



United States Department of the Interior

FISH AND WILDLIFE SERVICE

3817 Luker Road
Cortland, NY 13045



July 19, 2011

Mr. Stephen Tomasik
Project Manager
NYS Department of Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, NY 12233-1750

Dear Mr. Tomasik:

This is in response to your May 25, 2011, Notice of Availability of a Draft Environmental Impact Statement (DEIS) for the proposed Cricket Valley Energy Center located along NYS Route 22 in the Town of Dover, Dutchess County, New York. The following comments are provided pursuant to the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). This response does not preclude additional U.S. Fish and Wildlife Service (Service) comments under other legislation.

We offer the following comments by DEIS section.

Section 3 Natural Resources

3.1 Applicable Laws, Regulations, and Policies

3.1.2 Clean Water Action Section 404 Permit Program and 3.1.3 Endangered Species Act

We understand that the U.S. Army Corps of Engineers is involved through authorizations under Section 404 of the Clean Water Act. Federal agencies have responsibilities under Section 7(a)(2) of the ESA to consult with the Service regarding projects that may adversely affect Federally-listed species or "critical habitat," and confer with the Service regarding projects that may adversely affect Federally-proposed species or proposed "critical habitat."

3.2 Existing Conditions

3.2.5 Protected Species

The introduction mentions previous coordination with the Service, New York Natural Heritage Program, and New York State Department of Environmental Conservation (NYSDEC) in June 2009 for two species, the Federally-listed threatened and State-listed endangered bog turtle (*Glyptemys [=Clemmys] muhlenbergii*) and the State-listed threatened timber rattlesnake (*Crotalus horridus*). The Service previously provided comments on the potential for not only the bog turtle, but the Federally- and State-listed endangered Indiana bat (*Myotis sodalis*) and Federal candidate for listing, New England cottontail (*Sylvilagus transitionalis*) listed species to occur at the project area in our July 20, 2009, and September 21, 2009, letters to the project sponsor's consultant, ARCADIS.

3.2.5.1.7 Bog Turtle

In our September 21, 2009, letter, we agreed that no suitable habitat was found within the property limits, and stated that the focus of an effects analysis should be indirect effects to bog turtles and habitat in wetland DP-22. The effects analysis (one paragraph) provided on page 3-29 is insufficient. For example, additional information should be provided on the proximity of proposed activities to bog turtle habitat. Depending on the proximity, protective fencing and preconstruction turtle surveys by permitted biologists may be needed. A summary of the groundwater withdrawal information provided in Section 5 should be provided in this section with a rationale for the conclusion that "withdrawals will not have an appreciable effect on the hydrology of onsite or offsite wetlands, or the Swamp River". The same recommendation applies to the stormwater management plan. A summary is needed regarding how that will avoid changes in surface water quality or quantity to offsite wetlands. We previously provided ARCADIS with a list (although not exhaustive) of potential impacts to bog turtles to consider in our July 20, 2009, letter, and expected to see an analysis addressing these items.

3.2.5.3.1 New England Cottontail

The project sponsor should obtain current location information for this species from the NYSDEC. This section does not address any potential indirect effects to New England cottontail from habitat impacts.

3.2.5.3.2 Indiana Bat

As stated in our September 21, 2009, letter, without any additional site-specific bat studies, it is reasonable to assume that Indiana bats are using the project area given its location and natural features of the site. Therefore, similar to the bog turtle, the next step is to determine the potential impacts to this species. We provided comments and recommendations on what to consider in this analysis in our letter and our comments were not addressed in the DEIS.

3.2.6 Construction Laydown/Worker Parking Site

3.2.6.2 Wildlife Habitat

Page 3-37 accurately states that ARCADIS coordinated with the Service regarding this site in July 2010. On August 5, 2010, the Service sent ARCADIS our standard FAX with directions to use our website for county-based species lists. The DEIS addresses several species that may occur at the site. However, for some reason, the Indiana bat was not addressed. This will need to be completed.

3.2.6.2.2 Bog Turtle

The final sentence states that “while portions of the Laydown Site are bordered by perennial emergent wetlands, these habitat were dominated by vegetated overstories or invasive species, and are not considered to be suitable habitat for the bog turtle.” Please note that many (if not most or all) bog turtle sites have invasive species to various degrees. If any of the wetlands may be impacted (directly or indirectly) by work at the Laydown Site, Phase 1 bog turtle surveys should be conducted by a qualified bog turtle surveyor.

3.2.6.2.3 New England Cottontail

Similar to the project site, the project sponsor should obtain current location information for this species from the NYSDEC. This section does not address any potential indirect effects to New England cottontail from habitat impacts.

3.3 Project Related Impacts and Mitigation Measures

3.3.3 Potential Wildlife and Habitat Impact

As discussed above, the DEIS lacks a real analysis of potential impacts to Federally-listed or candidate species at this time. Page 3-48 states that “seasonal restrictions on clearing will be imposed to avoid potential impact to Indiana bat habitat.” As you are aware, seasonal restrictions on clearing are intended to avoid direct impacts to the bats themselves. Clearing the trees may be an impact to habitat (and therefore result in indirect effects to Indiana bats); however, we consider the amount of habitat and the landscape context in which the clearing is conducted.

We have the same comments on the bog turtle analysis on page 3-48 as we provided for Section 3.2.5.1.7.

As a reminder, the most recent compilation of Federally-listed and proposed endangered and threatened species in New York* is available for your information. Until the proposed project is complete, we recommend that the project sponsor check our website every 90 days from the date of this letter to ensure that the listed species presence/absence information for the proposed project is current.

Thank you for your time. If you require additional information please contact Robyn Niver at (607) 753-9334. Future correspondence with us on this project should reference project file 90453.

Sincerely,

A handwritten signature in black ink that reads "David A. Stilwell". The signature is written in a cursive style with a large, stylized initial "D".

David A. Stilwell
Field Supervisor

*Additional information referred to above may be found on our website at:
<http://www.fws.gov/northeast/nyfo/es/section7.htm>

cc: NYSDEC, New Paltz, NY (Attn: L. Masi/A. Ciesluk)
NYSDEC, Albany, NY (Wildlife Diversity)
COE, New York, NY (Attn: B. Orzel)