



FLAT CREEK SOLAR

Permit Application No. 23-00054

§ 1100-2.13 Exhibit 12

NYS Threatened or Endangered Species

Contents

Acronym List ii

Glossary of Terms iii

Exhibit 12: NYS Threatened or Endangered Species 1

12(a) Wildlife Site Characterization Report 1

12(b) Pre-Application Wildlife Survey Reports 1

12(c) ORES Determination on Occupied Habitat 6

12(d) Avoidance and Minimization Measures in Facility Design 8

12(e) *De Minimis* Impact Submission for Threatened and Endangered Grassland Bird
Species 13

 (1) Not Present Based on Survey 14

 (2) No Recent Confirmed Nesting or Roosting Location 14

 (3) Delisted or Downlisted Species 14

12(f) Net Conservation Benefit Plan 15

References: 19

Appendices

Appendix 12-1 Wildlife Site Characterization Report - **CONFIDENTIAL**

Appendix 12-2 Grassland Breeding Bird Survey Report - **CONFIDENTIAL**



Appendix 12-3 Wintering Grassland Raptor Survey Report 2020-2021 - **CONFIDENTIAL**

Appendix 12-4 Wintering Grassland Raptor Survey Report 2021-2022 - **CONFIDENTIAL**

Appendix 12-5 ORES Determination of Occupied Habitat, Incidental Take, and Net
Conservation Benefit - **CONFIDENTIAL**

Appendix 12-6 Net Conservation Benefit Plan - **CONFIDENTIAL**

Acronym List

Applicant	Flat Creek Solar NY LLC
BBS	Breeding Bird Survey
BMP	Best management practices
DBH	diameter at breast height
Facility	Flat Creek Solar Facility
IPaC	Information for Planning and Consultation
MW	Megawatt
NCBP	Net Conservation Benefit Plan
NDA	Non-Disclosure Agreement
	
NYCRR	New York Codes, Rules and Regulations
NYS	New York State
NYSDEC	New York State Department of Environmental Conservation
NYSDPS	New York State Department of Public Service
ORES	Office of Renewable Energy Siting and Electric Transmission
POI	Point of Interconnection
USC	Uniform Standards and Conditions
USFWS	United States Fish and Wildlife Service
WGRS	Wintering Grassland Raptor Survey
WSCR	Wildlife Site Characterization Report

Glossary of Terms

Applicant	Flat Creek Solar NY LLC, a subsidiary of Cordelio Power LP, the entity seeking a siting permit for the Facility from the Office of Renewable Energy Siting and Electric Transmission (ORES) under Article VIII of the New York State Public Service Law.
Facility	Flat Creek Solar, a 300 MW solar generating facility located in the Towns of Root and Canajoharie, NY. The proposed Facility components to be constructed for the generation, collection, and distribution of energy for Flat Creek Solar include solar panel modules, electrical collection system, collection substation, point of interconnection (POI) switchyard, access roads, laydown/staging areas, and other ancillary facilities.
Facility Site	The participating parcels encompassing Facility components, which totals approximately 3,794 acres in the Towns of Canajoharie and Root, Montgomery County, New York (Figure 2-1).
Study Area	The Study Area for the Facility includes a radius of five miles around the Facility Site boundary, unless otherwise noted for a specific resource study or Exhibit. The 5-mile Study Area encompasses approximately 108,667 acres, inclusive of the approximately 3,794-acre Facility Site.
Limit of Disturbance (LOD)	The area to which temporary construction impacts will occur, totaling approximately 1,637 acres.

Exhibit 12: NYS Threatened or Endangered Species

This Exhibit provides information required in accordance with the requirements of §1100-2.13 of the Article VIII Regulations.

12(a) Wildlife Site Characterization Report

A Wildlife Site Characterization Report (WSCR) was prepared pursuant to 16 New York Codes, Rules and Regulations (NYCRR) § 1100-1.3(g)(1) for the Facility, summarizing publicly available information on birds, bats, and other wildlife species with a focus on New York State (NYS) listed threatened, endangered, or species of special concern that occur or have the potential to occur within the vicinity of the Facility Site. The WSCR was submitted to the New York State Department of Environmental Conservation (NYSDEC) and the Office of Renewable Energy Siting (ORES) on April 29, 2022, per § 1100-1.3(g)(2). A meeting between the Applicant and associated representatives, the NYSDEC, and ORES was held virtually on June 6, 2022, per § 1100-1.3(g)(2). At this meeting, the agencies provided feedback on the content and conclusions of the WSCR. Following this meeting, ORES provided a Pre-Application Wildlife Site Characterization Consultation on June 8, 2022, confirming presence of occupied habitat in vicinity of the Facility and recommending supplemental surveys, as discussed below. The WSCR is included as Appendix 12-1.

12(b) Pre-Application Wildlife Survey Reports

Several pre-application biological surveys were completed, and survey reports identified in this Exhibit were previously provided to ORES and the NYSDEC and have been included as Appendices within this Application. Specifically, this Application includes reports for the Applicant's Grassland Breeding Bird Survey (BBS; Appendix 12-2) and Wintering Grassland Raptor Survey (WGRS; Appendix 12-3 and Appendix 12-4). Summaries of these surveys and reports are provided below. Other non-wildlife related pre-application surveys such as wetland and stream delineations, can be found in their applicable sections within the Application.

Grassland Breeding Bird Survey May 2022-July 2022

A Grassland BBS Report for the Facility was submitted to the NYSDEC and ORES and is included herein as Appendix 12-2. A summary of this report is below.

On behalf of the Applicant, TRC conducted a pre-application survey to determine the presence and site use by state-listed grassland bird species during the breeding season (May through July). On April 15, 2022, a proposed breeding bird survey study plan, developed in accordance with the

NYSDEC Survey Protocol for State-listed Breeding Grassland Bird Species (BBS Protocol; 2021), was submitted to ORES. The Office responded with comments and feedback on the study plan on April 29, 2022, which the Applicant then updated and implemented for the surveys.

Point count surveys were conducted at 62 survey locations (hereafter “points”) within the Facility Site (approximately 2,743 acres at the time of the survey) between May 3, 2022, and July 15, 2022. The purpose of the grassland breeding bird survey was to determine the presence and site use by state-listed threatened, endangered, and rare grassland bird species during the breeding season. New York State listed grassland nesting birds include northern harrier (*Circus hudsonius*; threatened), upland sandpiper (*Bartramia longicauda*; threatened), short-eared owl (*Asio flammeus*; endangered), Henslow’s sparrow (*Ammodramus henslowii*; threatened), sedge wren (*Cistothorus stellaris*; threatened), grasshopper sparrow (*Ammodramus savannarum*; special concern), vesper sparrow (*Pooecetes gramineus*; special concern), and horned lark (*Eremophila alpestris*; special concern). Areas of potentially suitable breeding habitat were surveyed to determine the extent to which state-listed grassland birds are present within and using the Facility to meet essential life cycle needs (i.e., foraging, nesting, cover).

A total of 1,176 bird observations of 35 species and one unidentified species (flycatcher; *Empidonax* spp.) were recorded within the Facility Site during the regular point count surveys. An additional 64 species were recorded incidentally to regular surveys throughout the survey period. Incidental observations include species documented within the Facility Area, that were observed outside of the scheduled survey window (i.e., when walking to or from a survey location, or before/after the survey time had started). Bobolink (*Dolichonyx oryzivorus*) was the most frequently observed species (116 individuals), comprising 20.4 percent of all birds observed. Thereafter, the most frequently observed species were American pipit (*Anthus rubescens*) (90 individuals), savannah sparrow (*Passerulus sandwichensis*) (81 individuals), red-winged blackbird (*Agelaius phoeniceus*) (72 individuals), and song sparrow (*Melospiza melodia*) (35 individuals). These five most frequently observed species comprised 69.4 percent of all individuals observed during regular surveys.

Due to the amount of [REDACTED] activity observed during the 2021-2022 WGRS in mid-April 2022 (summarized below), the Applicant implemented an early start to the breeding bird survey season (as is recommended in the BBS Protocol if [REDACTED] are to be targeted), which added two additional visits to the beginning of the survey season. This was done in accordance with New York State recommendations to increase coverage of surveys due to noted onsite characteristics. The number of points fluctuated throughout the survey season due to changes in

land access and habitat shifts due to agricultural activities. Ten visits were conducted over the course of the survey period resulting in a total of 527 surveys.

Based on onsite observations during the BBS, evaluations conducted as part of the WSCR, and coordination with the NYSDEC and ORES, the grassland bird community observed at the Facility Site is primarily composed of species widely distributed in and typical of NYS. Observed species are representative of those expected where suitable grassland habitat is present. The number of observations fluctuated throughout the survey period with the highest recorded on May 5, 2022 (112 observations) and the lowest on June 24, 2022 (one observation). The peak on May 5, 2022, was driven primarily by a single observation of a large flock of American pipits.

Two state-threatened species, [REDACTED] ([REDACTED]) were documented during surveys. Seventeen [REDACTED] were observed on 11 occasions. Thirteen of these observations were recorded incidentally to regular surveys. Evidence of probable breeding activity was observed for this species, including agitated behavior, territorial defense, courtship display, and a pair observed in suitable habitat. One [REDACTED] was observed incidentally to regular surveys on one occasion during the survey period. The individual was a fly-through and not exhibiting essential or breeding behavior.

Three state-species of special concern, [REDACTED] [REDACTED], were observed on seven occasions throughout the study period. The [REDACTED] observation was of a single individual flying through and therefore not an essential or breeding behavior. Two [REDACTED] were observed incidentally to regular surveys. One of the two observations was reported flying through, and the other was a courtship display. Finally, six [REDACTED] observations were recorded during the survey period, four of which were during regular surveys and two as incidental sightings. [REDACTED] [REDACTED] were observed singing and in suitable habitat. No confirmed breeding activities (e.g., nest with young, feeding young) were observed for any state-listed species or special of special concern.

The Pre-Application Wildlife Site Characterization Consultation received from ORES on June 8, 2022, indicated known occupied breeding habitat for [REDACTED] [REDACTED] within vicinity of the Facility Site. Of these species, only the [REDACTED] were observed during the BBS. No [REDACTED] [REDACTED] were observed in the Facility Site.

Based on the results of the BBS, the Applicant determined that the Facility Site contains occupied habitat for the [REDACTED], as the behaviors observed were consistent with possible indicators of breeding activity (adults in suitable nesting habitat) and additional essential behaviors (foraging).

Wintering Grassland Raptor Surveys

Pre-application wintering grassland raptor surveys were conducted in two consecutive winters to determine the presence and site use of state-listed grassland raptor species during the wintering season and to assess the need for additional studies. Two seasons of surveys were necessary due to changes in the Facility Site over the course of the two years. The WGRS Reports for each winter were submitted to the NYSDEC and ORES and are included herein as Appendix 12-3 and Appendix 12-4, respectively.

November-April 2020-2021

The first season of wintering grassland raptor surveys was conducted from November 16, 2020, to March 31, 2021, following the *NYSDEC Survey Protocol for State-listed Wintering Grassland Raptor Species* (Draft 2015; Draft WGRS Protocol). Due to observations of listed species during the final two weeks of March, an additional survey event was performed between April 1 and April 15, 2021. Nine stationary survey points and a driving route consisting of 18 driving survey stops was established in accordance with the Draft WGRS Protocol, amounting to a total of 99 stationary surveys and 196 driving route survey stops completed over 11 survey events across the approximately 2,175-acre Facility Site at the time of the survey.

Ninety-one observations of 11 raptor species were recorded during stationary surveys, comprising a total of 852 use minutes. Raptor use minutes are defined as the number of minutes raptors were observed within the Facility Site during surveys. Mean overall use is calculated by dividing the number of use minutes by the total number of survey minutes conducted to determine a use rate. Overall mean use of the Facility Site by wintering raptors during stationary surveys was 0.093. Twenty-one observations of seven species were recorded during driving surveys. Red-tailed hawk (*Buteo jamaicensis*) was the most observed raptor during both stationary and driving surveys, accounting for 45.1 percent of stationary survey observations and 38.1 percent of driving survey observations. Overall, raptor use of the Facility Site was relatively constant throughout the study period, with observations peaking prior to snowfall (December 15, 2020) and after snowmelt in March.

Two state-listed wintering grassland raptor species were observed during 2020-2021 surveys, including eight observations of [REDACTED] and 12 observations of [REDACTED]. As described in the 2020-2021, report using language from the 2015 NYSDEC WGRS Protocol, [REDACTED] were observed flapping, hunting, and perching during stationary surveys. [REDACTED] were also observed flapping, hunting, and gliding during both stationary and driving surveys. Both species were observed throughout the Facility Site, however, activity was highest in [REDACTED] of the Facility. Stationary survey location [REDACTED] recorded the highest number of [REDACTED] observations.

Additionally, non-grassland state-listed species observed during the survey included [REDACTED]
[REDACTED]
[REDACTED].

November – April 2021-2022

In order to cover additional land added to the Facility Site, which was not surveyed during the 2020-2021 wintering season, the second season of wintering grassland raptor surveys was conducted from November 15, 2021, to March 31, 2022, following the *NYSDEC Survey Protocol for State-listed Wintering Grassland Raptor Species* (August 2021; WGRS Protocol). Due to observations of listed species during the final two weeks of March, two additional survey events were performed between April 1 and April 13, 2022. A total of seven stationary survey points were identified in areas of potential habitat, and a driving route consisting of 11 driving survey stops were established along public roads traversing the Facility Site. A total of 136 stationary surveys and 193 driving route stops across the approximately 4,601-acre Facility Site at the time of the survey, were completed over 20 survey events, amounting to a total survey effort of 213.5 stationary survey hours and 111.75 driving survey hours during the survey.

Two hundred and eighty-two observations of 13 raptor species, an unidentified *Buteo sp.*, and an unidentifiable raptor were recorded during stationary surveys, comprising a total of 1,563 use minutes. Additionally, 61 incidental raptor observations of seven species were also observed. Overall mean use of the Facility Site by raptors during stationary surveys was 0.1220. During the driving surveys, 116 observations of seven species, and three unidentified *Buteo sp.* were recorded. Thirty-nine incidental raptor observations of six species were also recorded during the driving surveys. [REDACTED] were observed most frequently during stationary surveys, accounting for 41.7 percent of all stationary observations. Red-tailed hawks were observed most frequently during driving surveys, accounting for 41.3 percent of all driving survey observations.

Overall, raptor use within the Facility Site was inconsistent throughout the study period with three peaks during the months of November, December, and April.

Two state-threatened and one state-endangered raptor species were observed during the surveys. Eight [REDACTED] observations, 184 [REDACTED] observations, and 62 [REDACTED] observations were recorded. [REDACTED] were observed exhibiting both essential and non-essential behaviors, including interaction and flythrough. At certain locations, [REDACTED] were observed exhibiting essential behaviors including foraging, interaction and roosting, and non-essential behaviors such as circling, fly-through, and perching. Additionally, three state-listed species of special concern, the [REDACTED] were observed.

Based on the results of the WGRS, the Applicant determined that the Facility Site contains occupied habitat for the [REDACTED] as the behaviors observed were consistent with essential behaviors (foraging, interaction, and roosting).

12(c) ORES Determination on Occupied Habitat

Following completion of the BBS and WGRS, the Applicant provided the subsequent reports and data (Appendices 12-2 through 12-4) to the NYSDEC and ORES to facilitate ORES’ final determination of occupied habitat and take.

Following submittal of the data results and reporting, the Applicant prepared a Field-by-Field Analysis of the Facility Site. As part of this analysis, an avian biologist evaluated the data collected at each field identified to determine if the specific field was considered “occupied habitat” for the species. Further, the avian biologists prepared an Occupied Habitat and Estimated Take Memo, which accompanies the Field-by-Field Analysis, to determine which fields are considered occupied habitat based on the observations of [REDACTED] from the surveys and the associated habitat. The layout of the Facility was then overlaid on those fields to assist in determining the “take” of occupied habitat.

The Occupied Habitat and Estimated Take Memo, Field-by-Field Analysis, and shapefiles were submitted to ORES and the NYSDEC on February 8, 2024. The Applicant met with ORES again on March 8, 2024 to discuss ORES’ review of the Occupied Habitat and Estimated Take Memo, ORES’ draft determination of occupied habitat and take, and the Applicant’s proposed mitigation. After this meeting, ORES provided a Determination of Occupied Habitat, Take, and Net Conservation Benefit on April 4, 2024. Another meeting was held between the Applicant and

ORES on April 15, 2024, which resulted in a revised Determination of Occupied Habitat, Take, and Net Conservation Benefit that was submitted to the Applicant on April 17, 2024. A copy of the revised ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit for the Facility Site pursuant to § 1100-1.3(g)(7) dated April 17, 2024, is included as Appendix 12-5.

The April 17, 2024, ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit indicated the following:

[REDACTED]

- *Indiana bat:*
 - The Facility Site is not within 2.5 miles of a maternity roost site nor within 2.5 miles of a hibernaculum or bachelor colonies for the Indiana bat.

[REDACTED]

- *Grassland Birds:*
 - The Facility Site overlaps with occupied habitat for [REDACTED] [REDACTED] ORES has determined that the Facility is estimated to [REDACTED] [REDACTED] [REDACTED] [REDACTED] The Applicant shall avoid potential significant adverse impact(s) to these habitats to the maximum extent practicable. If the Applicant can demonstrate that full avoidance of potential significant adverse impact(s) to these habitats is not practicable, the Applicant is required to develop and submit a Net Conservation Benefit Plan (NCBP) to minimize or mitigate any remaining potential significant adverse impact(s) to these habitats for the proposed Facility.

- To avoid and minimize impacts to occupied grassland habitat, construction shall also adhere to the Uniform Standards and Conditions (USC) § 1100-6.4(o)(3)(i)-(vii). To avoid direct impacts to individual listed grassland birds during construction and to mitigate impacts to occupied grassland habitat, the Applicant shall adhere to USC § 1100-6.4(o)(3)(viii) and (ix).
- *Other State-listed Species:*
 - The following NYS species of special concern are confirmed to be present within the proposed Facility Site: [REDACTED].

12(d) Avoidance and Minimization Measures in Facility Design

The Applicant has worked diligently during the pre-Application and Application development phases to collect and analyze data regarding listed species and has consulted with ORES throughout the process to provide updates on Facility design, estimated take, minimization and avoidance efforts, and to ensure that the Applicant has the most up to date information available. As data regarding listed species and their habitats was collected as part of field efforts and avian surveys at the Facility Site, the Applicant worked with the avian biologists and engineering team to modify and reduce the design where appropriate to avoid and minimize impacts in areas where listed species were identified. Site design practices avoid sensitive habitats for the listed species by siting solar arrays primarily in previously disturbed agricultural fields, minimizing construction disturbances to the extent practicable, and adhering to designated limits of disturbance (LOD) for construction and species-specific time of year restrictions, as applicable. The avoidance and/or minimization of Facility-related impacts to NYS-listed species will be accomplished through adherence to the USCs, continued careful site design, best management practices (BMPs), and construction monitoring.

Avoidance and minimization measures that will allow for avoidance of take of several of the listed species with potential to occur in the Facility Site are discussed below. However, even with avoidance and minimization measures, there will be unavoidable impacts to occupied habitat for [REDACTED]. These impacts are summarized by species impacted within an assessment of the acreage in Table 12-1 below.

Table 12-1. Avoidance and Minimization Efforts for Listed Species within the Facility Site

Species		State Status	Avoidance/Minimization Measures	Estimated "Take" (Occupied Habitat Acreage)
[REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]		

[REDACTED]

As noted in the ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit, the Facility Site is within [REDACTED]. The Applicant received the [REDACTED] under a Non-Disclosure Agreement (NDA) with the NYSDEC and has been in contact with ORES, requesting updated information about [REDACTED]. [REDACTED] were observed during grassland BBS or WGRS, [REDACTED] by field staff at the location provided by NYSDEC during other field data collection efforts conducted at the Project.

[REDACTED]

[REDACTED]

Topographic conditions present south of the [REDACTED]. In order to further mitigate for potential impacts to [REDACTED], panels were removed from a portion of the Facility resulting in [REDACTED]. Therefore, the Applicant has avoided impacts to [REDACTED].

Additionally, no tree clearing will be occurring [REDACTED]. No helicopter use will be occurring within [REDACTED], or for the Facility at all. No blasting is anticipated for the Facility, however, if it is determined that blasting is needed, the Facility will work with USFWS and NYSDEC to determine how to avoid impacts to [REDACTED], such as avoiding blasting [REDACTED], unless greater tolerance to the activity (or similar activity) has been demonstrated by [REDACTED] or get an incidental take permit if it is determined necessary.

If, at any time during construction and operation of the Facility, an active [REDACTED] is identified within the Facility Site, the New York State Department of Public Service (NYS DPS) and ORES shall be notified within 48 hours of discovery and prior to any disturbance of the [REDACTED]. An area [REDACTED] shall be posted and avoided to the maximum extent practicable until notice to continue construction at that site is granted by NYSDPS and ORES.

Additionally, in order to avoid impacts to [REDACTED] will not occur:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Based on the factors considered herein and avoidance measures to be implemented, the Facility will avoid impacts to [REDACTED]. The Facility will be in compliance with state and federal regulations pertaining to [REDACTED], as described above.

Bats

Based on the USFWS Information for Planning and Consultation (IPaC) list for the Facility, the Facility may be in the vicinity of the [REDACTED]. Consultation with USFWS will occur as necessary prior to construction to address these species federally.

As noted in the ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit, the Facility is [REDACTED], and therefore [REDACTED]. The majority of the Facility Site consists of open/previously disturbed fields, however, there is some vegetative clearing associated with the Facility. Tree clearing will occur on approximately 135.7 acres for siting of Facility components, siting of safe access roads, and to prevent shading on the panel arrays. As noted, in areas where the Applicant could maximize solar array coverage on a previously disturbed agricultural crop lot, this was done to minimize tree clearing in the surrounding area to only the extent necessary to prevent shading. Tree clearing is distributed throughout the Facility Site and will not be consolidated heavily in any one area. All tree clearing activities will be conducted in compliance with applicable federal, state and local regulations.

[REDACTED]

No tree clearing activities will occur at any time within 0.25 mile of any known NLEB hibernacula. All tree clearing activities (except for hazard tree removal to protect human life or property) occurring within 5 miles of a hibernaculum site (but not within 0.25 miles of hibernacula), shall be conducted during the hibernation season (between November 1 and March 31) without further restrictions, unless otherwise approved by ORES. This limitation does not include trees less than or equal to four inches in diameter at breast height (DBH).

For [REDACTED] from April 1 to October 31, the following restrictions will be implemented for tree clearing activities in the Facility Site, unless otherwise agreed by the ORES:

- The Applicant will leave uncut all snag and cavity trees, as defined under the NYSDEC Program Policy ONRDLF-2 Retention on State Forests, unless their removal is necessary for protection of human life and property. This restriction pertains to trees that are greater than or equal to 4 inches DBH. When necessary, snag or cavity trees may be removed after being cleared by an environmental monitor who shall conduct a survey for bats exiting the tree. This survey shall begin 30 minutes before sunset and continue until at least one hour after sunset or until it is otherwise too dark to see emerging bats. Unoccupied snag and cavity trees in the approved clearing area shall be removed within 48 hours of observation.
- If any bats are observed flying from a tree, or from a tree that has been cut, tree clearing activities, depending on the potential species present, shall be suspended and the NYSDPS and ORES shall be notified as soon as possible. The Applicant shall have an environmental monitor present on site during all tree clearing activities. If any bat activity is noted, a stop work order will immediately be issued and will remain in place until such time as the NYSDPS and ORES have been consulted and authorize resumption of work.

If at any time during the life of the Facility, an active NYS threatened or endangered bat species maternity colony roost tree (or structure) is discovered within the Facility Site, the NYSDPS and ORES will be notified within 24 hours of discovery (during construction) and 48 hours of discovery (during operation), and the colony site will be marked. A 500-foot radius around the colony will be posted and avoided until notice to continue construction, ground clearing, grading, non-emergency maintenance or restoration activities, as applicable, at that site is granted by NYSDPS or ORES. A re-evaluation of the potential impacts of the Facility on listed bat species shall be provided to the NYSDPS and ORES, if this occurs.

Based on the factors considered herein and avoidance and minimization measures to be implemented, the Facility has minimized and avoided impacts to [REDACTED] and take is not anticipated.

Grassland Birds

As noted in the avian survey reports described above and the ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit, the Facility Site contains occupied habitat for the [REDACTED]. The Facility has been designed to avoid impacts to ecologically sensitive features to the maximum extent practicable.

The Facility layout has been designed to avoid and minimize impacts to wetland and forest habitats. Based on the results of the surveys conducted on site, the Applicant modified the design of the Project by removing panels from a portion of the Facility that contained [REDACTED] [REDACTED] in an effort to minimize potential impacts to state listed grassland birds. However, impacts to agricultural areas, which constitute the majority of habitat available for grassland birds, are unavoidable. The Applicant has made a concerted effort to co-locate Facility components, where feasible, to reduce the Facility footprint.

The Facility is expected to result in unavoidable adverse impacts to occupied habitat for [REDACTED] [REDACTED]. Therefore, a NCBP has been developed and is further discussed in Section 12 (f) and included as Appendix 12-6. The avoidance and minimization measures for these grassland bird species are outlined in this NCBP.

Other Listed Birds

As indicated in the ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit, the following NYS species of special concern are confirmed to be present within the Facility Site: [REDACTED] [REDACTED]. Additionally, Facility construction shall adhere to the USC §1100-6.4(o)(3). The Applicant notes that implementation of the above measures to avoid, minimize and mitigate impacts to threatened and endangered species will also provide benefits to species of special concern and unlisted species.

12(e) De Minimis Impact Submission for Threatened and Endangered Grassland Bird Species

The Article VIII Regulations state that “For a facility to be determined to only have de minimis impacts to NYS threatened or endangered grassland birds or their habitat, the applicant shall submit a demonstration that the facility has been designed to meet one or more of the following criteria, as applicable.” See sections below for detail on each criteria found in § 1100-2.13(e)(1-3) of the Article VIII Regulations. However, based on these criteria and the Determination of Occupied Habitat, Incidental Take, and Net Conservation Benefit issued by ORES, the Facility does not meet these criteria and therefore is anticipated to have a greater than a de minimis impact on occupied habitat for state-listed grassland bird species.

(1) Not Present Based on Survey

Criteria 1 of § 1100-2.13(e) states that the Applicant must demonstrate that *“the Facility has been designed such that the only impacts would be to occupied habitat identified based on records greater than five years old from the time of the WSCR, but for which the Applicant conducted appropriate surveys as approved by ORES that demonstrate that the species is not present at the Facility Site.”*

The Applicant completed the appropriate surveys as described above in Section 12(b), however, [REDACTED] are present, as they were observed during these surveys, and there is occupied habitat, therefore, the Facility does not meet this criteria.

(2) No Recent Confirmed Nesting or Roosting Location

Criteria 2 of § 1100-2.13(e) states that the Applicant must demonstrate that *“construction of the Facility within each mapped area of listed bird occupied habitat (based on the documented area of species’ use prior to addition of buffers) will only impact grasslands less than 25 acres in size and will not include recent (i.e., less than five years) confirmed nesting or roosting locations.”*

Construction of the Facility will be in occupied habitat fields that are greater than 25 acres in size, some of which include recent (identified via the surveys) assumed nesting and roosting locations. Therefore, the Facility does not meet this criteria.

(3) Delisted or Downlisted Species

Criteria 3 of § 1100-2.13(e) states that the Applicant must demonstrate that *“the Facility has been designed such that the only impacts would be to occupied habitat identified by NYS threatened or endangered species for which the NYSDEC has issued a Notice of Adoption of regulations delisting or down-listing to special concern.”*

The species for which impacts will occur to occupied habitat based on the Facility have not been issued a Notice of Adoption of regulations delisting or downlisting to special concern. Therefore, this section does not apply. However, it is important to note that on October 25, 2019, the [REDACTED] was pre-proposed for downlisting by the NYSDEC under Part 182 of 6 NYCRR from threatened to special concern. Additionally, [REDACTED] are pre-proposed for downlisting from threatened to special concern, [REDACTED] are pre-proposed for downlisting from endangered to special concern, and [REDACTED]

██████ are pre-proposed for delisting from special concern to off list. There is currently no timeline for regulatory changes to be made to the list of listed species. Despite these proposed changes, these species have not been issued a Notice of Adoption of regulations, and therefore this Criteria does not currently apply.

12(f) Net Conservation Benefit Plan

Based on the ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit, the Facility will adversely impact (“take”) state-listed grassland breeding and wintering bird habitat. Therefore, pursuant to § 1100-6.4(o), a NCBP has been prepared in and is included as Appendix 12-6. The purpose of the NCBP is to identify and describe the proposed mitigation actions to be undertaken to offset impacts resulting from Facility development such that a net conservation benefit is achieved for each listed species impacted (in this instance, the ██████████ ██████████). The implementation of the proposed NCBP would result in a net positive conservation benefit to each of the affected species by protecting suitable ██████████ ██████████ ██████████

The Applicant is proposing a NCBP involving permittee-funded grassland bird habitat conservation in lieu of payment of a mitigation fee per § 1100-6.4(o)(3)(ix), as the Applicant understands a mitigation fund per § 1100-6.4(o)(3)(ix) is not available at this time. The NCBP includes the identification and detailed description of the mitigation plan proposed to achieve a net conservation benefit to the affected species via financial contribution to an existing mitigation project designed to benefit grassland birds. The Applicant has proposed a Partnership with NY Magnolia LLC (Magnolia) on the Tibbets Point Mitigation Area, which functionally operates as a proper mitigation fund mechanism as ORES originally intended, as the ORES-administered fund is not available to applicants at this time.

As outlined in ORES Determination of Occupied Habitat, Take, and Net Conservation Benefit the mitigation acreage required for the Facility is ████████ acres of mitigation. The mitigation is proposed to be implemented by the Applicant or a designated agent for the life of the Facility/term of the Siting Permit.

The Applicant is actively pursuing off-site mitigation with NY Magnolia as described in Appendix 12-6 (NCBP). The ████████ acre Flat Creek Solar Mitigation Site is located in the Town of Cape Vincent, Jefferson County, New York. The Mitigation Site comprises ████████ acres from the Tibbetts Point Mitigation Complex. The Mitigation Site will be owned and managed by Thousand Islands Land Trust as part of the larger Tibbetts Point Mitigation Complex. The Mitigation Site is generally

bounded by other protected and managed areas within Magnolia’s Tibbetts Point Grassland Bird Mitigation Complex to the north and south, agricultural land and Fuller Bay to the west, agricultural land to the north, and a protected site owned by Thousand Islands Land Trust to the east. The entire Mitigation Site is located within Grassland Focus Area 5 and the Jefferson County Grassland Bird Conservation Center, identified as priority areas for conservation of grassland bird habitat in the NYSDEC Strategy for Grassland Bird Habitat Management and Conservation 2022-2027. The Mitigation Site also sits adjacent to an Important Bird Area, identified as a priority area for supporting at-risk bird populations by the Audubon Society.

Habitat management for [REDACTED] will be implemented as part of the larger Tibbetts Point Mitigation Complex. Specific management practices of the Mitigation Site will adhere to the Tibbetts Point Mitigation Complex Grassland Bird Mitigation Plan.

Based on correspondence with and approval from NYSDEC, the initial restoration tasks of the Tibbetts Point Mitigation Plan have already begun and are progressing on schedule. Crop fields were converted to native grassland prairie in the early growing season of 2023. The primary task included the installation of a matrix of native grasses and forbs for the benefit of native grassland birds, specifically [REDACTED]. Additionally, roughly a third of the complex was mowed to create a diversity of vegetation heights and to promote growth of installed native seed. As a predator species, [REDACTED] require a habitat that supports a healthy diversity of small birds and mammals. The initial restoration practices have already proven successful as suitable habitat for [REDACTED]; multiple sightings of the species have been observed at the Mitigation Site in 2023. The Tibbetts Point Mitigation Complex Grassland Bird Mitigation Plan was developed in coordination with the NYSDEC and the land manager, Thousand Islands Land Trust.

Suitability of Selected Mitigation Site While the Applicant did communicate with some landowners who may be interested in offering land for an avian mitigation project in the vicinity of the Facility Site; the Applicant determined that potential sites contained other constraints, including the presence of State-protected wetlands, or were already existing [REDACTED] (i.e., forested, wetlands, etc.) and conversion of these habitats may result in negative impacts to other species of concern. Additionally, the requirements for a mitigation parcel were unduly burdensome for landowners approached by the Applicant, notably that placing said parcels into mitigation would render areas incompatible with continued agricultural use. If the Applicant was required to create [REDACTED] mitigation in the vicinity of the Facility Site, the Applicant would likely need to split the acreage between several parcels to get an acreage suitable to mitigate for impacts, resulting in a fragmented landscape with competing land uses outside of the mitigation

areas. While this may result in modest benefits to the local population of individual [REDACTED], these parcels would not provide a contiguous benefit and not necessarily result in the desired outcomes such as could be achieved by contributing to a NYSDEC-approved, functioning [REDACTED] mitigation site in Northern New York. By instead contributing to the continued management and expansion of the Tibbets Mitigation Complex, the mitigation action will result in the development of a contiguous, [REDACTED]-acre mitigation site in the vicinity of currently functioning habitat that is successful for the target species and will increase the benefit to the target species' population in a meaningful way. Additionally, the selected site is located adjacent to an Audubon Important Bird Area, as well as several protected areas, which may not only benefit the target species, but several other species of concern as well.

When evaluating potentially suitable sites, the Applicant found that there is significant forested cover in the areas surrounding the Facility Site. To create an avian mitigation site (or several), tree clearing would more than likely be required which would cause increased disturbances beyond the current Facility footprint which the Applicant has worked diligently to consolidate. The removal of trees would reduce potential habitat for forest dwelling avian species, and other species of concern including federally listed bats, which rely on forested and/or edge habitats. While evaluating open and/or previously disturbed land in the vicinity of the Facility Site, the Applicant noted that these parcels either contained other ecological resources which would be affected (e.g., wetlands, streams or adjacent areas/buffers) and which limited the acreage available for an avian mitigation site, or that these parcels were currently being used for or could be used for farming in the future, as well as significant prevalence of Prime Farmland and Farmland of Statewide Importance. The Applicant does not intend to further expand the impacts of the Facility and reduce available acreage for private landowners to continue to farm outside of the current Facility Site. Further, surveys conducted at the Facility Site primarily indicate use by [REDACTED] during the wintering season. Given the extent of available wintering habitat within the agricultural areas located within the Facility Site (~69,000 acres) and directly adjacent to and in the vicinity of the Facility (~54,000 acres), mitigation of these areas may be redundant as local resident individuals are likely to disperse to similar available habitats during and following construction.

The Applicant's selected mitigation site was developed specifically for [REDACTED] (among other species), is in close proximity to several areas of protected habitat, close to the shores of Lake Ontario which supports high avian diversity, has proven success through documented use of the site by [REDACTED] since it was built in 2021, and

it was built with the intent to sell credits to offset anticipated habitat losses associated with future infrastructure projects, such as the proposed Facility, and to provide a net benefit to affected species. This site was not developed to replace any previous loss of habitat in the State.

The Applicant intends to continue discussions with ORES throughout finalization of the Facility Site layout and to communicate regarding the anticipated decrease in overall impacts to listed species ([REDACTED]). Since receipt of the Final Determination of Take in April 2024, the Applicant has removed panels in the [REDACTED] of the Facility Site to avoid avian habitat and proximity to noted [REDACTED] and will update the final take number with ORES prior to finalization of the NCBP.

If at any point over the duration of the mitigation to be implemented by the Applicant, one or more of the species described in the NCBP are downlisted, the area of occupied habitat will be re-evaluated to reflect only listed species. The acreage for mitigation efforts will subsequently be updated to include only the acreage of occupied habitat for current listed species. Additionally, if for some reason the permittee-implemented NCBP is no longer feasible, the Applicant would instead negotiate a mitigation fee to be provided on a one-time basis to the Endangered and Threatened Species Mitigation Bank Fund once available, to provide a net conservation benefit for the take of occupied habitat, as described above.

References:

New York State Department of Environmental Conservation (NYSDEC). 2015. NYSDEC Draft Survey Protocol for State-listed Wintering Grassland Raptor Species

NYSDEC. 2016. Conservation Plan for Bald Eagles in New York State. March 2016. Available at: https://www.dec.ny.gov/docs/wildlife_pdf/nybaldeagleplan.pdf

NYSDEC. 2019. Draft Species List Under the Part 182.5 Pre-proposal. Available at: https://extapps.dec.ny.gov/docs/wildlife_pdf/preproposal182.pdf

NYSDEC. 2021. Survey Protocol for State-listed Breeding Grassland Bird Species.

NYSDEC. 2021. Survey Protocol for State-listed Wintering Grassland Raptor Species. August 2021.

United States Fish and Wildlife Service (USFWS). 2007. National Bald Eagle Management Guidelines. May 2007. Available at: https://www.fws.gov/sites/default/files/documents/national-bald-eagle-management-guidelines_0.pdf