.

The mitigation ratio proposed by GBT also contradicts NYSDEC's direct testimony regarding the mitigation process and determination of the number of acres needed for the life of the project.<sup>104</sup> According to the NYSDEC,

*The Department is not stating that the Applicant must acquire the total [occupied habitat acreage] at the onset of the project and continue to maintain it for the life of the project to achieve net conservation benefit. Rather, the net conservation benefit can be accomplished by conserving and properly maintaining a lesser amount of land for the life of the project. The total amount of land and time that it must be managed depends on several factors, including the: (i) existing condition of the target parcel(s) to be managed (whether currently in a condition suitable for use by the target species, or need to be restored to quality grassland condition); (ii) expected amount of time it would take, absent management, for grassland habitat in the area to transition to a condition that is predominately unsuitable for use by the target species (years of habitat suitability) (for this Project, the Department has determined this to be five years); and (iii)*

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<sup>102</sup> GBT Petition, Exhibit J, Record DMM Item No. 84.

<sup>103</sup> GBT Petition, Exhibit G, pg. 7, Record DMM Item No. 84.

<sup>104</sup> Attachment A: Avian Memorandum, pg. 16.

*number of years the Project is expected to be operational (life of the Project).*

Taking into consideration the successional lifecycles used by ORES, the 0.4 and 0.2 breeding and wintering mitigation ratios set by ORES represent 2:1 for breeding habitat and 1:1 for wintering habitat impacts.<sup>105</sup> Following this methodology, the Facility requires 10.71 acres for winter season mitigation and 205.41 acres for breeding season mitigation, resulting in a total of 216.12 acres of mitigation.<sup>106</sup> Ultimately, GBT's claims that the mitigation ratios do not constitute a net benefit are not supported by the regulatory agencies. The mitigation process advocated for by the NYSDEC has been in place for many years. Also, claims that the Facility's use of 0.4 and 0.2 for mitigation ratios is inadequate are incorrect based on information directly from ORES and the NYSDEC. The 2:1 impact to mitigation ratio, when divided by five (to reflect habitat succession) yields effective mitigation ratios of 0.4 for breeding habitat and 0.2 for wintering habitat.<sup>107</sup> GBT's argument that the mitigation process is inadequate and should be abandoned for the Facility due to the Facility's location in and around the Environmental Areas lacks practical, scientific, and legal reasoning.

Accordingly, GBT has not met the burden of showing that its claims regarding the mitigation ratios are both substantive, raising a factual dispute that could result in permit denial or major modification, or significant supported by credible evidence that would materially affect the outcome. GBT's disagreement with the Draft Permit requirements is nothing more than a policy disagreement and therefore does not create an issue for adjudication.

*(c) An Enhanced Mitigation Ratio is Not Necessary*

For all of the reasons discussed above, an enhanced mitigation ratio is not necessary because the mitigation ratios proposed in the Draft Permit are enough to protect grassland birds and ensure that the Facility as proposed achieves a net conservation benefit. GBT references letters in Exhibit G from Audubon, the New York State Ornithological Association, as well as various

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<sup>105</sup> Attachment A: Avian Memorandum, pg. 16.

<sup>106</sup> Attachment A: Avian Memorandum, pg. 16.

<sup>107</sup> Attachment A: Avian Memorandum, pg. 16.

public comments that support an enhanced mitigation ratio.<sup>108</sup> The Audubon letter claims that the Facility's construction and operation will negatively impact Bobolink, Savannah, Vesper, and Grasshopper Sparrows, Horned Lark, and Eastern Meadowlark, as well as threatened and endangered species such as the Short-eared Owl, Sedge Wren, and Northern Harrier.<sup>109</sup> The Facility has been designed to avoid, minimize, and mitigate impacts and where impacts are unavoidable, has prepared a NCBP to ensure that the Facility will have a net conservation benefit that will benefit all of the species noted by Audubon.

The approach used by ORES is not only scientifically grounded but also more ecologically robust than a standard 1:1 ratio requested by GBT, because the adjustment accounts for the time-lag inherent in habitat recovery and ensures that restored or managed lands reach functional maturity before being credited toward mitigation. In fact, using the flat 1:1 ratio fails to incorporate habitat development timelines and may overestimate the immediate conservation value of newly established sites.<sup>110</sup>

Additionally, ORES already determined that additional grassland habitat due to habitat quality is not required and the regulatory ratios achieve a net conservation benefit. In the Tracy Solar proceeding, the proposed solar energy facility is located in Jefferson County near a GBCC similar to the Washington County GBCC and was also located in an IBA.<sup>111</sup> The Tracy Solar Facility application documented impacts of 117 acres of breeding habitat and 47.85 acres of wintering habitat. ORES and the NYSDEC ultimately concluded, even after taking into consideration the project's location in an IBA, that applying a 0.4 mitigation ratio for breeding habitat and a 0.2 ratio for wintering habitat was sufficient to achieve a net conservation benefit for grassland bird species.<sup>112</sup> Therefore, the regulatory mitigation ratios are appropriate for the Facility as well, based on the mitigation efforts described in the Application and despite the Facility's location in and around the Environmental Areas.

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<sup>108</sup> GBT Petition, Exhibit G, Record DMM Item No. 84.

<sup>109</sup> GBT Petition, Exhibit G, pg. 1, Record DMM Item No. 84.

<sup>110</sup> Attachment A: Avian Memorandum, pg. 16.

<sup>111</sup> Attachment A: Avian Memorandum, pg. 16.

<sup>112</sup> Attachment A: Avian Memorandum, pg. 16.

Ultimately, the letters provided in Exhibit G of GBT's Petition do nothing more than discuss concerns with the Facility being sited in the Environmental Areas, and request that a significantly higher mitigation ratio be applied. These general concerns are nothing more than disagreements with the ORES mitigation ratio. The concerns do not provide specific facts related to the Facility other than it is unsightly and impacts grassland bird habitat. Therefore, they do not raise substantive and significant issues warranting party status or an adjudicatory hearing.

**(3) The Parcels Identified for Conservation are Still Available and Will Allow the Facility to Achieve a Net Conservation Benefit**

According to GBT, the Applicant's proposed NCBP is flawed and "now infeasible," and the Applicant's description of GBT's involvement is "deceptive."<sup>113</sup> Both of these statements are incorrect and GBT, along with the Agricultural Stewardship Association (ASA), has incorrectly interpreted the language of the conservation easements.

The Applicant has been transparent with GBT since the early phases of the application process and at no point in the process has done anything that could even remotely be considered deceptive. The Applicant has also met individually with GBT numerous times, along with an individual meeting with the Audubon Society on May 6, 2022.<sup>114</sup> The Applicant and the Grassland Bird Trust have engaged in sustained and meaningful dialogue over a period of five years in relation to their partnership on the Project. These interactions have included both in-person and virtual meetings, specifically held on the following dates: October 2, 2019; January 11, 2022; April 26, 2022; June 15, 2023; April 18, 2024; April 23, 2025; and September 15, 2025. In addition to these scheduled meetings, the parties maintained continuous communication through numerous concurrent email exchanges. These threads served to reinforce the collaborative relationship and facilitated real-time information sharing, thereby ensuring transparency and continuity throughout the engagement.

*(a) The Parcels Identified for Conservation are Still Available*

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<sup>113</sup> GBT Petition, pg. 41, Record DMM Item No. 84.

<sup>114</sup> Application, Exhibit 2: Overview and Public Involvement, Revision 1, pg. 2-11, Record DMM Item No. 70.

According to the ASA, the Applicant's proposed mitigation on the Faille parcels would violate the terms of the conservation easements, making the proposed mitigation no longer an option.<sup>115</sup> However, the ASA's point focuses on the incorrect section of the conservation easements. According to the ASA, the Applicant's plans are inconsistent with the easements' terms prohibiting activities that would, unreasonably restrict or regulate Farm Operations in contravention of the purposes of Article 25-AA of the Agriculture and Markets Law, "because the haying and grazing schedules are too restrictive."<sup>116</sup> However, the NYSDEC and ORES recommend that mowing be avoided between April 23 and August 15 anyway to protect ground-nesting birds, particularly grassland species.

The easement referenced by ASA allows for the implementation of grassland birds mitigation pursuant to the definition of Agricultural Use. "Agricultural Use" is defined as activities necessary to, "be actively enrolled in any federal or state or local program whose intent is to temporarily suspend (for a specified period of one or more years or crop seasons) the production of Crops, Livestock and Livestock Products for the stipulated purpose of soil and water conservation, wildlife habitat, or similar conservation purpose."<sup>117</sup> By allowing the parcels proposed for mitigation to participate in the mitigation process outlined by the Article VIII permitting regime and approved by ORES, a state agency, the parcels meet the defined use of being actively enrolled in a state program whose intent is to temporarily suspend the production of crops, livestock and livestock products for the stipulated purpose of grassland habitat. The language of the easement expressly allows for this exception.

Despite ASA's disagreement, the Applicant's proposal is permissible as an enrollment in a state-approved wildlife habitat program. The ASA claims that Public Service Law Article VIII is "not the type of program referred to in that section," and refers to the USDA Conservation Reserve Program as an example of what would be permitted.<sup>118</sup> However, the USDA Conservation program is not discussed in the easements at all, let alone the section ASA is

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<sup>115</sup> GBT Petition, Exhibit F, pg. 2, Record DMM Item No. 84.

<sup>116</sup> GBT Petition, Exhibit F, pg. 6, Record DMM Item No. 84.

<sup>117</sup> Attachment C: Conservation Easements.

<sup>118</sup> GBT Petition, Exhibit F, pg. 7, Record DMM Item No. 84.



referring to. Additionally, the language of the easement only refers to “any federal or state or local program,” and does not provide other qualifying factors.<sup>119</sup> The ASA cannot agree to the broad language of the easements and then decide that a state program does not qualify and the parcels’ enrollment is not an “actual enrollment in a program,” merely because they do not like the program.<sup>120</sup>

The ASA also argues that the Applicant’s plans are not compatible with the purpose of the easements that is defined as “preventing the conversion of the Property to non-farm uses, except for those allowed herein.”<sup>121</sup> This is not true, because as discussed above, the ASA is still allowed to use the properties for “Agricultural Use” as defined by the conservation easement by enrolling the parcel in the Article VIII mitigation process to preserve grassland bird habitat. In addition to the expressly permitted mitigation options, the Applicant is committed to working with the ASA to support successful reproduction and long-term grassland bird habitat viability while also meeting the requirements of the agricultural easement and maintaining the quality of the parcel. As such, the Applicant provided ASA a grazing plan evaluation to identify the potential methods for continuing agricultural practices on the mitigation parcels while still conserving land for grassland bird mitigation. Specifically, the Applicant identified that the acreage of both land parcels totals to 357 acres, and after designating 216 acres for grassland bird mitigation and haying within the best management practice breeding bird windows, 141 acres remain with unrestricted use. The Applicant also proposed that an 86-acre portion of the unrestricted 141 acres could be incorporated into a grazing plan, which would serve to further enhance the land's agricultural use.

*(b) The Mitigation Parcels Will Allow the Facility to Achieve a Net Conservation Benefit*

GBT, through Mr. Merriman's report, argues that even if the Applicant is allowed to use the ASA parcels, the Facility will not achieve a net conservation benefit due to the lack of data on the parcel.<sup>122</sup> This argument is flawed based on the site visits and environmental studies discussed below.

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<sup>119</sup> Attachment C: Conservation Easements.

<sup>120</sup> GBT Petition, Exhibit F, pg. 7, Record DMM Item No. 84.

<sup>121</sup> GBT Petition, Exhibit F, pg. 6, Record DMM Item No. 84.

<sup>122</sup> GBT Petition, Exhibit A, pg. 15, Record DMM Item No. 84.

As part of the Applicant's preparation of the NCBP, and their continued consultation efforts with GBT, the Applicant conducted a wintering grassland raptor study with a view of the proposed mitigation parcels, where both Short-eared Owls and Northern Harriers were observed flying to and hunting within the parcel.<sup>123</sup> Although the Applicant did not have access to the parcels at the time of the survey conducted for the Project, a site visit was conducted on the proposed mitigation parcel at the onset of the 2024 breeding season. In fact, during a site visit on April 18, 2024, attended by representatives from the GBT, several key grassland bird species were directly observed on the parcel.<sup>124</sup> Notably, several Short-eared Owls, Northern Harrier, Savannah Sparrows, and an Eastern Meadowlark were observed on the parcels, indicating that the mitigation parcels have suitable habitat conditions and conservation potential.<sup>125</sup> Additionally, at the time of the visit and the observed species, the agricultural easement and associated practices were already in place, contributing to habitat conditions suitable for grassland species and ultimately affirming the viability of the mitigation parcel for grassland bird conservation and directly supports the objectives outlined in the Applicant's NCBP.<sup>126</sup> The final NCBP will also confirm the viability of the mitigation parcels.

GBT also argues that the proposed mitigation may be detrimental to Northern Harrier breeding and may make the habitat less suitable for Northern Harrier breeding due to the annual mowing schedule within the appropriate grassland bird best management practice mowing windows proposed by the Applicant and supported by the NYSDEC.<sup>127</sup> However, current agricultural operations on the mitigation parcels, where the grassland birds were observed indicating a suitable habitat under current practices, involve mowing more than once per year.<sup>128</sup> The Applicant intends to collaborate with the ASA to better align conservation priorities and improve the habitat to encourage additional grassland bird habitat by only allowing mowing during

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<sup>123</sup> Attachment A: Avian Memorandum, pg. 12.

<sup>124</sup> Attachment A: Avian Memorandum, pg. 13.

<sup>125</sup> Attachment A: Avian Memorandum, pg. 12.

<sup>126</sup> Attachment A: Avian Memorandum, pg. 16.

<sup>127</sup> GBT Petition, Exhibit A, pgs. 14-15, Record DMM Item No. 84.

<sup>128</sup> Attachment A: Avian Memorandum, pg. 10.

the best management practice windows for breeding birds. Therefore, the Applicant's proposed management of the mitigation parcels will positively impact all grassland breeding birds, including the Northern Harrier as current agricultural practices reduce breeding success. Also, the agricultural easement referenced by the ASA does not apply to the entire proposed mitigation area. The size of the combined mitigation parcels is approximately 357 acres. Only 157 acres of the mitigation area are under ASA's agricultural easements.<sup>129</sup> The remaining 59 acres will be managed in accordance with the NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) that are specifically designed to support grassland bird habitat conservation and that GBT includes as Exhibit H.<sup>130</sup> The ASA maintains the freedom to use the remaining land as they choose.

Additionally, the Applicant's mitigation efforts will not make the habitat any less suitable for Northern Harriers. GBT argues that the Facility's solar array placement would reduce the area and broader connectivity of a relatively large, contiguous grassland area. As discussed numerous times in the Application and this response, the Applicant has modified<sup>131</sup> design and taken deliberate steps to minimize impacts to grassland bird habitat, specifically the Northern Harrier and Short-eared Owl. One of these deliberate steps was the Applicant's strategic choice of the proposed mitigation parcels that will enhance habitat connectivity by linking 216 acres of newly conserved land to the existing 478-acre protected grassland bird area which ultimately offsets potential impacts while also strengthening the long-term viability of habitat for priority species such as the Short-eared Owl and Northern Harrier.<sup>132</sup> GBT's concern does not provide project-specific evidence capable of altering the outcome of this proceeding.

For the foregoing reasons, GBT has not met the burden of showing that its claims are both substantive, raising a factual dispute that could result in permit denial or major modification, or significant supported by credible evidence that would materially affect the outcome. GBT and the

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<sup>129</sup> Attachment A: Avian Memorandum, pg. 11.

<sup>130</sup> Attachment A: Avian Memorandum, pg. 16; GBT Petition, Exhibit H, Record DMM Item No. 84.

<sup>131</sup> GBT Petition, Exhibit A, pg. 15, Record DMM Item No. 84.

<sup>132</sup> Attachment A: Avian Memorandum.

ASA have merely misinterpreted the language of the conservation easement and are skeptical of the proposed mitigation and therefore does not create an issue for adjudication.

**(4) The Remaining Exhibits Do Not Raise Substantive or Significant Issues and GBT Should Not Receive Party Status**

GBT argues that its' remaining exhibits contain substantive and significant issues that must be addressed. Although the Applicant has already directly addressed Exhibits A, B, C, F, G, and J, the Applicant will now directly address Exhibits D, E, H, and I.

*(a) The Use of Senator Patricia Fahy's Affidavit is Inappropriate and Irrelevant to this Proceeding*

GBT includes an affidavit of opposition from New York State Senator Patricia Fahy as Exhibit D of its petition to suggest that ORES has "established a standard practice of ignoring evidence of unique local concerns and circumstances and standing behind the Uniform Standard Conditions" and that ORES's refusal to form site specific conditions violates the purpose of the Article VIII process.<sup>133</sup> The use of the Senator's affidavit is inappropriate and irrelevant because the affidavit was written for completely different projects, in a different location, and for a different purpose. Senator Fahy's affidavit was written for the Flat Creek and Mill Point projects<sup>134</sup> two proposed projects located in Montgomery County.<sup>135</sup> The Fort Edward Facility is located in Washington County, which is not even in Senator Fahy's district. The affidavit was also written with the primary focus of the Senator's concerns related to local law waivers by ORES and impacts to agricultural land, neither of which are potential issues being raised by GBT in any of its exhibits. GBT's concerns are solely related to impacts to grassland bird habitats. By referencing this affidavit, GBT is taking the Senator's unrelated concerns about a different project and trying to assert them as concerns about a completely different project that does not have the same issues and is not even within the Senator's district. This in no way raises a substantive and significant issue because it is not credible evidence that has the potential to materially change the outcome of this proceeding. By referencing this affidavit, GBT is taking a Senator's unrelated concerns about

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<sup>133</sup> GBT Petition, pg. 18, Record DMM Item No. 84.

<sup>134</sup> GBT Petition, Exhibit D, Record DMM Item No. 84

<sup>135</sup> GBT Petition, Exhibit D, Record DMM Item No. 84.

a specific project and trying to assert them as concerns about a completely different project that does not have the same issues and is not even within the Senator's district. This in no way raises a substantive and significant issue.

*(b) NYSDEC's 2016 Press Release Does Not Raise a Substantive and Significant Issue in this Proceeding*

Exhibit E of GBT's petition is a press release from NYSDEC that announces the opening of the Washington County IBA during Earth Week in 2016.<sup>136</sup> This press release does not discuss the Project and was issued 8 years before the Applicant submitted their application. GBT includes this press release in an attempt to demonstrate that the area is unique and requires additional protections and to ultimately suggest that the Facility will negatively impact the IBA.<sup>137</sup> This press release along with GBT's claim, as previously discussed above, is a generalized assertion that does not provide scientific reasons why the Facility will negatively impact the IBA. A press release issued 8 years before the Applicant submitted their Application in 2024 cannot possibly take into consideration the efforts that the Applicant took to design the Facility, along with drafting the NCBP that not only avoids, minimizes, and mitigates impacts, but also ensures that the Facility achieves a net conservation benefit. These same efforts were also reviewed and confirmed by ORES through multiple consultations.

As discussed above, the Applicant has mitigated any potentially adverse impacts to the IBA through the submission of the NCBP that was approved by ORES and will continue to mitigate impacts throughout the construction and operation of the Facility through the terms of the *Draft Permit*. The NYSDEC press release of the Washington County IBA does not raise a substantive and significant issue and the Applicant has addressed potential impacts to the IBA as discussed above. Therefore, GBT's reference to a press release that is 9-years old does not raise a substantive and significant issue because it does not take into consideration the Applicant's efforts to avoid, minimize, and mitigate impacts to the IBA.

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<sup>136</sup> GBT Petition, Exhibit E, Record DMM Item No. 84.

<sup>137</sup> GBT Petition, pgs. 14-15, Record DMM Item No. 84.

*(c) The NYSDEC Grassland Bird Strategy Does Not Raise a Substantive and Significant Issue in this Proceeding*

GBT includes the NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) as Exhibit H.<sup>138</sup> However, GBT does not discuss the NYSDEC Strategy at all except for claiming that the Facility, along with the NCBP, are not consistent with the Strategy.<sup>139</sup> This method of potential issue introduction is similar to GBT's other attempts to introduce potential "issues" by using an unrelated policy document to claim the Facility will not achieve a net conservation benefit for grassland birds. In fact, the Facility has been designed to directly align with the NYSDEC Strategy. Some of the goals of the NYSDEC Strategy include, "to maintain, restore, enhance, and expand grassland bird habitat," and "to provide direction and guidance on the management of WMAs as one element of the Division's implementation of grassland bird conservation efforts," as well as "to guide conservation actions that will ensure that populations of the target species do not fall below minimum viability thresholds."<sup>140</sup>

As discussed in Exhibit 12 of the Application, the Applicant developed an NCBP demonstrating that proposed mitigation efforts will result in a net conservation benefit on each of the species and other applicable requirements to fund and execute the proposed mitigation for the life of the Facility.<sup>141</sup> Additionally, as discussed above, the Applicant designed the Facility to completely avoid and eliminate any potential impacts to the WMA, which the NYSDEC Strategy establishes as the anchor field to any GBCC and the most important area to preserve. Therefore, it is unclear what GBT means by the statement that the Facility is not consistent with the NYSDEC Strategy. In fact, the Applicant will manage the remaining 59 acres in the mitigation area discussed above in accordance with the NYSDEC Strategy.<sup>142</sup> Ultimately, GBT's introduction of the

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<sup>138</sup> GBT Petition, Exhibit H, Record DMM Item No. 84.

<sup>139</sup> GBT Petition, pg. 29, Record DMM Item No. 84.

<sup>140</sup> GBT Petition, Exhibit H, pg. 7, Record DMM Item No. 84.

<sup>141</sup> Application, Exhibit: NYS Threatened or Endangered Species, pg. 12-9, Record DMM Item No. 70.

<sup>142</sup> Attachment A: Avian Memorandum, pg. 11.

NYSDEC Strategy does not introduce a substantive and significant issue, or any issue at all for that matter.

*(d) The Proposed Legislative Changes to Article VIII From Assemblywoman Woerner Do Not Raise a Substantive and Significant Issue in this Proceeding*

To suggest that an increased mitigation ratio is the appropriate action, GBT includes proposed legislation from Assemblywoman Carrie Woerner of the 113 District as Exhibit I of their petition.<sup>143</sup> The proposed legislation, if passed, would change the mitigation ratio to 3:1 for occupied grassland bird breeding habitat and 1:1 for wintering habitat for siting electric transmission facilities and solar facilities.<sup>144</sup> The issues statement proceeding for the Fort Edward Solar project is not the appropriate place to introduce proposed legislation. Especially to use that proposed legislation that does not take into consideration any of the mitigation efforts that have been reviewed and are described throughout the Application, to argue what a mitigation ratio should be for the Facility. Proffering proposed legislation, that has not been acted on in 10 months, and is not specific to the Facility is nothing more than a general policy disagreement with the USCs and does not provide scientific or project specific information that creates a substantive and significant issue.<sup>145</sup> The mitigation ratio was set through consultations between ORES and the NYSDEC and has been used for years as the appropriate standard. Similar to the Fahy affidavit, the NYSDEC press release, and the NYSDEC Grassland Bird Strategy, GBT is attempting to introduce a general policy issue as a project specific issue in the Fort Edward Solar project issues statement proceeding. This proceeding is not the appropriate place for generalized policy concerns. Therefore, the proposed legislation does raise a substantive and significant issue.

**E) RESPONSES TO PUBLIC COMMENTS**

An in-person Public Statement Hearing was held on September 30, 2025, at the Durkeetown Church, 2 Durkeetown Road, Fort Edward, New York 12828. Opportunities for

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<sup>143</sup> GBT Petition, Exhibit I, Record DMM Item No. 84.

<sup>144</sup> GBT Petition, Exhibit I, pg. 3, Record DMM Item No. 84.

<sup>145</sup> New York State Assembly, Legislative Information Tracker, [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A03959&term=2025&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03959&term=2025&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y).

public comment remained open through October 3, 2025, and members of the public wishing to comment were able to submit comments to the ORES DMM docket for this proceeding.

The Applicant responds to all public comments made in writing through October 3, 2025, and at the public comment hearing in the attached **Attachment D**. In summary, there were a total of 273 comments received.

Some of the comments received were not directly relevant to the content of the *Draft Permit*, apart from general criticisms about local law waivers granted by ORES. However, the Applicant has endeavored to provide responses to the substance of these comments, while not required to do so where the comments are not relevant to the *Draft Permit*.

In general, adjudicable issues can only be raised by potential parties, ORES or the applicant. However, under 16 NYCRR § 1100-8.3(c)(1)(ii), an issue may be adjudicable if a public comment “on a draft siting permit condition published by the office raise a substantive and significant issue.” Based on the text of the regulations, public comments which are unrelated to conditions in the *Draft Permit* cannot raise adjudicable issues. In general, aside from statements in support of the project, the most common issues raised in the public comments included grassland bird impacts, agricultural impacts, property values, and consistency with local laws. Each of these common issues are addressed in Attachment D. As discussed herein, comments which merely provide an opinion disagreeing with ORES’s decision to waive local laws raise legal issues which are not sufficiently substantiated to warrant adjudication at an evidentiary hearing. Further, disagreements with general statewide renewable energy policies or implementation of those policies are not factual issues appropriate for adjudication at an evidentiary hearing in a specific permit proceeding.

Overall, the matters raised by public comments in this proceeding are not substantive—they do not involve an inquiry into whether the Applicant can meet applicable standards—nor are they significant—they do not have the potential to result in the denial of the permit or imposition of additional permit conditions. Therefore, the public comments do not raise adjudicable issues under 16 NYCRR § 1100-8.3(c)(1)(ii).]]



**F) CONCLUSION**

For the reasons set forth herein, the potential party's submissions fail to raise substantive or significant issues requiring adjudication in this proceeding. Moreover, no substantive or significant issues for adjudication have been raised by the public comments submitted on the *Draft Permit*.

Therefore, the Applicant respectfully requests that the ALJs find that no disputed issues of fact exist, that no adjudicatory hearing is needed in this proceeding, and that ORES staff can continue processing the Application to issue the requested siting permit consistent with 16 NYCRR § 1100-8.3(c)(5). Further, we do not believe any remaining legal issues require briefing or further development. However, to the extent the ALJs feel limited briefing is required to further address the merits of any remaining legal issues, the Applicant respectfully requests that the ALJs set a schedule for such briefing without delay.

Submitted by:

YOUNG/SOMMER LLC

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