



**BROOKSIDE SOLAR, LLC**

**Matter No. 21-00917**

**900-2.13 Exhibit 12**

**NYS Threatened and Endangered Species**

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## Acronym List

AES	The AES Corporation, Inc.
Application	Brookside Section 94-c Application
BBS	Breeding Bird Surveys
DBH	Diameter at Breast Height
NCBP	Net Conservation Benefit Plan
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
USCs	Uniform Standards and Conditions
USFWS	United States Fish and Wildlife Service
WRS	Winter Raptor Surveys
WSCR	Wildlife Site Characterization Report

## Glossary Terms

<b>Applicant</b>	Brookside Solar, LLC, a subsidiary of The AES Corporation, Inc. (AES), and entity seeking a siting permit for the Facility from the Office of Renewable Energy Siting (ORES) under Section 94-c of the New York State Executive Law.
<b>Facility</b>	The proposed components to be constructed for the collection and distribution of energy for the Riverside Solar Project, which includes solar arrays, inverters, electric collection lines, and the collection substation.
<b>Facility Site</b>	The parcels encompassing Facility components which totals 1,471 acres in the Towns of Burke and Chateaugay, Franklin County, New York (Figure 2-1).
<b>Study Area</b>	In accordance with the Section 94-c Regulations, 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 69,963 acres, inclusive of the 1,471-acre Facility Site.

## **Exhibit 12: NYS Threatened and Endangered Species**

This Exhibit provides information required in accordance with the requirements of Section 900-2.13 of the Section 94-c Regulations.

### **12(a) Wildlife Site Characterization Report**

A Wildlife Site Characterization Report (WSCR) was prepared pursuant to Section 900-1.3(g)(1) and was submitted to the New York State Department of Environmental Conservation (NYSDEC) and the Office of Renewable Energy Siting (ORES) on February 28, 2021. A meeting between the Applicant and associated representatives, the NYSDEC, and ORES was held virtually on April 5, 2021. At this meeting, the agencies provided feedback on the content and conclusions of the WSCR, which is discussed further below. The WSCR is included as Appendix 12-1.

### **12(b) Pre-application Wildlife Survey Reports**

In addition to the WSCR, several preconstruction surveys were completed in support of the Brookside Section 94-c Application (Application). Survey reports identified in this Exhibit were previously provided to ORES and the NYSDEC and have been included as Appendices with this Application. Specifically, the Application includes reports for the Applicant's breeding bird surveys (BBS) (Appendix 12-2) and winter raptor surveys (WRS) (Appendix 12-3). 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***

TRC conducted a preconstruction survey of grassland bird species on behalf of the Applicant to determine the presence and site use by state-listed grassland bird species during the breeding season (late May through July of 2020). The survey methodology followed the NYSDEC *Draft Survey Protocol for State-listed Breeding Grassland Bird Species* (NYSDEC, 2015a). A study plan for the survey was submitted on May 7, 2020, to NYSDEC for review and comment. NYSDEC comments were incorporated into a revised study plan which was submitted to NYSDEC on June 29, 2020.

Point count surveys were conducted at 24 survey locations (points) within the Facility Site between May 20, 2020 and July 7, 2020 (Study Period). The number of points fluctuated during the Study Period resulting from land use shifts to agricultural production. Four rounds of point count surveys were conducted over the course of the Study Period, with each location visited between one and four times, resulting in a total of 80 point count surveys.

A total of 846 grassland bird observations of 47 species occurred within the Facility Site during the Study Period. Of these, 22 species were observed during regular (point count) surveys, and an additional 25 species were observed incidentally. The five most frequently observed species during regular surveys composed 83.6 percent of all individuals observed. The most frequently observed species during surveys was the red-winged blackbird (*Agelaius phoeniceus*; 78 observations), comprising 27.8% of all birds observed. Thereafter, the most frequently observed species were the bobolink (*Dolichonyx oryzivorus*), savannah sparrow (*Passerculus sandwichensis*), song sparrow (*Melospiza melodia*), and eastern meadowlark (*Sturnella magna*).

Grassland bird observations fluctuated throughout the Study Period. The number of observations was highest on June 19, 2020, with 91 observations (n=91). Observations were lowest on June 10, 2020 (n=26). The grassland bird community observed in the Facility Site is composed of species widely distributed in and typical to New York State (NYS). Observed species are representative of those expected where suitable grassland habitat is present.

During the Study Period, two state-listed threatened species and one state-listed special concern species were documented. Northern harrier (*Circus cyaneus*) was observed on two occasions, with one observation during regular surveys and one incidentally observed during a meander survey in transit between survey points. During daytime surveys, two observations of Henslow's sparrows (*Ammodramus henslowii*) were documented at two separate points. Additionally, one species of special concern, the grasshopper sparrow (*Ammodramus savannarum*), was observed four times including one incidental observation. The three non-incident observations were of two singing males all at one point. Observed evidence of probable breeding was documented for all listed species (i.e., singing males, visiting probable nest sites). A nest was observed for the northern harrier; however, the nest was later destroyed by agricultural activities. The destruction of the nest was reported to the NYSDEC and they determined no incidental take permit was needed pursuant to Part 182.13(a)(3), which exempts the taking of any species listed as endangered or threatened resulting from existing, routine,

and ongoing agricultural activities. For more details on these conditions please see the Grassland Breeding Bird Survey Report included as Appendix 12-2.

The Grassland Breeding Bird Survey Report was submitted to the NYSDEC and ORES on November 23, 2021, and is included herein as Appendix 12-2.

### ***Winter Raptor Surveys***

On behalf of the Applicant, TRC conducted a preconstruction survey of wintering grassland raptors. The objective of the WRS was to determine the presence and site use of state-listed grassland raptors within the proposed Facility Site. Target species were the short-eared owl (*Asio flammeus*) and northern harrier. The survey methodology followed the NYSDEC *Draft Survey Protocol for State-listed Wintering Grassland Raptor Species* (NYSDEC, 2015b). A study plan for the survey was submitted to the NYSDEC on December 10, 2019, and was approved on November 23, 2020.

Surveys were performed in the winters of 2019 and 2020 and were conducted between December 5, 2019 to March 31, 2020. Surveys were performed using both rotating stationary survey points and weekly driving surveys along roads, with short-duration counts conducted along the route in areas of grassland habitat. Stationary survey points were situated in or near grassland habitat within the Facility Site with clear visibility in all or most directions. Stationary survey points were no further than 1,000 meters apart when multiple stationary survey points were needed to cover an area of grassland habitat.

A total of five stationary survey points and one driving route consisting of eight driving survey stops were established in areas of potential habitat throughout the Facility Site. A total of 45 stationary surveys and 72 driving route survey stops were completed over 9 survey events, for a total survey effort of 68.9 stationary survey hours and 8.13 driving survey hours during the study.

A total of one raptor observation of one turkey vulture (*Cathartes aura*) was recorded during the stationary surveys comprising a total of one-use minute. Overall mean use of the Facility Site by raptors for stationary surveys was 0.00 minutes. During the driving surveys, two raptor observations representing two species were recorded including two species not observed during stationary surveys. The observed species were red-tailed hawk (*Buteo jamaicensis*) and the

American kestrel (*Falco sparverius*). One red-tailed hawk was observed incidentally in route to survey locations. There were no state-listed raptor species observed on the Facility Site.

Overall, minimal raptor use was observed throughout the Facility Site, though observed raptor activity was highest in the west-central portion of the Facility Site and most of the raptor observations occurred in March. Observations were recorded at one of the stationary locations and two of eight driving route stops. No state-listed raptor species were observed on the Facility Site.

The State-Listed Wintering Grassland Raptor Survey Report was submitted to the NYSDEC and ORES in July 2020, and is included herein as Appendix 12-3.

### **12(c) ORES Determination on Occupied Habitat**

ORES' determination of occupied habitat at the Facility Site pursuant to Section 900-1.3(g)(7), dated September 13, 2021, is included as Appendix 12-4. A pre-application consultation letter was received from ORES, dated December 10, 2020. A meeting between the Applicant and associated representatives, the NYSDEC, and ORES was held virtually on February 28, 2021, to discuss the WSCR and this pre-application consultation letter. On behalf of the Applicant, on June 29, 2021, TRC provided a response to ORES Pre-application Consultation regarding the estimate of occupied habitat for state-listed species (Appendix 12-6).

The September 13, 2021 determination on occupied habitat, incidental take, and net conservation benefit indicated the following:

- The Facility is not within 1.5 miles of a maternity roost site or 5 miles of a hibernaculum site for northern long-eared bats (*Myotis septentrionalis*).
- The Facility is not within 2.5 miles of a maternity roost site or within 2.5 miles of a hibernaculum of bachelor colonies for Indiana bat (*Myotis sodalis*).
- There are no active bald eagle (*Haliaeetus leucocephalus*) nests located within the Facility Site or within 0.25 miles of the Facility Site.
  - Results of the BBS conducted onsite in 2020 indicate that much of the Facility is sited in areas of occupied breeding habitat of the northern harrier and Henslow's sparrow. In accordance with the September 13 determination, construction of the



Facility in occupied habitat will not result in a take of listed species, and the Applicant will follow the Uniform Standards and Conditions (USCs) (§§ 900-6.4 (o)(3)(i)-(vii)). The Facility Site contains 329.1 acres of occupied breeding northern harrier and Henslow’s sparrow habitat. Construction of the Facility will adversely impact all 329.1 acres of occupied breeding habitat for these two species. A Net Conservation Benefit Plan (NCBP) for these species has been developed. To mitigate impacts to occupied grassland habitat USC §§ 900-6.4 (o)(3)(viii) and (ix)) shall be adhered to.

- There are no other known state-listed species occurrences within the Facility Site.

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

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, and construction monitoring. Site design practices avoid sensitive habitats for the above-listed T&E species by siting solar arrays primarily in previously disturbed agricultural fields, minimizing construction disturbances to the extent practicable, and adhering to designated construction limits and species-specific time of year restrictions (as applicable). 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. Unfortunately, even with avoidance and minimization measures, there will be potential adverse impacts to habitat for several species. These adverse 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)
Henslow’s sparrow ( <i>Ammodramus henslowii</i> )	Threatened	Refer to the Net Conservation Benefit Plan (NCBP) – Appendix 12-5 for avoidance and minimization measures for these species.	Breeding habitat (329.1 acres)
Northern harrier ( <i>Circus cyaneus</i> )	Threatened		Breeding habitat (329.1 acres);
Grasshopper sparrow ( <i>Ammodramus savannarum</i> )	Special concern	Species will benefit from the NCBP.	N/A

**Bats**

As noted in the WSCR and the ORES determination on occupied habitat, the Facility is not within 5 miles of a northern long-eared bat hibernaculum or 1.5 miles of maternity roost sites and is not within 2.5 miles of an Indiana bat maternity roost site or within 2.5 miles of an Indiana bat hibernaculum or bachelor colony. Based on the United States Fish and Wildlife Service's (USFWS's) Information for Planning and Consultation (IPaC) list for the Facility, the range of the Indiana bat does not overlap with the Facility Site, and therefore, the species is unlikely to occur.

If at any time during the life of the Facility, an active NYS-listed threatened or endangered bat species maternity colony roost tree (or structure) is discovered within the Facility Site, the New York State Department of Public Service (NYSDPS) and ORES shall 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.

Based on the factors considered herein, the Facility is unlikely to adversely affect the Northern long-eared bat or the Indiana bat and therefore no net conservation benefit plan is needed and seasonal tree clearing limitations are not applicable. This is consistent with the Uniform Standards and Conditions under Section 94-c and the Federal 4d Rule which only applies tree clearing restrictions for known hibernaculum and known maternity roosts represented in locational information contained in species records maintained by State or Federal agencies or by natural heritage programs.

**Bald Eagle**

As noted in the State-Listed Wintering Grassland Raptor Survey Report, the WSCR, and ORES determination on occupied habitat, there are no active bald eagle nests within 0.25 mile of the Facility Site. The 2015 NYSDEC Conservation Plan for Bald Eagles in New York State states that new construction is not recommended within 0.25 mile of a nest if there is no visual buffer, and recommends new construction be sited no closer than 660 feet of a nest. The 2007 USFWS

National Bald Eagle Management Guidelines also recommend maintaining a buffer of at least 330 feet between new construction project activities and the nest if the new construction is not visible from the nest. If the new construction will be visible from the nest, the USFWS recommends maintaining a 660-foot buffer. Construction proposed at the Facility is beyond these distance thresholds to any known nest locations, and therefore, will avoid impacts to nesting bald eagles. The majority of the Facility Site is open fields and there is minimal total tree clearing (45.9 acres) associated with the Facility. Based on the factors considered herein, the Facility is unlikely to disturb nesting bald eagles.

If, at any time during construction and operation of the Facility, an active bald eagle nest or roost is identified within the Facility Site, the NYSDPS and ORES shall be notified within 48 hours of discovery and prior to any disturbance of the nest or immediate area. An area 0.25 mile in radius for nests without a visual buffer, and 660 feet in radius for nests with a visual buffer from the nest tree shall be posted and avoided to the maximum extent practicable until notice to continue construction at that site is granted by NYSDPS and ORES. Tree removal will not occur:

- Within 660 feet of an active nest during breeding season (January 1 through September 30);
- Within 0.25 mile from an important winter roost during the wintering period (December 1 through March 31); or
- Of overstory trees within 330 feet of an active nest at any time.

### ***Threatened and Endangered Grassland Birds***

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. 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 two state-listed species: northern harrier and Henslow's sparrow. Therefore, a Net Conservation Benefit Plan (NCBP) has been developed, as further discussed in Section 12(f), and is included

as Appendix 12-5. The avoidance and minimization measures for these grassland bird species, including species of special concern such as the grasshopper sparrow, are outlined in this NCBP.

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

The Facility was not determined to have only a *de minimis* impact to NYS-listed threatened or endangered grassland birds or their habitat, as it does not meet the below criteria, therefore, this section is not applicable.

#### **(1) *Not Present Based on Survey***

For a Facility to be determined to have only *de minimis* impacts to NYS-listed 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, including that the Facility has been designed such that the only impact 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 Facility does not meet these criteria.

#### **(2) *No Recent Confirmed Nesting or Roosting Location***

For a Facility to be determined to have only *de minimis* impacts to NYS-listed 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, including 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 5 years) confirmed nesting or roosting locations. This category does not apply to this Facility.

#### **(3) *Delisted or Down-listed Species***

For a Facility to be determined to have only *de minimis* impacts to NYS-listed 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, including

that the Facility has been designed such that the only impacts would be to occupied habitat identified by NYS-listed 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 down-listing to special concern.

Therefore, this section does not apply. However, it is important to note that on October 25, 2019, the northern harrier was pre-proposed for down-listing by the NYSDEC under Part 182 of 6 New York Codes, Rules and Regulations (NYCRR) from threatened to special concern. Additionally, bald eagles are pre-proposed for down-listing from threatened to special concern, and osprey and sharp-shinned hawk are both pre-proposed for delisting from special concern to removal from the list. There is currently no timeline for regulatory changes to be made to the list of endangered species.

### **12(f) Net Conservation Benefit Plan**

Based on the occupied habitat determination, the Facility will adversely impact (“take”) state-listed grassland breeding bird habitat. Therefore, a NCBP has been prepared in compliance with section 900-6.4(o) and is included as Appendix 12-5. The purpose of the NCBP is to describe 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. The NCBP demonstrates a result in a positive benefit on each of the affected species and provides a consideration of potential minimization and mitigation measures, along with a consideration of potential sites for mitigation measures for each of the affected species. The NCBP includes the identification and detailed description of the mitigation actions that will be undertaken by the Applicant to achieve a net conservation benefit to the affected species. As physical mitigation will be performed, a letter or other indication of the Applicant’s financial and technical capability and commitment to fund and execute such management, maintenance, and monitoring for the life of the facility/term of the siting permit is also included in the NCBP.

### **Conclusions**

Through correspondence with the NYSDEC and USFWS, it was determined that the Facility Site has the potential to support the following listed species: the northern long-eared bat, bald eagle, Henslow’s sparrow, and northern harrier. BBS and WRS were conducted, and an NCBP

was written at the request of ORES for the northern harrier and Henslow's sparrow. Impacts to bald eagles and northern long-eared bats are not expected. Sensitive habitats are avoided to the extent practicable by siting solar arrays primarily in previously disturbed agricultural fields, minimizing construction disturbances and adhering to designated construction limits and species-specific time-of-year restrictions. The Facility has been designed to comply with 19 NYCRR Section 900-2.13 and the USCs, and impacts related to NYS-listed threatened and endangered species have been avoided and minimized to the maximum extent practicable.

## References

New York State Department of Environmental Conservation (NYSDEC). 2015. Conservation Plan for Bald Eagles in New York State. March 2016. Available at: [https://www.dec.ny.gov/docs/wildlife\\_pdf/nybaldeagleplan.pdf](https://www.dec.ny.gov/docs/wildlife_pdf/nybaldeagleplan.pdf).

NYSDEC. 2015a. Draft Survey Protocol for State-listed Breeding Grassland Bird Species.

NYSDEC. 2015b. NYSDEC Draft Survey Protocol for State-listed Wintering Grassland Raptor Species

NYSDEC. 2019. List of Endangered, Threatened, and Special Concern Fish & Wildlife Species of New York State. Available at: <https://www.dec.ny.gov/animals/7494.html>.

United States Fish and Wildlife Service (USFWS). 2007. National Bald Eagle Management Guidelines. May 2007. Available at: <https://www.fws.gov/pacific/ecoservices/documents/NationalBaldEagleManagementGuidelines.pdf>.