

**APPENDIX F**  
**IMPLEMENTING AGREEMENT**

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**IMPLEMENTING AGREEMENT**

**by and between**

**CRITERION POWER PARTNERS, LLC,**

**and**

**U.S. FISH AND WILDLIFE SERVICE.**

This Implementing Agreement (“Agreement”), made and entered into as of [date], by and among CRITERION POWER PARTNERS, LLC (“Criterion” or “Permittee”) and the UNITED STATES FISH AND WILDLIFE SERVICE (“USFWS”), hereinafter collectively called the “Parties,” defines the Parties’ roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed species and its habitat of the proposed Criterion Wind Energy Project in Garrett County, Maryland (“the Project”).

**1.0 RECITALS**

This Agreement is entered into with regard to the following facts:

1.1 The Service has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants and their habitats under various federal laws, including the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 et seq.), the Migratory Bird Treaty Act (“MBTA”) (16 U.S.C. § 701 et seq.), the Bald and Golden Eagle Protection Act (“BGEPA”) (16 U.S.C. § 668 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-666(c)), and the Fish and Wildlife Act of 1956 (16 U.S.C. § 742(a) et seq.).

1.2 The ESA prohibits the “take” of species listed as endangered or threatened under the ESA. Under Section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)), the Service may issue permits authorizing the incidental take of endangered or threatened species during otherwise lawful activities if certain statutory requirements are met by the applicant and such take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. To obtain a federal incidental take permit, the applicant must submit a habitat conservation plan describing, among other things, the steps the applicant will take to minimize and mitigate the maximum extent practicable the impact of such take. Permittee submitted its application for a Permit to the Service on December 2, 2011, and amended the application in response to comments from the USFWS on January 17, 2014;

1.3 Permittee owns and operates the Criterion Project (“the Project”), located in Garrett County, Maryland, as more fully described in the associated Habitat Conservation Plan. Permittee will operate the Project pursuant to a siting certificate waiver issued by the State of Maryland;

1.4 Permittee leases the Covered Lands upon which the Project is located. Permittee has acquired the necessary legal rights to construct and operate the Project and its associated facilities from the underlying land owners;

1.5 Permittee, with technical assistance from the Service, has prepared a Habitat Conservation Plan (“HCP”) and related documents covering certain listed “Covered Species” under the jurisdiction of the Service (as further defined below);

1           1.6     Permittee has developed a series of conservation measures to conserve listed species  
2 and to meet other applicable requirements of the ESA to support issuance of a Permit by the Service  
3 pursuant to Section 10(a)(1)(B) of the ESA for the permit term described in Section 7.0 herein;

4           1.7     Permittee has developed the HCP, which is designed to substantively address effects  
5 to Covered Species and benefit their local and regional populations; the Plan causes Permittee to,  
6 among other things, (a) engage in certain habitat enhancement actions for certain Covered Species;  
7 (b) adjust Project operations to implement certain conservation actions; and (c) provide information  
8 on the implementation of these conservation actions;

9           1.8     This Agreement defines the Parties' roles and responsibilities and provides a com-  
10 mon understanding of actions that will be undertaken under the HCP and Permit, among other things,  
11 to minimize and mitigate the take of Covered Species (described in Section 5 of the HCP) from  
12 Covered Activities (described in Section 2 of the HCP) within the Covered Lands (described in Sec-  
13 tion 1 of the HCP); and

14 **THEREFORE**, the Parties hereto do hereby understand and agree as follows.

## 15 **2.0     TERMS USED**

16 Terms defined and utilized in the Habitat Conservation Plan and the Endangered Species Act shall  
17 have the same meaning when utilized in this Agreement, except as specifically noted in Section 3.0.

## 18 **3.0     DEFINITIONS**

19 The following terms as used in this Agreement shall have the meanings set forth below:

20           3.1     The term "Permit" shall mean an incidental take permit issued by the Service to Cri-  
21 terion pursuant to Section 10(a)(1)(B) of the Endangered Species Act, ("ESA") and its implementing  
22 regulations at 50 C.F.R. Parts 13 and 17.

23           3.2     The term "Permit Area" shall mean the Project area consisting of approximate-  
24 ly 117 acres of private land in Garrett County, Maryland as depicted in Figures 1.1 and 1.2 of the  
25 HCP.

26           3.3     The term "Permittee" shall mean Criterion Power Partners, LLC.

27           3.4     The term "Conservation Plan" or "HCP" shall mean the Habitat Conservation Plan  
28 prepared for the Project.

29           3.5     The term "Plan Species" or "Covered Species" shall mean the Indiana bat (*Myotis*  
30 *sodalis*); the list of covered species may be modified from time to time in accordance with the terms of  
31 Sections 8.2.1 and 8.4.3 of the HCP, the USFWS' implementing regulations and Section 14 of this IA.

32           3.6     The term "Covered Activities" shall mean those activities specified in Section 2 of the  
33 HCP, for which the Permittee has committed to avoidance, minimization and mitigation measures;  
34 from which impacts to ESA-listed species and the human environment have been evaluated pursuant  
35 to the ESA and the National Environmental Policy Act, respectively; and, of which only turbine op-  
36 erations are likely to cause incidental take, to be authorized through the Permit.

## 37 **4.0     HABITAT CONSERVATION PLAN**

38 Pursuant to the provisions of Section 10(a)(1)(B) of the ESA, Criterion [hereinafter referred to as  
39 Permittee] has prepared a Habitat Conservation Plan ("HCP") and submitted it to the Service with a  
40 request that the Service issue a Permit ("Permit") to allow subject Plan species to be incidentally

1 taken within the Permit Area as depicted and described in Figures 1.1 and 1.2 of the HCP. The HCP  
2 proposes a mitigation program for the subject Plan Species and its habitat. In order to fulfill the re-  
3 quirements that will allow the Service to issue the Permit, the HCP sets forth measures that are in-  
4 tended to ensure that any take occurring within the Permit Area will be incidental; that the impacts  
5 of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to  
6 deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be  
7 provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of  
8 the Plan Species in the wild. It also includes measures that have been suggested by the Service as  
9 being necessary or appropriate for purposes of the HCP.

#### 10 **5.0 INCORPORATION OF HCP**

11 The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein.  
12 In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms  
13 of this Agreement shall control only for the purposes of interpreting this IA. The provisions of the  
14 Plan, ITP, and this IA shall be interpreted to be consistent with and complementary to each other.  
15 This IA is not intended to negate or nullify any provision of the ITP and/or the Plan.

#### 16 **6.0 PURPOSES**

17 The purposes of this Agreement are:

18 6.1 To ensure implementation of each of the terms of the HCP;

19 6.2 To describe remedies and recourse should any Party fail to perform its obligations,  
20 responsibilities, and tasks as set forth in this Agreement; and

21 6.3 As stated in paragraph 12.2(a) hereof, to provide assurances to the Permittee that as  
22 long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are ful-  
23 ly and faithfully performed, no additional mitigation will be required except as provided for in this  
24 Agreement or required by law.

#### 25 **7.0 TERM**

26 This Agreement shall become effective on the date that the Service issues the Permit requested in  
27 the HCP and shall remain in full force and effect for the permit duration of 20 years or until termi-  
28 nation of the Permit, whichever occurs sooner.

#### 29 **8.0 FUNDING**

30 8.1 Permittee will provide such funds as may be necessary to carry out its obligations  
31 under the HCP. The Permittee should notify the Service if the Permittee's funding resources have  
32 materially changed, including a discussion of the nature of the change, from the information pro-  
33 vided in Section 6.0 of the HCP.

34 8.2 The Permittee shall further ensure that funding is available to meet its obligations  
35 under this Agreement, the Permit, and the HCP through a performance bond issued on behalf of  
36 Constellation Holdings, Inc. in favor of the Permittee and dated no later than 45 days from the effec-  
37 tive date of the Permit, the form of which is attached hereto as Exhibit A. The performance bond  
38 shall be maintained for the life of the Permit. The performance bond shall be in an initial amount of  
39 not less than \$1,467,150 provided, however, that from time to time the Permittee may with prior no-  
40 tice to and concurrence from the Service reduce the amount of the performance bond as the Permit-  
41 tee completes the tasks set forth in the HCP, and may be required to augment the amount of the per-  
42 formance bond should the estimates provided in Section 6.0 of the HCP prove to be undervalued..

1 Funds from the performance bond shall only be used if the Permittee is otherwise unable to meet its  
2 obligations under this Agreement, the Permit, or the HCP.

3 8.3 CPP will develop a binding contract with BCI or other qualified entity to implement  
4 the mitigation required under Sections 5.3.1 and 6.0 of the HCP within 60 days of approval of the  
5 mitigation project by USFWS. The contractor will be required to implement the project within 24  
6 months of permit issuance. The contract shall cover the expenses to implement the mitigation pro-  
7 ject up to but not to exceed amount of \$176,250. A copy of the executed contract shall be deliv-  
8 ered to the Service within five business days of signature by both parties.

9 8.4 In the event of a legal challenge to the final Permit by any third party that results in  
10 the entry of preliminary or permanent injunctive relief that precludes Project operations according to  
11 the Permit's and HCP's terms, expenditures of monies for mitigation will be stayed until the final  
12 resolution of such legal challenges, including any administrative or judicial appeals by any party.  
13 Upon exhaustion of appeals to such challenges, monies reserved for mitigation may be spent and  
14 obligated as long as the permit is not terminated, relinquished, or revoked.

15 8.5 In the event the Permit is terminated, relinquished, or revoked in accordance with the  
16 terms of this Agreement prior to the expenditure of all monies reserved for mitigation, the Permittee  
17 will notify the Service of the amount of all unspent and unobligated monies.

18 **9.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPL-**  
19 **MENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE**

20 **9.1 Responsibilities of the Permittee**

21 In consideration of the issuance of an ITP authorizing any incidental take which may result from  
22 activities conducted in accordance with the HCP, and in consideration of the assurances provided by  
23 the Permit, the Service regulations and this Agreement, Permittee agrees to:

- 24 (a) Fully and faithfully perform all obligations in the HCP, the Permit and this Agree-  
25 ment, including, but not limited to, all the conservation management and monitoring  
26 measures, as well as those measures deemed necessary for Adaptive Management or  
27 to respond Changed Circumstances as identified through processes described in the  
28 HCP.
- 29 (b) Fully fund all costs needed to perform its affirmative obligations under the Permit  
30 and the Plan, even if costs are underestimated in the HCP.
- 31 (c) Promptly notify the Service if, for any reason (including, but not limited to, court  
32 rulings or lack of sufficient funds), Permittee has or is likely to become unable to ful-  
33 fill any obligation required by the HCP, the Permit or this Agreement.
- 34 (d) Promptly respond to all notices from the Service in accordance with the HCP, Permit  
35 or this Agreement, and inquiries from the Service regarding the same.
- 36 (e) Promptly notify the Service of any lawsuits filed against Permittee or written notices  
37 or letters expressing intent to file suit challenging the issuance of or compliance with  
38 the Permit.
- 39 (f) Notify the Service in writing within ten (10) days of the occurrence of any of the fol-  
40 lowing: (1) any change in the registered name of Permittee; (2) the dissolution of  
41 Permittee; (3) the sale or conveyance of Permittee; (4) bankruptcy proceedings by  
42 Permittee as well as whether Permittee is in receivership; (5) when Permittee will no

1 longer perform the Covered Activities in the Covered Lands; (6) the revocation or  
 2 suspension of Permittee’s corporate authorization to do business in the state or states  
 3 in which it is registered to do business and, (7) Permittee is disqualified from per-  
 4 forming Covered Activities under the Permit for either of the disqualifying factors  
 5 circumstances listed in 50 C.F.R. § 13.21(c) and (d), as may be amended, or under  
 6 any future Service regulation.

7 **9.2 Responsibilities of the Service**

8 The Service agrees, pursuant to its authorities and subject to appropriations, to:

- 9 (a) Fully and faithfully perform all obligations required under this Agreement, the HCP  
 10 and Permit; in particular, upon execution of the this Agreement, and satisfaction of  
 11 all other applicable legal requirements, issue a Permit to Permittee authorizing speci-  
 12 fied incidental take of Covered Species which may result from activities conducted in  
 13 accordance with the HCP. The Permit will include the no surprises assurances set  
 14 forth in 50 C.F.R. § 17.22(b)(5) and articulated in the HCP at Section 8.3.
- 15 (b) As of the effective date of the Permit, Permittee may take the Covered Species while  
 16 carrying out Covered Activities in the Project area, as authorized by and subject to  
 17 the conditions of the Permit and the HCP.
- 18 (c) Cooperate with and provide technical assistance to Permittee as well as attend meet-  
 19 ings requested by Permittee to consider matters relevant to the Project, the HCP, and  
 20 the Permit, or any of the operations or other activities contemplated there-under;  
 21 promptly respond to all notices received from Permittee in accordance with the HCP,  
 22 Permit and this Agreement.
- 23 (d) Promptly notify Permittee if, for any reason (court ruling or lack of appropriated  
 24 funds), the Service is unable to fulfill any obligation associated with the HCP, Permit  
 25 or this Agreement.
- 26 (e) Promptly notify Permittee of any lawsuits filed against the Service, requests for dis-  
 27 closures of documents received under the Freedom of Information Act pertaining to  
 28 the Permit, or written notices or letters expressing an intent to file suit against the  
 29 Service challenging the issuance of, or Permittee’s compliance with, the Permit or  
 30 any federal law relating to the Permit.
- 31 (f) Promptly respond to all notices from CPP in accordance with the HCP, Permit or this  
 32 Agreement, and inquiries from the CPP regarding the same.

33 **10.0 CHANGED CIRCUMSTANCES AND ADAPTIVE MANAGEMENT**

34 **10.1 Changed Circumstances and Adaptive Management provided for in the Plan.**  
 35 Section 8.2 of the HCP contains the complete list of Changed Circumstances and describes those  
 36 specific conservation and mitigation measures that Permittee agrees to implement where, pursuant  
 37 to the HCP, they are deemed necessary to respond to the Changed Circumstances. Section 5.6 of the  
 38 HCP, contains the adaptive management strategy to respond to new information produced by re-  
 39 quired monitoring. Any revisions or amendments to the HCP or Permit will be determined on a  
 40 case-by-case basis, and undertaken in accordance with Amendment Process in Section 8.4 of the  
 41 HCP, and referenced in Section 14 of this Agreement.

1           10.2 **Changed Circumstances Not Provided for in the Plan.** If additional conservation  
2 and mitigation measures beyond those provided for in the Plan are deemed necessary to respond to  
3 Changed Circumstances, the Service may not require any such additional conservation and mitiga-  
4 tion measures without Permittee's consent, provided that the HCP is being properly implemented.

5 **11.0 REPORTING AND INSPECTIONS**

6           11.1 **Reporting.** Permittee will provide the Service with the reports described in Sec-  
7 tion 5.5 of the HCP and at the notice address then in effect for the Service, and will provide any  
8 available information reasonably requested by the Service to verify the information contained in  
9 such reports. Permittee will provide USFWS, within thirty (30) calendar days, any additional infor-  
10 mation requested to determine whether Permittee is in compliance with the Permit, HCP and this  
11 Agreement.

12           11.2 **Certification of Reports.** All reports shall include the following certification by a  
13 responsible company official who supervised or directed preparation of the report:

14                         "Under penalty of law, I certify that, to the best of my knowledge, after  
15                         appropriate inquiries of all relevant persons involved in the preparation of  
16                         this report, the information submitted is true, accurate, and complete."

17           11.3 **Inspections.** The Service may inspect the lands within the Permit area and mitigation  
18 areas in accordance with its applicable regulations and law. Except where the Service has reason to  
19 believe that Permittee may be acting in violation of applicable laws or regulations or in breach of the  
20 Permit or this Agreement, the Service will provide reasonable advance notice of its inspection and  
21 will allow Permittee's representatives to accompany the Service's representatives making such in-  
22 spection. USFWS shall ensure that any individual conducting an inspection of the Project on its be-  
23 half performs such inspection in compliance with all regulations and statutes applicable to USFWS,  
24 and the requirement of this section for advance notice, where applicable. For the purpose of this  
25 paragraph, USFWS is intended to mean agency employees, law enforcement agents and contractors.

26           11.4 **Required Meetings.** The Permittee and USFWS shall conduct an annual meeting  
27 during the month of March following the completion of the first three years of monitoring (2011-2013)  
28 to discuss Plan implementation and the need for any amendments to the minimization strategy, if at all,  
29 under Section 5.2 of the HCP. The Permittee and USFWS shall also meet following completion of  
30 each of the 5-year monitoring periods to determine if any changes to the minimization strategy or  
31 other revisions are necessary. Nothing in the ITP, Plan or this IA shall prevent the Parties from  
32 meeting more frequently.

33

34 **12.0 REMEDIES AND ENFORCEMENT; DISPUTE RESOLUTION**

35 **12.1 Remedies in General**

36 Except as set forth below, each Party shall have all remedies otherwise available to enforce the  
37 terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, sub-  
38 ject to the following:

39           a. **No Monetary Damages**

40 No Party shall be liable in damages to the other Party or other person for any breach of this Agree-  
41 ment, any performance or failure to perform a mandatory or discretionary obligation imposed by

1 this Agreement or any other cause of action arising from this Agreement. Notwithstanding the fore-  
2 going:

3 (1) *Retain Liability*

4 All Parties shall retain whatever liability they would possess for their present and fu-  
5 ture acts or failure to act without existence of this Agreement.

6 (2) *Land Owner Liability*

7 All Parties shall retain whatever liability they possess as an owner of interests in  
8 land.

9 (3) *Responsibility of the United States*

10 Nothing contained in this Agreement is intended to limit the authority of the United  
11 States government to seek civil or criminal penalties or otherwise fulfill its enforce-  
12 ment responsibilities under the ESA or other applicable Federal laws.

13 **b. *Injunctive and Temporary Relief***

14 The Parties acknowledge that the Plan Species is unique and that its loss as species would result in  
15 irreparable damage to the environment and that therefore injunctive and temporary relief may be  
16 appropriate to ensure compliance with the terms of this Agreement.

17 **12.2 THE PERMIT**

18 **a. *Permit Termination, Suspension, and Revocation***

19 Except as otherwise provided for under the terms of this Agreement, the Permit shall be terminated,  
20 suspended or revoked in conformance with the provisions of 50 C.F.R. §§ 13.26–13.29 (2010), as  
21 the same exists as of the date hereof.

22 **b. *Effect of Suspension, Termination, and Revocation***

23 Any termination, suspension, or revocation of an ITP automatically terminates, suspends, or revokes  
24 the HCP and this Agreement as between Permittee and the Service. Activities thereafter conducted  
25 on the Project will be subject to all applicable provisions of the ESA and related regulations as if the  
26 Permit had never been issued. A suspension, termination or revocation by the Service limited to one  
27 or more species but less than all of the species then provided for in the Plan shall apply only to the  
28 affected species. The Permit and this Agreement shall continue in full force and effect as to all other  
29 Covered Species.

30 **c. *Post-Termination Mitigation***

31 The Parties acknowledge that Permittee's compliance with the Permit, HCP and this Agreement is  
32 contingent on its execution of a contract to cover required mitigation that must be completed within  
33 two years of Permit issuance under Section 8.3. If the mitigation requirements have been completed  
34 within the two year period, upon termination, relinquishment, or revocation of the Permit, Permittee  
35 shall have no further obligations hereunder or under the ESA with regard to Covered Species or  
36 Covered Lands. If termination, relinquishment, or revocation of the Permit occurs during the two  
37 year period in which the mitigation must be completed, but the contract has not been executed or the  
38 mitigation funds have not yet been expended:

1 (i) Permittee shall have no further obligations hereunder or under the ESA with regard to  
2 Covered Species or Covered Lands so long as there has been no take of Covered Species  
3 during that two year period, and Permittee may seek a refund of mitigation monies under  
4 Section 8.5; or

5 (ii) if there has been an actual take of Covered Species during the two-year time period, then  
6 Permittee's obligation to fully fund and complete the mitigation survives termination, relin-  
7 quishment, or revocation of the Permit

### 8 12.3 DISPUTE RESOLUTION

9 The parties recognize that disputes concerning implementation of, or compliance with, this IA, the  
10 HCP or the Permit may arise from time to time. In particular, the adaptive management and  
11 changed circumstances provisions of the HCP (sections 5.6 and 8.2) establish procedures that call  
12 for dispute resolution. The parties agree to work together in good faith to resolve such disputes,  
13 using the following dispute resolution processes.

14  
15 12.3.1 Dispute Resolution Process For Implementation. Unless the parties agree in writing  
16 upon another dispute resolution process, or unless a party has initiated administrative proceedings or  
17 suit in federal court, the parties may use the following informal process to attempt to resolve dis-  
18 putes:

#### 19 20 Step 1

21  
22 (a) The party wishing to institute dispute resolution will notify the other party in writing of  
23 the dispute and its desire to institute the processes called for in this section. Notification during Step 1  
24 shall be addressed to and from the Supervisor, Chesapeake Bay Field Office, USFWS and Manager of  
25 Permitting and Environmental Affairs, Exelon Wind, representing Permittee.

26 (b) The party claiming a dispute shall identify in its notice the specific objection that it  
27 claims, the basis for the objection, and a proposed remedy to address the objection.

28 (c) The party receiving the notice of dispute shall respond in writing to the notice within  
29 thirty (30) days, or at such other time as may be mutually agreed in writing by both parties. In doing so,  
30 the responding party shall either propose a remedy to resolve the objection or, alternatively, explain  
31 why the objection is unfounded. During this time the responding party may seek clarification of the  
32 information provided in the initial notice from the objecting party. The objecting party will use its best  
33 efforts to provide any information then available to it that may be responsive within ten (10) days  
34 from receipt of such a request for clarification.

#### 35 36 Step 2

37  
38 (a) If the response to an objection resolves the issue to the satisfaction of the objecting  
39 party, then the objecting party shall so notify the responding party in writing, and the responding party  
40 shall implement the agreed remedy, if any.

41 (b) If the response to an objection does not resolve the issue to the satisfaction of the ob-  
42 jecting party, then the objecting party shall so notify the other party in writing, describing the reasons  
43 why the response does not resolve the objection. Thereafter, both parties shall meet and attempt to  
44 resolve the dispute. This meeting between the Supervisor, Chesapeake Bay Field Office, USFWS,  
45 and Manager of Permitting and Environmental Affairs, Exelon Wind,, representing Permittee, shall

1 occur within thirty (30) days after the responding party receives the objecting party's response, or at  
2 such other time as may be mutually agreed in writing by both parties.

3

4 Step 3

5

6 (a) If the parties are unable to resolve a dispute through Steps 1 and 2 above, then an ob-  
7 jecting party may elevate the dispute to be handled through a meeting of the chief executives of both  
8 parties. For purposes of this provision, "chief executive" shall mean Vice President, Exelon  
9 Wind/Solar, representing the Permittee, and the Assistant Regional Director of Ecological Services,  
10 Northeast Region, USFWS. Each party shall be represented in person by its chief executive at the  
11 meeting, and the meeting shall occur within forty five (45) days of the notice of an objecting party  
12 following completion of Step 2 above.

13 (b) If the dispute cannot be resolved through these elevated negotiations, the parties may  
14 seek non-binding mediation or other alternative dispute resolution processes.

15

16 If at any time either party determines that circumstances so warrant, it may seek any available remedy  
17 without waiting to complete the informal dispute resolution process.

18

19

20 12.3.2 Dispute Resolution Process For Permit Violations. If USFWS has reason to believe  
21 that Permittee may have violated the Permit, the HCP or this IA with respect to any Covered Species,  
22 it will notify the Permittee in writing of the specific provisions which may have been violated, the  
23 reasons USFWS believes the Permittee may have violated the provision, and the remedy the  
24 USFWS proposes to resolve the alleged violation. The Permittee will then have sixty (60) days, or  
25 such longer time as may be mutually acceptable to both parties, to respond in writing to the allega-  
26 tion. During this time, the Permittee may seek clarification of the information provided in the notice  
27 from the USFWS, and the USFWS will use its best efforts to respond to the request for clarification. If  
28 the dispute cannot be resolved within thirty (30) days after the Permittee's response is due, or such  
29 longer time as may be mutually agreed in writing by both parties, the parties may consider  
30 non-binding mediation or other alternative dispute resolution processes to resolve the dispute.

31

32 12.3.3 The parties reserve their right, at any time without completing informal dispute res-  
33 olution, to use whatever enforcement powers and remedies are available by law or regulation, in-  
34 cluding but not limited to, in the case of the USFWS, suspension or revocation of the Permit and  
35 civil or criminal penalties.

36

37

1    **13.0   LIMITATIONS AND EXTENT OF ENFORCEABILITY**

2            **a.    No Surprises Policy**

3    The Service is obligated to issue the Permit with the regulatory assurances described more fully in  
4    Section 8 of the HCP (the Federal “No Surprises” Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998) (codified  
5    at 50 C.F.R. §§ 17.3, 17.22(b)(5), 17.32(b)(5)). For purposes of that Rule in the context of this  
6    Agreement, the Parties agree that the Permit, and the HCP, the Indiana bat is adequately covered by  
7    CPP’s HCP. As further detailed in the rule, so long as Permittee is properly implementing the HCP,  
8    this Agreement, and the Permit, no additional commitment of land, water, or financial compensation  
9    will be required with respect to Covered Species, and no restrictions on the use of land, water, or  
10   other natural resources will be imposed beyond those specified in the HCP without the consent of  
11   the Permittee. Application of the rule to changed circumstances is described herein at Section 10.  
12   With respect to unforeseen circumstances, the Service bears the burden of demonstrating that they  
13   exist using the best available scientific and commercial data available while considering certain factors.  
14   (50 C.F.R. §§ 17.22(b)(5)(iii)(C)).

15   In negotiating unforeseen circumstances, the Service will not require the commitment of additional  
16   land, water or financial compensation or additional restrictions on the use of land, water or other  
17   natural resources beyond the level otherwise agreed upon for the species covered by the HCP with-  
18   out the consent of Permittee. (50 C.F.R. §§ 17.22(b)(5)(iii)(A)). If additional conservation and miti-  
19   gation measures are deemed necessary to respond to unforeseen circumstances, the Service may re-  
20   quire additional measures of Permittee where the HCP is being properly implemented but only if  
21   such measures are limited to modifications within conserved habitat areas, if any, or to the HCP’s  
22   operating conservation program for the affected species, and maintain the original terms of the plan  
23   to the maximum extent possible. (50 C.F.R. §§ 17.22(b)(5)(iii)(B)). Additional conservation and  
24   mitigation measures will not involve the commitment of additional land, water or financial com-  
25   pensation or additional restrictions on the use of land, water, or other natural resources otherwise  
26   available for development or use under the original terms of the conservation plan without the con-  
27   sent of Permittee.

28   Notwithstanding these assurances, nothing in the “No Surprises” Rule “will be construed to limit or  
29   constrain the Service, any Federal agency, or a private entity, from taking additional actions, at its  
30   own expense, to protect or conserve a species included in a conservation plan.”  
31   (50 C.F.R. §§ 17.22(b)(6)).

32            **b.    Private Property Rights and Legal Authorities Unaffected**

33   The Parties agree that CPP has entered into the ITP, Plan and this IA on a voluntary basis. Except as  
34   otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the  
35   rights of the Permittee to the use or development of those lands, or interests in lands, constituting the  
36   Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other  
37   limitations as may apply to such lands, or interests in lands, under the ESA, other laws of the United  
38   States and the State of Maryland.

39    **14.0   AMENDMENTS**

40            **16.1   Modifications to this Agreement.** This Agreement may be amended only with the  
41   written consent of each of the Parties hereto. Either Party may object to any amendment proposed  
42   by the other upon any reasonable basis.

1           16.2 **Amendment or Modification of the HCP.** Any amendment or modification of the  
2 HCP shall follow the procedures described in Section 8.4 of the HCP.

3           16.3 **Amendment or Modification of the Permit.** The ITP may be amended in accord-  
4 ance with 50 C.F.R. § 13.23, the provisions of the Permit, and all applicable legal requirements, in-  
5 cluding but not limited to the ESA, NEPA, and the Service's implementing regulations.

6 **15.0 MISCELLANEOUS PROVISIONS**

7           15.1 NO PARTNERSHIP

8 Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement  
9 the agent for or the partner of any other Party.

10           15.2 SUCCESSORS AND ASSIGNS

11 This Agreement and each of its covenants and conditions shall be binding on and shall inure to the  
12 benefit of the Parties hereto and their respective successors and assigns. Assignment and transfer of  
13 the permit shall be governed by the Service's regulations at 50 C.F.R § 13.25, or whatever regula-  
14 tion exists at the time assignment or transfer is contemplated.

15           15.3 NOTICE

16 Any notice required by this Agreement shall be delivered by United States mail, certified and post-  
17 age prepaid, return receipt requested. Notice shall be deemed given five days after deposit in the  
18 United States mail. Notices may also be delivered by facsimile or electronic mail, provided that the  
19 original is also delivered personally or by certified mail, postage prepaid, return receipt requested.  
20 Notices shall be addressed as follows or at such other postal or electronic mail address as any Party  
21 may from time to time specify to the other Parties in writing:

22                   Field Supervisor  
23                   United States Fish and Wildlife Service  
24                   177 Admiral Cochran Drive  
25                   Annapolis, MD 21401  
26                   Facsimile: (410) 269-0832

27  
28                   Criterion Power Partners, LLC  
29                   c/o Exelon Generation Company, LLC  
30                   300 Exelon Way, Suite 340  
31                   Attn: Associate General Counsel  
32                   [Todd.Cutler@exeloncorp.com](mailto:Todd.Cutler@exeloncorp.com)  
33                   Facsimile: (610) 765-5980

34  
35                   With a copy to:  
36                   Attn: Commercial Operations Dept.  
37                   [Magin.Reyes@exeloncorp.com](mailto:Magin.Reyes@exeloncorp.com)

38  
39           15.4 ENTIRE AGREEMENT

40 This Agreement, together with the HCP and the Permit, constitutes the entire agreement between the  
41 Parties. Excepting the HCP and Permit, the terms contained in this agreement supersedes any and all  
42 other agreements, either oral or in writing among the Parties with respect to the subject matter here-

1 of and contains all of the covenants and agreements among them with respect to said matters, and  
 2 each Party acknowledges that no representation, inducement, promise or agreement, oral or other-  
 3 wise, has been made by any other Party or anyone acting on behalf of any other Party that is not  
 4 embodied herein.

5 15.5 ELECTED OFFICIALS NOT TO BENEFIT

6 No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to  
 7 any benefit that may arise from it.

8 15.6 AVAILABILITY OF FUNDS

9 Implementation of this Agreement and the HCP by the Service is subject to the requirements of the  
 10 Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be  
 11 construed by the parties to require the obligation, appropriation, or expenditure of any money from  
 12 the U.S. Treasury. The parties acknowledge that the Service will not be required under this Agree-  
 13 ment to expend any Federal agency's appropriated funds unless and until an authorized official of  
 14 that agency affirmatively acts to commit to such expenditures as evidenced in writing.

15 15.7 DUPLICATE ORIGINALS

16 This Agreement may be executed in any number of duplicate originals. A complete original of this  
 17 Agreement shall be maintained in the official records of each of the Parties hereto.

18 15.8 NO THIRD PARTY BENEFICIARIES

19 Without limiting the applicability of the rights granted to the public pursuant to the provisions of  
 20 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any  
 21 member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this  
 22 Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of  
 23 this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with  
 24 respect to third parties shall remain as imposed under existing Federal or State law.

25 15.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

26 The terms of this Agreement shall be governed by and construed in accordance with the ESA and  
 27 applicable Federal laws. In particular, nothing in this Agreement is intended to limit the authority of  
 28 the Service to seek criminal or civil penalties or otherwise fulfill its responsibilities under the ESA.  
 29 Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and res-  
 30 sponsibilities of the Service as an agency of the Federal government. Nothing in this Agreement  
 31 shall limit the right or obligation of any federal agency to engage in consultation required under  
 32 Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of  
 33 Permittee under the HCP, Permit, and this Agreement shall be considered in any consultation con-  
 34 cerning Permittee's use of the Permit Area.

35 15.10 REFERENCES TO REGULATIONS

36 Any reference in this Agreement, the HCP, or the Permit to any regulation or rule of the Service  
 37 shall be deemed to be a reference to such regulation or rule in existence at the time an action is tak-  
 38 en.

39

1           15.11 APPLICABLE LAWS

2 All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance  
3 with all applicable State and Federal laws and regulations.

4           15.12 SEVERABILITY

5 If any provision of this Agreement or the HCP is found invalid or unenforceable, such provision  
6 shall be enforced to the maximum extent possible and the other provisions shall remain in effect to  
7 the extent they can be reasonably applied in the absence of such invalid or unenforceable provisions.

8

9 IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement  
10 to be in effect as of the date last signed below.

11

BY \_\_\_\_\_ Date \_\_\_\_\_  
Assistant Regional Director  
United States Fish and Wildlife Service  
Hadley, MA 01035-9587

BY \_\_\_\_\_ Date \_\_\_\_\_  
David Drescher  
Vice President  
Criterion Power Partners, LLC

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