



Department of Public Service
Office of Renewable Energy Siting
and Electric Transmission

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RESPONSE TO PETITION FOR PARTY STATUS AND
STATEMENT OF ISSUES BY THE APPLICANT

In the Matter of the

APPLICATION FOR A SOLAR FACILITY PERMIT PURSUANT TO
ARTICLE VIII OF THE PUBLIC SERVICE LAW

of

FORT EDWARD SOLAR LLC

Town of Fort Edward, Washington County

ORES DMM Matter No. 23-03023

October 27, 2025

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I. INTRODUCTION

Pursuant to Article VIII of the Public Service Law (PSL) and implementing regulations at 16 NYCRR Part 1100, Fort Edward Solar LLC (Fort Edward Solar or the Applicant) filed a siting permit application (Application) with the Office of Renewable Energy Siting and Electric Transmission (the Office or ORES). The Applicant has requested a permit for the siting, design, construction, operation, maintenance, and decommissioning of a 100 megawatt (MW) solar facility (Facility or Solar Facility) located in the Town of Fort Edward, Washington County. If approved, the Facility would produce approximately 100 MW of renewable energy and reduce greenhouse gas emissions by approximately 45,000 tons of carbon dioxide annually.¹

Following a comprehensive review of the Application in accordance with PSL Article VIII, Office Staff (Staff) issued a Draft Permit for the proposed Facility on July 28, 2025.² The Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure (Combined Notice) was also issued on July 28, 2025.³

The Applicant submitted a letter indicating that it had not identified any substantive or significant issues requiring adjudication and that it found the terms of the Draft Permit acceptable.⁴

The Town of Fort Edward (Town) did not file a statement of compliance with Local Laws and Regulations or a petition for party status. A review of Application documents conducted by C.T. Male Associates for the Town was filed as a public comment on October 3, 2025.⁵

¹ Record 28, Exhibit 17: Consistency with Energy Planning Objectives at 17-6; 17-11.

² Record 80, Draft Permit dated July 28, 2025 (Draft Permit).

³ Record 81, Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure (Combined Notice).

⁴ Record 85, Applicant Statement of Issues.

⁵ Public Comment No. 247, C.T. Male Associated Review Comments.

Grassland Bird Trust, Inc. (GBT) submitted a Petition for Full Party Status and Statement of Issues for Adjudication (GBT Petition) proposing four (4) issues for adjudication.⁶

Based upon a comprehensive review of the record (Record), Staff recommends a finding that no substantive and significant issues have been raised requiring adjudication under 16 NYCRR § 1100-8.3(c), and that the Office continue processing the Application to issue the requested siting permit, including issuance of a written summary and assessment of public comments received during the public comment period in accordance with 16 NYCRR § 1100-8.3(c)(5).

II. PROCEDURAL BACKGROUND

A. ORES Pre-Application Procedures

An important cornerstone of the PSL Article VIII process is pre-application consultation with local agencies and community members who may be adversely impacted by the siting of a proposed solar facility. In an effort to provide early identification of critical natural and cultural resource issues and avoid, minimize or mitigate potential adverse impacts to such resources to the maximum extent practicable, the Applicant completed pre-application consultation with the Office and involved local and State agencies at the earliest point possible in the Applicant's project planning process in compliance with 16 NYCRR § 1100-1.3(a) - (i).

With respect to local agencies and the community, the Applicant has been conducting outreach to stakeholders beginning in 2019, including “town officials, town boards, local elected officials, Washington County Industrial Development Agency, National Audubon Society, Grassland Bird Trust, snowmobile associations, and individual residents in the surrounding area.”⁷ The Applicant hosted a virtual open house for members of the host community on May 26, 2021; an in-person open house on April 18, 2023; and a second in-person open house on April 18, 2024.⁸ Representatives of the Applicant also communicated with representatives of the

⁶ Record 84, Grassland Bird Trust Petition for Full Party Status and Statement of Issues for Adjudication (GBT Petition).

⁷ Record 70, Exhibit 2, Overview and Public Involvement at 15.

⁸ Record 70, Exhibit 2, Overview and Public Involvement at 15.

Town of Fort Edward regarding its local laws on April 18, 2024, during a pre-application meeting as required by 16 NYCRR § 1100-1.3.⁹

On May 2, 2024, the Applicant published a 60-day notice of intent to file an application in accordance with the requirements of 16 NYCRR § 1100-1.3(d).¹⁰ This notice provided a project summary and served to inform local agencies and potential intervenors of the future availability of funding.

Consultation with other State agencies was completed during the pre-application process. This consultation included: the New York State Department of Environmental Conservation (NYSDEC) on impacts to wetlands, waterbodies, and threatened and endangered species; and the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) and State Historic Preservation Office (SHPO) regarding potential historic, archaeological, and cultural resources.

B. ORES Solar Facility Permit Application

The Applicant submitted its Application to the Office on August 22, 2024.¹¹ Upon receipt of the Application, submissions and materials were reviewed by subject matter experts from the Office and when applicable, NYSDEC, the New York State Department of Public Service (NYSDPS), OPRHP/SHPO, the New York State Department of Agriculture and Markets (NYSAGM), and other involved State Agencies. A Notice of Incomplete Application (NOIA) was issued on October 21, 2024.¹²

The Applicant requested permission to amend its application on January 17, 2025, stating that “[w]hile preparing the response to the NOIA, the Applicant has identified potential modifications to the facility design that will further reduce potential impacts to wetlands and threatened and endangered avian species, among

⁹ Record 70, Exhibit 2, Overview and Public Involvement at 15.

¹⁰ Record 10, Letter Filing Affidavits and publication of 60-Day Notice of Intent, Attachment 2, at PDF 107.

¹¹ Records 25-41, 49; see also Record 42, Notice of Application Filing and Availability of Local Agency Account Funding.

¹² Record 54, Notice of Incomplete Application (NOIA).

other impact reductions.”¹³ The Office reviewed Applicant’s submission and approved the amendment request on February 3, 2025.¹⁴ The Applicant supplemented its application as amended on February 3, March 28, and May 23, 2025.¹⁵ On May 27, 2025, the Office deemed the Application complete and in compliance with PSL § 142(1) and 16 NYCRR §§ 1100-4.1(c) and (g).¹⁶

C. Issuance of Draft Permit and Combined Notice

Pursuant to PSL § 142(2), the Office issued a Draft Permit for a Major Renewable Energy Facility on July 28, 2025.¹⁷ The Draft Permit was posted for public comment on the Office’s official public website at <https://dps.ny.gov/ores-permit-applications>, under DMM Matter Number 23-03023.

In issuing the Draft Permit, Staff considered the Record described herein and concluded that the proposed Solar Facility, together with applicable provisions of the Uniform Standards and Conditions (USCs) (subpart 4 of Draft Permit), necessary Site Specific Conditions (SSCs) (subpart 5 of Draft Permit), and applicable pre-construction and post-construction compliance filings (subpart 6 of Draft Permit), would comply with PSL Article VIII and applicable provisions of the Office’s regulations at 16 NYCRR Part 1100 and would avoid, minimize or mitigate, to the maximum extent practicable, potential significant adverse environmental impacts of the proposed Facility.

Also on July 28, 2025, the assigned Administrative Law Judges (ALJs) issued the Combined Notice.¹⁸ The Combined Notice established October 6, 2025, as the date for submission of all petitions for party status, municipal Statements of Compliance with Local Laws and Regulations, and the Applicant’s Statement of Issues.¹⁹ The Combined Notice also scheduled a public comment hearing on the Draft Permit to be

¹³ Record 61, Applicant Response to Notice of Incomplete Application and request to Submit an Amendment of an Application.

¹⁴ Record 67, ORES Response to Minor Amendment Request.

¹⁵ Records 66, 70-74, 77.

¹⁶ Record 78, Notice of Complete Application.

¹⁷ Record 80, Draft Permit.

¹⁸ Record 81, Combined Notice; see also 16 NYCRR § 1100-8.2.

¹⁹ Record 81, Combined Notice at 3 – 4; see 16 NYCRR §§ 1100-8.2(d)(3), 1100-8.4(b), 1100-8.4(d).

held at the Durkeetown Church, 2 Durkeetown Road, Fort Edward, New York, 12828 on September 30, 2025 at 6:00 p.m., with a public comment period extending through October 3, 2025, for the submission of written comments on the Draft Permit.²⁰

D. Public Hearing and Comment Period

On September 30, 2025, the Office held the in-person public comment hearing at the Durkeetown Church in Fort Edward, New York as required by the Combined Notice. Assigned ALJs Dawn MacKillop-Soller and John L. Favreau presided over the hearing, which took place at approximately 6:00 p.m. Twenty (20) people provided verbal comments.²¹

Twelve (12) speakers made comments in opposition to the Facility, providing comments on: (1) valuable grassland communities; (2) Important Bird Area; and (3) perceived inadequate mitigation.²²

Three (3) speakers also made comments not specific to the Facility, stating: (1) ORES should prioritize the existing portfolio before approving more applications; (2) concern over a rush to green energy; and (3) upstate New York is not ideal for solar.²³

Seven (7) speakers spoke in support of the Facility, providing comments on (1) job creation; (2) local hiring; and (3) opportunities for union membership.²⁴

By the conclusion of the written public comment period on October 3, 2025, the Office received approximately two hundred and fifty-nine (259) written public comments within that time frame and shortly thereafter. Approximately seventeen (17) individuals commented in support of the Facility noting the economic benefits of increased tax revenue for the host community and school districts, the right of private landowners to make decisions concerning their own property, the benefits of enhanced revenue on farm operation, and consistency with the State's renewable energy goals. Approximately 242 individuals commented in opposition to the Facility, of which approximately 191 expressed concerns about the impact the project will have

²⁰ Record 81, Combined Notice at 2; *see* 16 NYCRR §§ 1100-8.2(d)(1), 1100-8.3(a).

²¹ Record 83, Fort Edward Public Comment Hearing Transcript.

²² Record 83, Fort Edward Public Comment Hearing Transcript.

²³ Record 83, Fort Edward Public Comment Hearing Transcript.

²⁴ Record 83, Fort Edward Public Comment Hearing Transcript.

on grassland bird habitats, the declining bird populations across New York State and North America, the desire for the Applicant to exceed the regulatory minimum with regard to mitigation for impacts to grassland birds, the Facility's proximity to Audubon-designated Important Bird Area, and the importance of collaboration with GBT. Staff acknowledges these numerous comments voicing similar concerns regarding impacts to grassland birds, as well as specific comments submitted by the National Audubon Society, Agricultural Stewardship Association, American Bird Conservancy, the New York State Ornithological Association, and Dr. Susan Willson of St. Lawrence University.

Staff also acknowledges submission of two public comments by the Town of Fort Edward. Public Comment No. 157 is a letter dated September 29, 2025, written by Mr. Tim Fisher in his capacity as the Town Supervisor, indicating his belief that the proposed Facility has been responsibly designed and anticipating discussions regarding payment in lieu of taxes and host community agreements with the Applicant. Public Comment No. 247 is a review of certain documents in the Article VIII Application by C.T. Male Associates, Engineering, Surveying, Architecture, Landscape Architecture & Geology, D.P.C. directed to the Fort Edward Town Board.²⁵ Staff reviewed the comments submitted by the Town and respectfully finds that they do not raise substantive or significant issues, or issues which would impact Staff's recommendations for approval of advancing the permitting process.

These public comments will, to the extent they are not addressed in this Brief, be addressed in the Assessment of Public Comments should a Final Siting Permit be issued in this proceeding.

E. Applicant's Statement of Issues; Petitions for Full Party Status or Amicus Status; and Municipal Statements of Compliance with Local Laws and Regulations

The Combined Notice set October 6, 2025, as the date for submission of all petitions for full party status and amicus status, municipal Statements of Compliance with Local Laws and Regulations, and the Applicant's Statement of Issues, in compliance with 16 NYCRR §§ 1100-8.2(d)(3), 1100-8.4(d) and 1100-8.4(b),

²⁵ The Office infers that these are comments by the Town of Fort Edward. Chris Koenig (Project Manager, C.T. Male Associates) is identified as the commenter on DMM (Comment No. 247), but the attached comment letter is addressed to the "Fort Edward Town Board."

respectively.²⁶ The Combined Notice further set October 27, 2025, as the deadline for responsive briefing and the Applicant's response to public comments.²⁷

On October 6, 2025, the Applicant timely filed a letter indicating that it “has not identified any substantive or significant issue requiring litigation in this proceeding” and it “generally finds the terms of the Draft Permit acceptable.”²⁸ However, Applicant noted that sections (4.4)(o)(4) and (4.4)(o)(6) of the Draft Permit discuss construction requirements for Northern Long-eared Bats and bald eagles, but Exhibit 12: NYS Threatened or Endangered Species demonstrates that there are no known nests or roosts in the vicinity for these particular species.²⁹ The Applicant believes these provisions to be inapplicable to the Facility and requests that the Final Permit identify them as “Intentionally Omitted.”³⁰ Staff notes that these conditions are in place so that in the event qualifying nests or roosts are identified, no permit modification is required. Therefore, no revisions to the Draft Permit are necessary.

The GBT Petition was timely filed on October 6, 2025.³¹ GBT seeks full party status and raises four (4) issues for adjudication: (1) whether the draft permit fails to avoid, minimize and mitigate significant adverse impacts to grassland birds; (2) whether the uniform standard condition in the draft permit setting a default mitigation ratio of less than 1:1 will achieve a net conservation benefit; (3) whether the applicant has secured sufficient acreage to achieve a net conservation benefit, and; (4) whether any substantive or significant issues are raised by the exhibits attached to GBT's Petition.³² In addition, the Petition states: “In the alternative, if GBT is not awarded full party status, then amicus status is sought pursuant to 19 NYCRR §1100-8.4(g)(2).”³³

²⁶ Record 81, Combined Notice at 3.

²⁷ Record 81, Combined Notice at 4.

²⁸ Record 85, Applicant Statement of Issues.

²⁹ Record 85, Applicant Statement of Issues.

³⁰ Record 85, Applicant Statement of Issues.

³¹ Record 84, GBT Petition.

³² Record 84, GBT Petition at 30-44.

³³ Record 84, GBT Petition at 22.

III. FINDINGS AND DETERMINATIONS OF FACT

A. Avoidance, Minimization and Mitigation Standard

PSL Article VIII and the Office's regulations at 16 NYCRR Part 1100 establish a clear standard to apply in evaluating the potential significant adverse impacts that may result from the construction and operation of the proposed Fort Edward Solar Facility. Pre-application studies and required application exhibits, together with the permit's USCs and SSCs, form the basis of review for balancing resources, meeting the goals of the Climate Leadership and Community Protection Act (CLCPA)³⁴ and the Renewable Action through Project Interconnection and Deployment (RAPID) Act,³⁵ and evaluating the environmental and community benefits of the Facility. Applicants must show that potential significant adverse impacts would be avoided or minimized to the maximum extent practicable and offer mitigation measures to offset the unavoidable impacts of the Facility to the maximum extent practicable.³⁶

B. Applicant's Avoidance, Minimization and Mitigation Measures

The Applicant engaged in a comprehensive pre-application consultation process. Collectively, the information derived from the early consultation with the Town, community, the Office, and involved State agencies, as well as the delineations, consultations, and studies completed during the pre-application phase, led to the avoidance and minimization of potential impacts to resources during Facility siting. The siting and layout of the Facility as assessed throughout the Application phase shows how resources were balanced, and minimization and mitigation measures were applied to reduce potential significant adverse environmental impacts to the maximum extent practicable.

The Applicant has designed its proposed Solar Facility through a comprehensive and iterative site planning process to avoid, minimize or mitigate potential significant adverse impacts to wetlands, streams, agricultural resources, cultural resources, and other environmental and ecological resources, reflecting a

³⁴ Chapter 106 of the Laws of 2019.

³⁵ Chapter 58, part O, of the Laws of 2024.

³⁶ DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Final Decision of the Executive Director at 31-33.

successful balancing of competing interests consistent with the overall intent of PSL Article VIII.³⁷

C. Net Conservation Benefit

Pursuant to PSL § 138(1)(c), “ORES shall require that the application of uniform standards and conditions and site-specific conditions shall achieve a net conservation benefit to any impacted endangered and threatened species.” Under ORES regulations, the potential impacts to threatened and endangered (T&E) species must first be identified during the pre-application phase.³⁸ In compliance with 16 NYCRR § 1100-1.3(g), the Applicant completed a wildlife site characterization report summarizing existing public information on bird, bat and other species within five miles of the Facility site and consulted with the Office and NYSDEC regarding the surveys that would be required to assess potential significant adverse impacts to NYS Threatened or Endangered (T&E) species.³⁹

Following completion of breeding bird surveys and winter raptor surveys and additional consultation with the Office and NYSDEC on final survey results, the Office issued a Determination of Occupied Habitat, Incidental Take and Net Conservation Benefit (Take Determination) dated January 6, 2023, which stated the Facility would impact a total of 871.03 acres of avian T&E species occupied habitat.⁴⁰

Prior to filing the Application, the Applicant provided updated information to the Office on May 6, 2024, demonstrating modifications to the Facility layout that reduced impacts to grassland breeding and wintering occupied habitat by 168.36

³⁷ See e.g., High River Energy Center, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued March 11, 2021), at 110; Flint Mine Solar, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued August 4, 2021), at 65.

³⁸ 16 NYCRR § 1100-1.3(g).

³⁹ See Record 26, Appendix 12-A: Wildlife Site Characterization Report (Redacted).

⁴⁰ Record 70, Exhibit 12 (Revision 1): NYS Threatened and Endangered Species (Redacted) at 12-1; see also Record 26, Appendix 12-B: Wintering Grassland Raptor Report (Redacted); Record 27, Appendix 12-C: Breeding Bird Survey (Redacted); Record 70, Appendix 12-D (Revision 1): Pre-Application Consultation (Redacted).

acres and removed potential impacts to one species.⁴¹ Accordingly, the Office issued a revised Take Determination on June 14, 2024.⁴²

Under 16 NYCRR § 1100-2.13, Exhibit 12 of an application must include: the wildlife site characterization report; any pre-application survey reports; a copy of the Office's Take Determination; an identification and evaluation of avoidance and minimization measures and unavoidable potential impacts to T&E species if occupied habitat is confirmed or presumed at the site; and, for a facility that would adversely impact any T&E species or their habitat, a copy of a NCBP that complies with the Office's USCs.

Information provided by the Applicant as part of its August 22, 2024, Application indicated a further reduction of solar panels within the Facility site.⁴³ Therefore, the Office issued a revised Take Determination on October 18, 2024.⁴⁴

Following the issuance of the NOIA on October 21, 2024, the Applicant submitted a request to the Office to amend the Application, stating that the "Applicant has identified potential modifications to the facility design that will further reduce potential impacts to wetlands and threatened and endangered avian species, among other impact reductions."⁴⁵ On February 3, 2025, the Applicant provided updated information indicating a change in the Facility layout resulting in the removal and reduction of solar panels within identified occupied habitat.⁴⁶ The updated occupied habitat field analysis demonstrated further reductions in impacts to wintering and breeding raptor habitat and removal of all impacts to another species.⁴⁷

⁴¹ Record 70, Exhibit 12 (Revision 1): NYS Threatened and Endangered Species (Redacted) at 12-2.

⁴² See Record 70, Appendix 12-D (Revision 1): Pre-Application Consultation (Redacted).

⁴³ Record 70, Exhibit 12 (Revision 1): NYS Threatened and Endangered Species (Redacted) at 12-2.

⁴⁴ See Record 70, Appendix 12-D (Revision 1): Pre-Application Consultation (Redacted).

⁴⁵ Record 61, NOIA Amendment Letter.

⁴⁶ See Record 66, Letter Filing Occupied Habitat Data, Figure 1: Occupied Habitat Map Book (Redacted), Applicant Occupied Habitat Field by Field Analysis Submission Table; see also Record 68, Letter Clarifying Prior Submission.

⁴⁷ Record 66, Letter Filing Occupied Habitat Data.

Accordingly, the Office issued a revised Take Determination on March 20, 2025, which resulted in an estimated take of 513.52 acres of occupied breeding habitat for one species and 487.07 acres of occupied wintering habitat for two species, and a total impact to occupied habitat of 567.08 acres.⁴⁸ The revised Take Determination concludes that therefore, “the Applicant is required to develop and submit a Net Conservation Benefit Plan (NCBP) for the proposed Facility to minimize the significant adverse impacts(s) to these habitats” pursuant to 16 NYCRR §§ 1100-2.13(d) and (f).⁴⁹

Under the USCs at 16 NYCRR §§ 1100-6.4(o)(3) and (5), for facilities that will have more than a de minimis impact on T&E grassland birds, the NCBP must include monitoring, work windows for ground disturbance and construction-related activities, vegetation restoration, implementation of avoidance and minimization measures, and, to the extent that the office has determined that mitigation is required, either payment of the required mitigation fee into the Endangered and Threatened Species Mitigation Bank Fund or, if “the permittee proposes a NCBP involving permittee-implemented grassland bird habitat conservation in lieu of payment of a mitigation fee pursuant to subparagraph (viii) of this paragraph, the required mitigation ratio shall be 0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat determined to be taken.”

A preliminary NCBP was provided with the Application that proposed establishment of a conservation easement on properties within and adjacent to the Facility Site, on which the Applicant stated it was “collaborating with a local grassland bird advocacy group and a local landowner to establish.”⁵⁰ Pursuant to ORES regulations, the proposed NCBP calculates the required amount of breeding and wintering habitat mitigation acreage as a total of 216.12 acres ($513.52 \times 0.4 = 205.41$ acres of breeding habitat and $53.56 \times 0.2 = 10.71$ acres of wintering habitat).⁵¹ The proposed NCBP states:

⁴⁸ See Record 70, Appendix 12-D (Revision 1): Pre-Application Consultation (Redacted); Record 70, Exhibit 12 (Revision 1): NYS Threatened and Endangered Species (Redacted) at 12-2.

⁴⁹ Record 70, Appendix 12-D (Revision 1): Pre-Application Consultation (Redacted).

⁵⁰ Record 70, Appendix 12-E (Revision 1): Net Conservation Benefit Plan (Redacted) at 6-1.

⁵¹ Record 70, Appendix 12-E (Revision 1): Net Conservation Benefit Plan (Redacted) at 7-1.

This mitigation land will be co-managed for grassland bird habitat and agricultural use due to an existing agricultural conservation easement with the New York Agricultural Stewardship Association (ASA). The Applicant and a local grassland bird advocacy group are discussing the best approach for long term management oversight for the proposed mitigation project lands while maintaining the requirements of the agricultural conservation easement. . . . Prior to compliance filings, the Applicant intends to enter into an agreement with a local grassland bird advocacy group for long term ownership and management of the grassland bird mitigation lands.⁵²

In the alternative, the NCBP proposes payment of a mitigation fee “commensurate with the actual acreage of occupied habitat taken” of 567.08 acres.⁵³

To avoid and minimize impacts to affected T&E species and achieve a net conservation benefit for adversely affected T & E grassland bird species, the Draft Permit mandates compliance with the USCs for the construction and operation of the Facility as part of the NCBP and either payment of the required mitigation fee or permittee-implemented grassland bird conservation.⁵⁴ In addition, the Draft Permit imposes a site-specific condition requiring submission of a final NCBP to the Office for review and approval as a mandatory pre-construction compliance filing, consistent with 16 NYCRR § 1100-10.2.⁵⁵

Based on the foregoing, Staff recommended a finding that the Facility will achieve a net conservation benefit for effected T & E species as required by PSL § 138(1)(c).

⁵² Record 70, Appendix 12-E (Revision 1): Net Conservation Benefit Plan (Redacted) at 6-2; see also Record 73, Appendix 12-F: Agricultural Conservation Easement.

⁵³ Record 70, Appendix 12-E (Revision 1): Net Conservation Benefit Plan (Redacted) at 7-2

⁵⁴ Record 80, Draft Permit at 18-20, 23.

⁵⁵ Record 80, Draft Permit at 37 (“Final Net Conservation Benefit Plan (NCBP) - Consistent with 16 NYCRR § 1100-10.2, the Permittee shall submit a final NCBP, developed in consultation with the Office and implemented prior to any disturbance of the identified occupied habitat of threatened or endangered species.”)

D. Facility Environmental Benefits and Contribution to CLCPA Targets

New York State enacted the CLCPA to reduce harmful emissions and combat climate change. The CLCPA, among other things, requires that a minimum of 70% of statewide electric generation be produced by renewable energy systems by 2030, and that by the year 2040 the statewide electrical demand system will generate zero emissions.⁵⁶

As a matter of law, New York State has found and determined that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York”⁵⁷ and that the adverse impacts of climate change include extreme weather events, rising sea and lake levels, decreased freshwater and saltwater fish populations, increases in air temperatures with attendant increases in power demand, exacerbation of air pollution, increases in infectious diseases, asthma, heart attacks and other negative health outcomes.⁵⁸ As the Legislature further declared, the adverse impacts of climate change include “a detrimental effect on some of New York's largest industries, including agriculture, commercial shipping, forestry, tourism, and recreational and commercial fishing.”⁵⁹ Decarbonizing New York’s electrical sector is a key component of the CLCPA’s effort to combat climate change and prevent or ameliorate these harms, and the development of large-scale renewable energy generation facilities in compliance with PSL Article VIII will play a critical role in meeting the State’s renewable energy goals.

Staff considered the proposed Facility’s contribution of up to 100 MW of renewable energy generation toward New York State’s CLCPA targets, and the environmental benefits of the proposed Facility, which include, but are not limited to, the Facility’s ability to offset approximately 45,000 tons of carbon dioxide annually.⁶⁰

⁵⁶ CLCPA, Chapter 106 of the Laws of 2019, Section 1, subd. 12(d) and Section 4, creating a new section 66-p of the Public Service Law at § 66-p(2).

⁵⁷ Id. at Section 1, subd. 1.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Record 28, Exhibit 17: Consistency with Energy Planning Objectives at 17-6, 17-11.

E. Community Benefits of the Facility

PSL § 142(6) and 16 NYCRR § 1100-6.1(f) require the Applicant to provide a host community benefit as defined by the Public Service Commission, as determined by the Office, or other benefits agreed to by the Applicant and host community, such as Payments in Lieu of Taxes (PILOTs).

The proposed Facility will provide host community benefits to the following taxing jurisdictions: Washington County, the Town of Fort Edward, the Hudson Falls Central School District (CSD), the Argyle CSD, and the Fort Edward Fire District.⁶¹ The host community benefits include but are not limited to job creation, a 30-year payment in lieu of taxes (PILOT) agreement; local and regional spending, an annual donation and sponsorship program; annual bill credits; host community agreements, and fire district tax payments.⁶² The Applicant anticipates that construction will last approximately 18 months and employ an average of 107 full-time equivalent (FTE) jobs and a peak of 202 FTE jobs, and that these jobs will be filled by a workforce made of majority New York residents to the extent possible based on the available labor market.⁶³ The proposed Facility will provide these positive socioeconomic impacts to the host communities while not significantly increasing costs to local authorities, school districts, or emergency services.⁶⁴

IV. FINDINGS AND DETERMINATIONS OF LOCAL LAWS

A. Required Findings Regarding Local Laws for ORES Permit Applications

Article VIII consolidates the permitting of major renewable energy facilities into a single state entity – ORES. Pursuant to PSL § 144(2), local procedural requirements for their “development, design, construction, operation, or decommissioning” are preempted unless expressly authorized under the PSL or ORES regulations. Further, PSL § 142(5) provides that a final Siting Permit may only be issued if the Office makes a finding that the proposed Facility, together with any applicable USCs, SSCs, and compliance filings set forth in the Permit, would comply with applicable laws and regulations. In making this determination, the Office may

⁶¹ Record 71, Exhibit 18 (Revision 1): Socioeconomic Effects (Redacted) at 18-7.

⁶² Record 71, Exhibit 18 (Revision 1): Socioeconomic Effects (Redacted) at 18-6, 18-7, 18-12.

⁶³ Record 71, Exhibit 18 (Revision 1): Socioeconomic Effects (Redacted) at 18-1, 18-2.

⁶⁴ Record 71, Exhibit 18 (Revision 1): Socioeconomic Effects (Redacted) at 18-5, 18-6, 18-7.

elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed Facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed Facility.⁶⁵

Pursuant to 16 NYCRR § 1100-2.25(a) and (b), the Applicant is required to identify in the Application all local requirements applicable to the Facility of a substantive nature, and provide a statement that the Facility “conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply.”⁶⁶ For each waiver request, the Applicant must provide a statement of justification, supported by facts and analysis, that shows: (1) the degree of burden caused by the requirement, (2) why the burden should not reasonably be borne by the Applicant, (3) that the request cannot reasonably be obviated by design changes to the facility, (4) that the request is the minimum necessary, and (5) that the adverse impacts of granting the request shall be mitigated to the maximum extent practicable.⁶⁷

The proposed 100 MW Solar Facility, and the collection substation, is wholly located within the Town of Fort Edward.⁶⁸ In Exhibit 24, the Applicant identified provisions of the Code of the Town of Fort Edward, Local Law No. 3 of 1988 (Code), as applicable to the proposed Facility.⁶⁹ The Facility is also wholly located within the Town of Fort Edward Agriculture-Residential Zone, in which ground-mounted and freestanding solar collectors mounted on a pole is considered a permissible use as primary structures in all zoning districts in the Town of Fort Edward and would ordinarily be subject (under the local process) to site plan review but for preemption under PSL § 144(2).⁷⁰ The Point of Interconnection (POI) substation and switchyard are also located within the Town of Fort Edward Agriculture-Residential Zone and

⁶⁵ PSL § 142(5); see also 16 NYCRR § 1100-6.3(a).

⁶⁶ 16 NYCRR §§ 1100-2.25(a), (b) and (c).

⁶⁷ 16 NYCRR § 1100-2.25(c).

⁶⁸ Record 71, Exhibit 3 (Revised): Location of Facilities and Surrounding Land Use at 1.

⁶⁹ Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 2-6.

⁷⁰ Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 32; Record 71, Appendix 3-A (Revised): Figures at PDF p. 16; Record 41, Appendix 24-C: Local Laws at PDF p. 144.

are considered a public utility use pursuant to Code § 108-8(C)(12).⁷¹ However, the Code does not set forth additional specific requirements for public utility use.⁷²

Exhibit 24 includes the required summary table of all local substantive requirements and demonstration of the degree of compliance of the Facility.⁷³ In the Draft Permit, Staff recommended a finding that except for the provisions from which the Applicant requested relief, as proposed and permitted, the Facility shall comply with the applicable substantive provisions of the Town of Fort Edward's laws identified in Exhibit 24.⁷⁴ Pursuant to 16 NYCRR § 1100-6.3(a) and Section 4.3(a) of the Draft Permit, the Applicant must construct and operate the Facility in accordance with such laws, except those determined to be unreasonably burdensome.⁷⁵

B. ORES Staff's Recommendations on Waiver Requests

The Applicant requested waivers from four (4) provisions of the Code: 25-foot side and rear yard setbacks as applied to participating properties; a 30-foot height limit applied to components within the POI substation and switchyard; and two provisions requiring a 150-day timeline for completion of removal upon decommissioning.⁷⁶ Staff notes that the Facility appears to comply with the setbacks set forth in the Code as applied to nonparticipating parcels, and thus only requires relief for certain boundaries between participating property lines.⁷⁷

In the Draft Permit, Staff recommended that the Office approve the requested waivers because, as applied to the proposed Facility, these provisions are unreasonably burdensome in view of the CLCPA targets and the environmental

⁷¹ Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 32; Record 41, Appendix 24-C: Local Laws at PDF p. 114.

⁷² Record 41, Appendix 24-C: Local Laws at PDF pp. 133-136.

⁷³ Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 13-31.

⁷⁴ Record 80, Draft Permit at 3.

⁷⁵ Record 80, Draft Permit at 9.

⁷⁶ Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 6-12. The Applicant requested waivers from §§ 108-49.4(E)(2) and 108-13 requiring a participating side and rear setback; § 108-13 which contains maximum height requirements; and §§ 108-49.6(A)(1) and 108-49.6(A)(2) requiring decommissioning removal timelines. See Record 41, Appendix 24-C: Local Laws at PDF pp. 126, 144, 146.

⁷⁷ Record 74, Appendix 24-A (Revised): Property Setbacks.

benefits of the proposed Facility.⁷⁸ In making the recommendations, Staff balanced the proposed Facility's potential impacts to multiple resources, and considered the Applicant's proposed measures to avoid, minimize or mitigate those impacts to the maximum extent practicable, while ensuring protection of the environment and consideration of pertinent social, economic and environmental factors. Staff also considered that the proposed Facility will contribute meaningfully to the CLCPA targets by producing up to 100 MW of renewable solar energy directly to New York's energy market; offset approximately 45,000 metric tons of carbon dioxide and associated greenhouse gas emissions per year; produce enough energy to power approximately 25,600 households; and create job opportunities, support economic growth and protect public health, safety, and the environment by reducing greenhouse gas emissions in New York State.⁷⁹

Staff also considered Applicant's consultation with the Town regarding compliance with local laws. The Town of Fort Edward Supervisor has indicated support of the waivers of local laws as requested by the Applicant.⁸⁰ Staff notes that the Town did not submit a Statement of Compliance with Local Laws and Regulations, and no issues regarding local law compliance or waiver are raised for adjudication.

V. ISSUES IDENTIFIED FOR ADJUDICATION

A. Issues Determination Procedure

"The purpose of the issues determination procedure is to determine whether substantive and significant issues of fact related to the findings that the Office must make on an application require adjudication and, if not, to resolve legal issues related to those findings."⁸¹ If "a party has raised a triable issue of fact requiring adjudication, the ALJ will define the issue as precisely as possible, set the matter down for an evidentiary hearing, and determine which parties are granted party

⁷⁸ Record 80, Draft Permit at 3-5.

⁷⁹ Record 80, Draft Permit at 3; Record 28, Exhibit 17: Consistency with Energy Planning Objectives at 6.

⁸⁰ Record 41, Appendix 24-B: Correspondence at PDF p. 43-44; Record 74, Exhibit 24 (Revised): Local Laws and Ordinances at 7.

⁸¹ ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, May 2, 2024 Ruling of the Administrative Law Judges on Issues and Party Status (Issues Ruling) at 22.

status for the hearing.”⁸² If “no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are reviewed.”⁸³ Evidentiary hearings (i.e. adjudicatory hearings) are not required or held on purely legal issues.

1. Standards of Review

The decision on whether an adjudicatory hearing is required is made by the presiding ALJs during the issues determination procedure in compliance with 16 NYCRR § 1100-8.3(b). An issue is adjudicable if: (1) it relates to a substantive and significant dispute between the Office and the Applicant concerning a proposed term or condition of the Draft Permit (including USCs); (2) a public comment (including comments by a municipality) on a Draft Permit condition raises substantive and significant issues; (3) it is related to a matter cited by the Office as a basis for denial and is contested by the Applicant; or (4) it is proposed by a potential party and is both substantive and significant.⁸⁴ Hearing participation is authorized pursuant to a petition process set forth in 16 NYCRR § 1100-8.4.

In accordance with the Office’s permit hearing regulations, where contested issues are not the result of a dispute between the applicant and the Office but are proposed by third parties, the issue must be both “substantive” and “significant” in order to be adjudicable.⁸⁵ An issue is “substantive” if there is sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to a project, such that a reasonable person would require further inquiry.⁸⁶ “In determining whether such a demonstration has been made, the ALJ shall consider the proposed issue in light of the application and related documents, the standards and conditions, [the] siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination, and any subsequent written or oral arguments authorized by the ALJ.”⁸⁷ An issue is “significant” if it has the potential to result in a denial of a permit, a major

⁸² Id. at 23.

⁸³ Id.

⁸⁴ 16 NYCRR § 1100-8.3(c).

⁸⁵ 16 NYCRR § 1100-8.3(c)(l)(iv).

⁸⁶ 16 NYCRR § 1100-8.3(c)(2).

⁸⁷ 16 NYCRR § 1100-8.3(c)(2).

modification to the proposed facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit (including USCs).⁸⁸

Legal determinations made by ORES Staff as reflected in the Draft Permit are reviewed for an error of law.⁸⁹ An error of law occurs when an “agency improperly interpret[s] or applie[s] a statute or regulation.”⁹⁰ Exercises of discretion and policy decisions made by ORES Staff are reviewed for an abuse of discretion.⁹¹ A reviewing body cannot interfere with an exercise of discretion by an administrative agency “unless there is no rational basis for the exercise of discretion or the action complained of is ‘arbitrary and capricious.’”⁹² Staff’s recommendations with regard to the Office’s legislatively-authorized discretion to waive, in whole or in part, a local law provision an applicant has demonstrated is “unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility” have been deemed exercises of discretion.⁹³ “If ORES staff determines, based on its review of the application materials and the justification provided by [an] applicant, that the applicant has supported its request with sufficient facts and analysis, ORES staff has the discretion to recommend not to apply, in whole or part, those substantive local law provisions it concludes are unreasonably burdensome in view of the CLCPA targets and the environment [sic] benefits of the proposed facility.”⁹⁴

⁸⁸ 16 NYCRR § 1100-8.3(c)(3).

⁸⁹ See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 24 (citing Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision of the Executive Director at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6 (citing Matter of Incorporated Vil. Of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979])).

⁹⁰ Alexander, Practice Commentary, McKinney’s Cons Laws of NY, Book 7B, Civil Practice Law and Rules § 7803.

⁹¹ See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 24 (citing Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 6 (citing Matter of Peckham v Calogero, 12 NY3d 424, 430-431 [2009]; Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974])).

⁹² Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty., 34 N.Y.2d 222, 231 (1974) (quoting Cohen and Karger, Powers of the New York Court of Appeals, pp. 460-461).

⁹³ See DMM 21-00976, Matter of Homer Solar Energy Center, LLC, Executive Director Decision at 21.

⁹⁴ DMM 21-00976, Matter of Homer Solar Energy Center, LLC, Decision at 23.

2. Petitioners' Burden and Offer of Proof

For a potential party to participate in an adjudicatory hearing, it must file a petition in writing that, among other things, contains 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 to each issue identified.⁹⁵ Likewise, any municipality that proposes to adjudicate any issues related to a facility's compliance with local laws and regulations must also file a petition for party status meeting these requirements.⁹⁶ General criticisms, expressions of concern, speculation, or conclusory statements are insufficient to raise an adjudicable issue.⁹⁷

In situations where the Office has reviewed an application and finds that a component of the applicant's facility, as proposed or as conditioned by the draft 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.⁹⁸ In addition, to raise an issue for adjudication, a party must allege facts, supported by an offer of proof meeting the requirements of 16 NYCRR § 1100-8.4(c), that are either contrary to what is in the application materials or draft siting permit, demonstrate an omission in the application or draft siting permit, or show that defective information was used in the application or draft siting permit.⁹⁹

A potential party carries the burden of persuasion through a sufficient offer of proof by a qualified expert.¹⁰⁰ Any assertions made in a potential party's offer of proof must have a factual or scientific foundation, and the qualifications of any experts that a petitioner identifies may also be examined at this stage, including the proposed expert's background and expertise.¹⁰¹ The Office may rebut opposing offers of proof

⁹⁵ 16 NYCRR § 1100-8.4(c)(2)(ii).

⁹⁶ 16 NYCRR § 1100-8.4(d).

⁹⁷ ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision, Sept. 27, 2021 at 8-9; see also Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006 at 5-10 (NYSDEC).

⁹⁸ 16 NYCRR § 1100-8.3(c)(4).

⁹⁹ See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 25-26.

¹⁰⁰ 16 NYCRR 1100-8.4(c)(2)(ii).

¹⁰¹ See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 26-27; see also ORES Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Issues Ruling at 5-6.

by citing to the application, Draft Permit and proposed conditions, and Office Staff's analysis.¹⁰²

B. GBT Has Failed to Meet its Burden of Proof

GBT appends ten exhibits (A through J) to its Petition as its offer of proof for the four issues for adjudication it raises in its petition.¹⁰³

- Exhibit A: Avian Impact and Mitigation Assessment;
- Exhibit B: Expert Qualifications for Samantha Carouso Peck, Ph.D. and Joel Merriman;
- Exhibit C: map showing the location of the Facility and the locations of the Washington County Grassland Bird Conservation Center (GBCC), Fort Edward Grasslands Important Bird Area (IBA), New York Natural Heritage Program Raptor Winter Concentration Area (RWCA), the NYSDEC Grassland Wildlife Management Area, lands owned by GBT, and other protected lands;
- Exhibit D: Affirmation in Opposition by State Senator Patricia A. Fahy submitted in another ORES proceeding;
- Exhibit E: April 20, 2016, NYSDEC Press Release announcing a wildlife viewing platform at the IBA;
- Exhibit F: correspondence from the Agricultural Stewardship Association (ASA) regarding its existing easement on proposed mitigation lands;¹⁰⁴
- Exhibit G: comments of the National Audubon Society, New York State Ornithological Association, and South Shore Audubon Society;¹⁰⁵
- Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027;
- Exhibit I: Assembly Bill A03959, which would amend PSL § 139 to mandate certain mitigation ratios for impacts from major electric transmission facilities to breeding and wintering habitat in NYSDEC designated grassland bird conservation centers; and
- Exhibit J: Proposed Stipulation.¹⁰⁶

¹⁰² See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 26-27; see also ORES Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Issues Ruling at 5-6.

¹⁰³ See Record 84; see also Record 84, GBT Petition at 27-30.

¹⁰⁴ This is also Public Comment No. 158.

¹⁰⁵ These are also Public Comment Nos. 260, 228, and 229, respectively.

¹⁰⁶ Record 120, Exhibits A-D to RPMV Petition.

16 NYCRR Part 1100 clearly provides that GBT carries the burden of persuasion at this stage of the proceeding through a sufficient offer of proof.¹⁰⁷ While some offers of proof made by GBT may appear facially sufficient pursuant to the regulations, the expert report and other materials submitted do not provide information that is contrary to or demonstrate that there is an omission in the application materials or draft siting permit, nor do they show that defective information was used in the application or draft siting permit to demonstrate any issues for adjudication.¹⁰⁸ A close review of the exhibits reveal that they fail to demonstrate a substantive and significant issue for adjudication pursuant to 6 NYCRR 1100-8.4(c)(ii). As demonstrated below, GBT has failed to meet the minimum requirements to be granted full party status and its proposed issues for adjudication should be rejected. Staff addresses each of the four issues GBT raises for adjudication below.

C. Grassland Bird Trust

As a threshold matter, Staff acknowledges and appreciates GBT's statements that although it seeks party status, it "would prefer to work collaboratively with ORES and the Applicant to resolve the concerns herein."¹⁰⁹ However, to the extent it requests that "a settlement ALJ be assigned to this case to mediate settlement discussions among the Applicant, ORES, and GBT," and offers a proposed stipulation, "settlement" is inappropriate in the absence of any identified adjudicable issues, and therefore, this request is premature.¹¹⁰

1. Whether the Draft Permit avoids, minimizes, or mitigates significant adverse impacts to grassland birds.

As discussed above in Section III.C, the proposed Facility layout has been revised multiple times to reduce its potential adverse impacts, including to T & E grassland bird habitat. In addition, the required mitigation for the take of occupied

¹⁰⁷ See 16 NYCRR §§ 1100-8.3(c)(4), 8.4(b)(1)(2).

¹⁰⁸ See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 25-26.

¹⁰⁹ Record 84, GBT Petition at 34. GBT further states that it "wishes to work collaboratively with ORES and the Applicant to ensure that FES results in a net conservation benefit, but without party status, will lack any standing to advocate for the changes that are necessary." Record 84, GBT Petition at 43.

¹¹⁰ See GBT Petition Exhibit J: Proposed Stipulation.

habitat may be addressed through either grassland conservation and management conducted by the Applicant itself, or payment of a mitigation fee to be used for the same. Therefore, Staff recommended a finding that the Facility's impacts have been avoided and minimized to the greatest extent practicable, and mitigation will achieve a net conservation benefit for effected T & E grassland bird species.

GBT disagrees. The crux of GBT's claim is that the avoidance, minimization and mitigation measures for impacts to grassland birds applied to the Facility under ORES regulations are insufficient due to the Facility's location. GBT claims that "the Application and Draft Permit fail to consider, or account for, the Project's location within the Washington County Grassland Bird Conservation Center, the Audubon-designated Fort Edward Grasslands Important Bird Area, and the NYNHP Raptor Winter Concentration Area, and surrounding the NYS DEC Grassland Wildlife Management Area, or its proximity to other conserved lands, including land conserved and held by the Grassland Bird Trust."¹¹¹ GBT further claims that the Facility (which it incorrectly states will consume "more than 1,828 acres") "undermines the NYSDEC Strategy for Grassland Bird [H]abitat Management and Conservation [Strategy] 2022-2027 (Exhibit B), and is inconsistent with the numerous special conservation designations and initiatives already applicable to the Facility Site."¹¹² Therefore, GBT claims an adjudicable issue exists over whether impacts have been sufficiently avoided, minimized or mitigated.

GBT points to its petition Exhibits A (Avian Impact and Mitigation Assessment) and G (Comment Letters) as its offer of proof on this issue, and states it "may offer panel testimony from the individuals who collaborated to draft GBT's report."¹¹³ GBT claims this offer of proof is sufficient because it "takes the form of a competent expert report and separate comment letter, identifies numerous defects or omissions in the application, and runs counter to both the Applicant's and ORES' assertions that the Draft Permit is sufficient to mitigate impacts to grassland birds

¹¹¹ Record 84, GBT Petition at 30-31.

¹¹² Record 84, GBT Petition at 31; Record 84, GBT Petition Exhibit C: Map (Corrected). As defined in the Application, the Facility Site is "the Parcels on which there are project components, as defined under the term "Facility". The Facility Site consists of private land primarily rural in nature and will encompass approximately 1,828 acres." However, the Limits of Disturbance (LOD) is much smaller: "This represents the land of the Facility Site that will necessarily be disturbed to facilitate construction and operation, including temporary workspaces, and will encompass approximately 527 acres." Record 70, Exhibit 12 (Revision 1): NYS Threatened and Endangered Species (Redacted) at vi.

¹¹³ Record 84, GBT Petition at 31.

located in a GBCC, IBA, and Raptor Winter Concentration Area and near the WMA.”¹¹⁴

As discussed in more detail herein, ORES regulations effectuate Article VIII’s mandate to achieve a net conservation benefit to species affected by major renewable energy facilities and set forth mitigation requirements in the form of either payment of a mitigation fee or permittee-implemented conservation of grassland habitat at specified ratios of impacted occupied habitat. The location of the Facility in certain designated or recognized grassland bird areas does not create any increased level of scrutiny or heightened mitigation requirements nor invalidate the statutory and regulatory structure under Article VIII. Nor does it undermine or conflict with the NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027. Finally, close review of the offer of proof reveals that GBT has not demonstrated an adjudicable issue over whether impacts to grassland bird T & E species have been avoided, minimized or mitigated to the maximum extent practicable.

NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy)

The NYSDEC Strategy is “the strategic plan for implementing priority actions for creating, managing, and maintaining grassland bird habitat within New York State and guiding management of grassland habitat on WMAs that are determined to be part of a Grassland Bird Conservation Center (GBCC)”¹¹⁵ The document “describes how the Division [of Fish and Wildlife in NYSDEC] will manage grassland habitats on certain state lands and how [it] will work with willing partners to achieve grassland conservation on private lands in support of the goals above. It is a *voluntary rather than regulatory effort* to achieve grassland bird conservation through collaboration.”¹¹⁶ Under the Strategy, the Division will take “three major actions: make maintenance and expansion of grassland habitat a priority on all WMAs in GBCCs, work to improve management for the species at greatest risk, and support the efforts of others to prioritize grassland bird management within GBCCs and on private lands. These actions will be carried out through the provision of technical

¹¹⁴ Record 84, GBT Petition at 33.

¹¹⁵ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 4.

¹¹⁶ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 8 (emphasis added).

guidance and, as made available through sources such as the Endangered and Threatened Species Mitigation Bank Fund and the Federal Aid in Wildlife Restoration Grant W-173-G, direct support for actions that support the implementation of the strategy.”¹¹⁷ Nothing in the NYSDEC Strategy prohibits or speaks to siting of the Facility in the proposed location.

Washington County Grassland Bird Conservation Center (GBCC)

A Grassland Bird Conservation Center (GBCC) is defined in the NYSDEC Strategy as “a landscape of at least 25,000 acres that contains at least two of three criteria: >7,500 acres (>30%) of grassland habitat; a grassland “anchor field” held in permanent conservation status; or at least 1,625 acres of managed grasslands.”¹¹⁸ According to the NYSDEC Strategy, the Washington County GBCC encompasses an area of 102,233 acres and consists of 38% grasslands with an anchor field (the Washington County Grassland WMA) and total conserved lands of 2,598 acres.¹¹⁹ As described in the NYSDEC Strategy, a GBCC is an identified area in the State wherein conservation efforts are focused, with specific acreage goals for maintaining and managing grassland habitat.¹²⁰

The Limits of Disturbance (LOD) of the Facility is approximately 527 acres, which is .5% of the area of the GBCC and 1.4% of the grassland area within the GBCC (38% of 102,233 = 38,848). The Facility will not impact the GBCC’s ability to meet the criteria, and, as discussed below, will not impact the anchor field and can serve

¹¹⁷ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 10. Regarding use of mitigation fees, the NYSDEC Strategy states that Audubon New York will “help guide the use of the Endangered and Threatened Species Mitigation Bank Fund in the most efficient and effective way, particularly in supporting a private landowner program.” *Id.*

¹¹⁸ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 4-5.

¹¹⁹ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 16. Grasslands are defined as: “Those areas that are open and dominated by grasses and forbs. Woody vegetation needs to be less than 25%. Ideally, the forb component should not exceed 25% by area. Grasslands may contain shrubs and other woody vegetation, but not to the point beyond which maintenance would require significant brush cutting (i.e. not suitable for brush-hogging).” Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 4.

¹²⁰ Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 9.

to increase the amount of conserved and managed grasslands due to the requirement to achieve a net conservation benefit.

NYS DEC Grassland Wildlife Management Area (WMA)

The Application acknowledges that the “majority of the Facility Site is within the Fort Edward Grasslands Important Bird Area (IBA) and adjacent to the Washington County Grasslands WMA.”¹²¹ The NYSDEC Strategy defines a WMA as “State-owned lands that are administered and managed by the Division’s Bureau of Wildlife.”¹²² The Washington County Grasslands WMA encompasses 478 acres of former agricultural lands.¹²³ According to the NYSDEC, the “primary purposes of Washington County Grasslands Wildlife Management Area (WMA) are for wildlife management, wildlife habitat management, and wildlife-dependent recreation.”¹²⁴ The WMA consists of two areas, one larger U-shaped parcel and one smaller parcel to its northeast.¹²⁵ The Application proposes location of solar arrays to the northeast, south and east of the U-shaped portion of the WMA property.¹²⁶

The map provided by GBT does not include the actual proposed layout of the Facility and instead misleadingly draws a circle around the WMA to indicate the location of “Fort Edward Solar.”¹²⁷ The Avian Impact and Mitigation Assessment attached to the GBT Petition provides no evidence for its assertion that “the proposed Fort Edward Solar project almost completely surrounds all four sides of the WMA,

¹²¹ Record 71, Exhibit 3 (Revision 1): Land Use at 3-7.

¹²² Record 84, GBT Petition Exhibit H: NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027 (NYSDEC Strategy) at 5.

¹²³ See <https://dec.ny.gov/places/washington-county-grasslands-wildlife-management-area>.

¹²⁴ See <https://dec.ny.gov/places/washington-county-grasslands-wildlife-management-area>.

¹²⁵ See Washington County Grassland WMA Map available at: <https://dec.ny.gov/places/washington-county-grasslands-wildlife-management-area>; see also Record 84, GBT Petition Exhibit C: Map (Corrected).

¹²⁶ Compare Record 70, Appendix 2-A (Revised): Figures with Washington County Grassland WMA Map available at: <https://dec.ny.gov/places/washington-county-grasslands-wildlife-management-area>.

¹²⁷ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 21; see also Record 84, GBT Petition Exhibit C: Map (Corrected).

thus limiting areas for expansion in accordance with the NYS Grassland Bird Strategy.”¹²⁸

To the contrary, the Application states:

The Facility Site surrounds the WMA on three sides but was sited intentionally to avoid entering or impacting the WMA, and no Facility components are located within the WMA. 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 solar arrays will be substantially screened by existing intervening hedgerows and scrub vegetation during both leaf-on and leaf-off seasons.¹²⁹

Thus, the Facility has been sited to avoid and minimize impacts to the WMA to the extent practicable. Nothing in the NYSDEC Strategy prohibits siting of a major renewable energy facility (or other kinds of development) in the GBCC or in the vicinity of the WMA. While the proposed Facility may impact land that has been identified as occupied habitat, pursuant to Article VIII and its regulations, it must then result in a net conservation benefit to affected species by providing either a conservation solution or mitigation payment. That does not make the Facility location inconsistent with the NYSDEC Strategy.

Audubon-designated Fort Edward Grasslands Important Bird Area (IBA)

The map attached to the GBT Petition also shows that the Facility would be located within an IBA as designated by Audubon.¹³⁰ According to the Avian Impact

¹²⁸ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 6.

¹²⁹ Record 71, Exhibit 3 (Revision 1): Land Use at 3-8.

¹³⁰ Record 84, GBT Petition Exhibit C: Map (Corrected).

and Mitigation Assessment, this is a 13,000-acre area recognized by the National Audubon Society in 1997.¹³¹

The Application states:

The IBA encompasses 11,358 acres. Approximately 96 percent of the Facility Site (1,756 of 1,828 acres) is located in the southern portion of the IBA, which makes up just 15 percent of the IBA. Approximately 98.5 percent of the LOD (520 of 527 acres) and 99 percent of the fenced area (479 of 484 acres) are located within the IBA, accounting for 5 percent and 4 percent of land within the IBA, respectively.”¹³²

GBT does not point to any legal or other authority that prohibits or limits siting of the Facility in this designated area.

NYNHP Winter Raptor Concentration Area

The New York Natural Heritage Program (NYNHP) “facilitate[s] the conservation of New York’s biodiversity by providing comprehensive information and scientific expertise on rare species and natural ecosystems to resource managers and other conservation partners.”¹³³ GBT claims the Facility “falls almost entirely within the New York Natural Heritage Program Winter Concentration Area, critical wintering ground for various raptor species, including the NYS endangered Short-eared Owl and threatened Northern Harrier.”¹³⁴ However, as discussed above, the Record fully acknowledges wintering occupied habitat will be impacted, and the Office’s Take Determination quantifies the impacts and therefore requires an NCBP. Review of the expert report reveals that it only states the Facility falls within this area; it does not specify any implications due to the Facility’s location in such an area.¹³⁵ Again, GBT does not point to any legal or other authority that prohibits or limits siting of the Facility in this area.

¹³¹ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 6.

¹³² Record 71, Exhibit 3 (Revision 1): Land Use at 3-8.

¹³³ See <https://www.nynhp.org/about/>.

¹³⁴ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 7.

¹³⁵ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment

Other Conserved Lands

The map attached to the GBT Petition shows that other than the parcel currently subject to the existing easement held by ASA, which the Applicant had proposed for mitigation, no other conserved lands are in the vicinity of the Facility. GBT fails to show any impacts to such areas.¹³⁶

Impacts on Grassland Birds

GBT has not demonstrated any adverse impacts that have not been addressed in the Record or by the conditions in the Draft Permit. While GBT's proffered expert report "[disagrees] with the Project documentation's conclusions about the likelihood and degree of severity of the proposed project's likely impacts to grassland birds," close review of the report reveals that it does not provide a sufficient offer of proof to demonstrate otherwise;¹³⁷ nor do the comments of the National Audubon Society, New York Ornithological Association, or the South Shore Audubon Society attached to the Petition.¹³⁸

The expert report raises five issues in terms of impacts: (1) habitat loss, (2) alteration of remaining habitat, (3) collisions with panels and other infrastructure, (4) displacement, and (5) cumulative impacts.¹³⁹ Regarding habitat loss, the expert report states that the Facility will eliminate breeding and wintering habitat, but this is already acknowledged in the Record, making the Facility subject to the requirement to provide a net conservation benefit for affected species. As already discussed above, GBT's conclusion that the Facility will hinder expansion of the WMA is not supported.

Regarding alteration of remaining habitat, GBT's expert report only opines that the Facility would create the "potential for edge effects," would "fragment and reduce the overall size of the Washington County GBCC and therefore "has the potential to extirpate more than one at risk species," and "could potentially reduce

¹³⁶ Record 84, GBT Petition Exhibit C: Map (Corrected).

¹³⁷ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 8.

¹³⁸ See Record 84, Petition Exhibit G: Comment Letters.

¹³⁹ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 8-13.

habitat connectivity.”¹⁴⁰ However, as discussed above, the LOD is only .5% of the area of the GBCC and 1.4% of the grasslands in the GBCC. GBT admits these potential “ecological effects” are “difficult to predict with precision in any given instance.”¹⁴¹ It also admits there is no research regarding potential for effects due to temperature variations at solar facilities.¹⁴²

Regarding collisions with solar panels, GBT admits there is little published science on this issue, and merely opines it is “likely that birds will be killed in collisions.”¹⁴³ GBT admits it is “unaware of any published science examining the potential for avian displacement effects.”¹⁴⁴ Finally, GBT admits that cumulative impacts are difficult to predict.¹⁴⁵

Thus, the expert report provides no evidence that either the impacts assessment or the Office’s Take Determination were faulty, or that avoidance and minimization measures were not carried out to the maximum extent practicable.¹⁴⁶ As demonstrated below, the Draft Permit conditions, pursuant to ORES regulations, will achieve a net conservation benefit via grassland bird mitigation. GBT fails to raise a substantive and significant issue regarding whether the Draft Permit avoids, minimizes, or mitigates significant adverse impacts to T & E grassland birds simply due to the Facility’s location.

¹⁴⁰ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 11.

¹⁴¹ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 11.

¹⁴² Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 11.

¹⁴³ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 11.

¹⁴⁴ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 12.

¹⁴⁵ Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 13.

¹⁴⁶ The National Audubon Society comment attached to the GBT Petition, signed by Erin McGrath, Policy Director, who is not offered as a witness, states: “Since the solar arrays will constitute a visual and structural disturbance and eliminate grassland habitat in the vicinity of the WMA, we are deeply concerned that the solar array could deter SEOW from using the fields within the WMA and believe this should be considered a take of occupied habitat that needs to be accounted for in the Net Conservation Benefit Plan if it is not already included.” However, this comment letter provides no further evidence or offer of proof to support this belief. See Record 84, GBT Petition Exhibit G: Comment Letters. As discussed below, the comments of the New York State Ornithological Association and the South Shore Audubon Society also do not provide any evidence or raise substantive or significant issues.

2. Whether the uniform standard condition in the Draft Permit setting a default mitigation ratio of less than 1:1 will achieve a net conservation benefit.

GBT claims that the Draft Permit condition is “not sufficient to result in a net conservation benefit given the unique circumstances of this case.”¹⁴⁷ The condition, which is verbatim with ORES regulations, requires any permittee-implemented grassland bird conservation proposed in lieu of payment of a mitigation fee to conserve acreage at a ratio of “0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat determined to be taken.”¹⁴⁸ GBT claims that mitigation ratio based on the “regulatory assumption of a 5-year timeframe in which unmanaged grassland would naturally succeed into scrub/shrub habitat is inapplicable in this case.”¹⁴⁹ GBT further claims that “the default mitigation ratios in the USC do not account for impacts arising from the siting of a project within a GBCC, IBA, and Raptor Winter Concentration Area, and surrounding a WMA.”¹⁵⁰ For the reasons set forth below, GBT’s claims fail to raise a substantive and significant issue for adjudication.

GBT’s claim regarding the sufficiency of the mitigation ratios as established by the Office regulations, adopted through the state’s rulemaking process, is not a matter for adjudication in this proceeding. To the extent that GBT is making a broad critique of the regulation itself, this issue is also outside the scope of this Facility-specific issues determination procedure.

GBT asserts the mitigation ratios are inapplicable because they rest on the erroneous regulatory assumption that “all grasslands succumb to scrub-shrub or forest results” and this “one size fits all” mitigation ratio “does not take into account any possibility other than that all agricultural activity will cease at the project site.”¹⁵¹ GBT also claims that this “undervaluation of habitats that are likely to stay

¹⁴⁷ Record 84, GBT Petition at 37.

¹⁴⁸ Record 80, Draft Permit at 20.

¹⁴⁹ Record 84, GBT Petition at 36.

¹⁵⁰ Record 84, GBT Petition at 39.

¹⁵¹ Record 84, GBT Petition at 37 (emphasis in original); see also Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 19.

in agricultural production results in mitigation ratios that are insufficient and prevent the attainment of a net conservation benefit.”¹⁵²

GBT misinterprets the regulation. It appears to read the last sentence of 16 NYCRR 1100-6.4(o)(3)(ix) (regarding the basis for the mitigation ratios) as a condition precedent or necessary element that must be satisfied in each case *before* the actual mitigation ratio can be applied/required of the Applicant.¹⁵³ The Assessment of Public Comments (APC) issued upon adoption of the regulations states with respect to the final phrase that “[T]his text was added to the regulations to clarify the basis for those ratios and address the comments.”¹⁵⁴ Nothing in this statement supports the proposition that the underlying assumption explained in “this text” needs to be proven in each and every case in order for the mitigation ratio to be applied. The final phrase of 16 NYCRR 1100-6.4(o)(3)(ix) simply provides technical context for the mitigation ratio.

When the Office wants to set up a regulatory structure that limits the application of mitigation ratios depending on the circumstances, it does so clearly in the wording of the regulations.¹⁵⁵ The fact that ORES did not lay out a category-based

¹⁵² Record 84, GBT Petition at 37 -38; see also Record 84, GBT Petition, Exhibit A Avian Impact and Mitigation Assessment at 19.

See Record 84, GBT Petition at 36 (“The regulatory assumption of a 5-year timeframe in which unmanaged grassland would naturally succeed into scrub/shrub habitat is inapplicable in this case.”) (emphasis added). The last sentence of 16 NYCRR 1100-6.4(o)(3)(ix) states: “These mitigation requirements are based upon multiplying impacts by the ratios described above and dividing impacts by five lifecycles of habitat succession (e.g., a 30-year mitigation project term and 5-year timeframe in which unmanaged grassland would naturally succeed into scrub/shrub habitat, minus one lifecycle to provide a net conservation benefit.”

¹⁵⁴ Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 – 900-15, Assessment of Public Comments, Office of Renewable Energy Siting at 132, *available at* <https://dps.ny.gov/assessment-public-comments-draft-regulations>. These mitigation ratios are based on the concept of ecological succession. Ecological succession is the theory, based on observation, that the composition of species in an ecological community changes over time, with certain species gradually replacing others. Open fields devoid of woody vegetation and dominated by herbaceous vegetation such as grasses and forbs, such as those present at Fort Edwards, are the ecological sere that provides essential habitat for breeding and overwintering grassland birds. Without periodic disturbance, this open herbaceous field sere would transition towards a shrub-dominated phase and ultimately, to a forested condition.

¹⁵⁵ See 16 NYCRR 1100-2.15(g)(2)(i) (“A(M1): Allowed, mitigation required (3:1 mitigation ratio by area of impact - creation only, broken down by cover type)...A(M2): Allowed, mitigation required (2:1 mitigation ratio by area of impact - creation, restoration, and enhancement)...A(M3): Allowed, mitigation required (1:1 mitigation ratio by area of impact – creation, restoration and enhancement)”) (emphasis added).

mitigation ratio scheme for grassland birds indicates that the mitigation ratio under 16 NYCRR 1100-6.4(o)(3)(ix) is, in fact, meant to be applied in all circumstances.

The rules of regulatory interpretation further support the Office's interpretation of the final phrase. The regulation clearly states: "[i]f the permittee proposes a NCBP involving permittee-implemented grassland bird habitat conservation in lieu of payment of a mitigation fee pursuant to subparagraph (viii) of this paragraph, the required mitigation ratio *shall be* 0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat determined to be taken."¹⁵⁶ There are no caveats to the application of the regulation. It would be contrary to the wording and purpose of the regulations to streamline the permitting process to effectively require ORES Staff to re-calibrate the ratio for each proposed facility site's unique conditions.

The sum total of GBT's "evidence" that the regulatory presumption does not apply is its assertion that because these areas have been mowed in the past, they will continue to be mowed going forward. GBT's claim that the open fields that currently provide habitat for grassland birds will continue to be maintained in this condition by farmers is unsupported by the expert report.¹⁵⁷ Farmers are under no obligation to mow these fields and may seek other options for use of the land. The report fails to demonstrate why fields at the Facility site would not undergo ordinary ecological succession or why the Facility Site would be exempt from general land use trends. In essence, GBT claims the Office should replace one assumption with another without any support.

Regarding the mitigation ratios themselves, GBT claims that "[b]ased on the evidence provided in Exhibits A and G, it is clear that the default mitigation ratios were never intended to apply to an area of unique importance to birds where there is an overlapping GBCC, IBA, RWCA, surrounding a WMA."¹⁵⁸ However, as noted above, review of these offers of proof reveal that just as these designations do not limit or prohibit the Facility itself, they do not mandate use of specific mitigation ratios. Nor has GBT demonstrated that impacts have not been sufficiently identified

¹⁵⁶ 16 NYCRR 1100-6.4(o)(3)(ix)(emphasis added).

¹⁵⁷ As site visit by Staff revealed that portions of the site, which contains overlapping agricultural lands, grasslands, and wetlands, are no longer being used for agriculture. See Record 54, NOIA at 11.

¹⁵⁸ Record 84, GBT Petition at 40.

or avoided and minimized.¹⁵⁹ The Applicant's proposal to mitigate the Facility's impacts to grassland bird occupied habitat by conserving and managing 216.12 acres for a minimum of 30 years is compliant with the Office's regulatory requirements and the Draft Permit.¹⁶⁰ GBT fails to demonstrate any legal or other authority for the premise that the mitigation ratios established by ORES regulations must be replaced with different or higher ratios.

Based on the foregoing, GBT has failed to raise an adjudicable issue regarding whether an NCBP which includes permittee-implemented conservation in accordance with the mitigation ratios as set forth in ORES regulations will achieve a net conservation benefit for affected grassland bird T &E species.

3. Whether the proposed Net Conservation Benefit Plan can achieve the regulatory minimum mitigation ratio.

GBT claims that the "Applicant's proposed NCBP is flawed and now infeasible" because the "parcel identified for conservation is no longer available for use as part of the NCBP."¹⁶¹ GBT objects to statements in the proposed NCBP that the Applicant is in collaboration with a "local grassland bird advocacy group" and attaches correspondence from the ASA, the holder of an existing conservation easement on the proposed mitigation lands, which indicates that it will not consent to the proposed use of the Property.¹⁶² GBT states that although it "was initially interested in taking title to the Proposed Mitigation Land and managing it for grassland birds under a separate contract with the Applicant, it has come to GBT's attention that the current owner of two agricultural conservation easements already

¹⁵⁹ Staff notes that GBT itself acknowledges that the Facility Site is not currently optimal or pristine grassland bird habitat: "Although these parcels are not maintained in accordance with best practices for grassland bird habitat management, they still function as valuable grassland bird habitat." Record 84, GBT Exhibit A: Avian Impact and Mitigation Assessment at 18. GBT points to the information in the Application itself and surveys conducted by the Applicant rather than any alternative habitat assessment that might demonstrate some heightened level of value to warrant a greater mitigation ratio: "The findings from the WSP (Winter Raptor Surveys) and Breeding Bird Surveys confirm that these hayfields are suitable and known habitat for grassland bird species." Id.

¹⁶⁰ See Record 70, Appendix 12-E (Revision 1): Net Conservation Benefit Plan (Redacted).

¹⁶¹ Record 84, GBT Petition at 41.

¹⁶² Record 84, GBT Petition at 42; Record 84, GBT Petition Exhibit F; see also Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at

attached to the land opposes any use of the Proposed Mitigation Land as part of an NCBP for this project.”¹⁶³

GBT also cites to “other problems with the NCBP” it asserts are demonstrated by the Avian Impact and Mitigation Assessment and concludes that “a significant issue of fact exists concerning whether the Applicant’ proposed NCBP is feasible, and whether the NCBP or underlying draft permit condition are sufficient to create a net conservation benefit.”¹⁶⁴ Finally, it questions whether post construction monitoring will be adequately funded.¹⁶⁵

The Draft Permit includes SSC 6(d), which provides:

Final Net Conservation Benefit Plan (NCBP) - Consistent with 16 NYCRR § 1100-10.2, the Permittee shall submit a final NCBP, developed in consultation with the Office and implemented prior to any disturbance of the identified occupied habitat of threatened or endangered species.¹⁶⁶

Nothing in this SSC mandates that the final NCBP must propose mitigation on the lands proposed in the Application. This is precisely to accommodate situations where, as here, such lands become unavailable or are otherwise removed from consideration. The option remains available to the Applicant to propose such conservation on other lands, in the event ASA maintains its position, and submit a final NCBP for Office approval.

Moreover, this SSC does not specify that the final NCBP must contain permittee-implemented conservation nor does it foreclose payment of the mitigation fee. Rather, the SSC mandates that to receive permission to construct the Facility, the Applicant must provide a final NCBP that achieves a net conservation benefit for review and approval by the Office. GBT is incorrect that “NCBP” refers only to a plan for permittee-implemented conservation. Under ORES regulations, and the Draft Permit, to achieve a net conservation benefit for impacted grassland birds and their

¹⁶³ Record 84, GBT Petition at 41.

¹⁶⁴ Record 84, GBT Petition at 42.

¹⁶⁵ Record 84, GBT Petition at 42.

¹⁶⁶ Record 80, Draft Permit at 37.

habitat, a NCBP must contain, and the permittee must implement, certain enumerated construction and operation measures, and the NCBP must provide for *either* payment of a mitigation fee or implement grassland conservation at the prescribed ratios.¹⁶⁷ In fact, the Draft Permit contains two provisions providing for achievement of a net conservation benefit through payment of a mitigation fee.¹⁶⁸ In addition, as discussed above in Section III.C, the Applicant’s proposed NCBP itself states that it will utilize the mitigation fee payment option in the event a permittee-implemented conservation option is not accepted by the Office. Therefore, any final permittee-implemented conservation will be required to meet the regulatory mitigation ratios or provide the required mitigation fee, and therefore the Draft Permit conditions (USCs and SSC), as will be contained in any Final Permit, are sufficient to create a net conservation benefit.¹⁶⁹

In addition, as demonstrated above, the mitigation ratios for permittee-implemented grassland conservation as set forth in ORES regulations are appropriate and any NCBP that adheres to such ratios will achieve a net conservation benefit. Based on the foregoing, GBT fails to raise an issue for adjudication regarding the feasibility of the NCBP and its ability to achieve a net conservation benefit for T & E grassland bird species.

4. Whether substantive and significant issues are otherwise raised in Exhibits A-J of the Petition.

As a final “issue for adjudication,” GBT “requests party status to assist ORES and the Applicant in resolving all other substantive and significant issues raised in the Grassland Bird Trust report, Fort Edward Solar – Avian Impact and Mitigation

¹⁶⁷ Record 80, Draft Permit at 18-20,22.

¹⁶⁸ Record 80, Draft Permit at 20, 22.

¹⁶⁹ GBT claims that the mitigation fee option “is the most detrimental option” and questions whether there is land that is comparably beneficial to grassland birds outside the IBA” and alleges it is likely that the funds will not be deployed in the IBA.” Record 84, GBT Petition Exhibit A: Avian Impact and Mitigation Assessment at 15-16. This claim is outside the scope of this proceeding. The option to pay a mitigation fee into the NYS Endangered and Threatened Species Mitigation Bank Fund is specifically provided for in PSL § 138(2) and the Office’s regulations. See also NY Env’tl. Cons. Law § 11-0535-c; 6 NYCRR § 182.18; Established cost estimates for approved off-site mitigation options, available at: <https://dec.ny.gov/nature/animals-fish-plants/biodiversity-species-conservation/endangered-species>.

Assessment, attached as Exhibit A to this Petition, and/or in any other exhibits to this Petition.¹⁷⁰ GBT's attempt to raise this "catch all" issue for adjudication fails.

Where contested issues are proposed by third parties, as is the case here with GBT, the issue must be both "substantive" and "significant" in order to be adjudicable. As already discussed above, the expert report, comment letters, NYSDEC Strategy, and ASA correspondence attached to the GBT Petition as Exhibits A, G, H, and F, respectively do not demonstrate any adjudicable issues. None of the remaining exhibits, when analyzed independently as suggested by GBT Issue 4, allege facts supported by offers of proof sufficient to raise a substantive and significant issue for adjudication under 16 NYCRR § 1100-8.4(c). Upon review, the remaining exhibits contain little to no context, raise no factual issues or legal arguments, and fail to specifically state the substantive and significant issue each would purport to raise. Thus, they fail to raise doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the Facility, show the permit must be denied, trigger a major modification to the proposed facility, or require the imposition of significant permit conditions in addition to those proposed in the draft permit.

For example: Exhibit B contains a list of those individuals that GBT has relied on for the assertions and conclusions advanced in its Petition and their expert qualifications; it does not raise any issues. Exhibit C is a map prepared by GBT depicting the location of the Facility relative to various ecological boundaries with no additional information. Exhibit E is a press release issued by NYSDEC on April 20, 2016, titled "DEC Celebrates Earth Week with Opening of Wildlife Viewing Platform in Washington County Grasslands" and raises no issues. Exhibit I is a copy of Assembly Bill A3959 and corresponding legislative bill memo, which would amend PSL § 139 regarding transmission facilities and is not relevant to this proceeding. Finally, Exhibit J is a proposed stipulation among GBT, ORES, and the Applicant, and a draft site-specific condition. As discussed at the outset, settlement discussion is inappropriate in the absence of any determination on party status by the ALJs.

With regard to Exhibit D, New York State Senator Patrica Fahy submitted this same affirmation in connection with a project under development in Montgomery County, within her Senate district.¹⁷¹ Specifically, in her affirmation, Senator Fahy

¹⁷⁰ Record 84, GBT Petition at 43.

¹⁷¹ See DMM Matter No. 23-02972, Application of ConnectGen Montgomery County LLC, Record 211, Joint Appeal of Ruling on Issues and Party Status.

states that “the state legislature intended that ORES seriously consider local concerns. That review should include, *when warranted*, the award of party status to those that request it, full and fair hearings, and the opportunity to submit evidence and to cross-examine applicant and agency experts on the basis of their conclusions.”¹⁷² As set forth above, the burden of proof is on a petitioner to offer facts and offers of proof that are either contrary to what is in the application materials or draft siting permit, demonstrate an omission in the application or draft siting permit, or show that defective information was used in the application or draft siting permit. Based on this analysis, which is predicated on statutory and regulatory bases, Staff has demonstrated herein that GBT has failed to meet its burden. The Senator’s Affirmation does not show otherwise.

For all of the foregoing reasons, GBT fails to demonstrate any substantive or significant issues for adjudication. Therefore, its request for party status should be denied. Because there are no adjudicable issues, including any issues of law or policy, its alternative request for amicus status, which does not make the required demonstration under 16 NYCRR §§ 1100- 8.4(c)(3) and (f)(2), should also be denied.

VI. CONCLUSION

Based on the foregoing, no substantive and significant factual or legal issues requiring adjudication have been demonstrated in this matter. Staff recommends a finding that the proposed Facility, together with the uniform standard conditions, site specific conditions, and required compliance filings in the Draft Permit, would comply with PSL Article VIII and the Office’s regulations at 16 NYCRR Part 1100, and will avoid, minimize and/or mitigate, to the maximum extent practicable, potential adverse environmental impacts of the Facility. In addition, Staff recommends a finding that the Facility will achieve a net conservation benefit for effected T & E species as required by PSL § 138(1)(c). Accordingly, Staff recommends issuance of a final Siting Permit.

¹⁷² Record 84, GBT Petition Exhibit D: Fahy Affirmation at 3 (emphasis added).