

IMPLEMENTING AGREEMENT

for the

Habitat Conservation Plan for the Karner Blue Butterfly and Frosted Elfin

For

Niagara Mohawk Power Corporation (d/b/a National Grid)
Upstate New York Electric and Natural Gas Activities on Affected Rights-of-Way

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1.0 PARTIES

The Parties to this Implementing Agreement (Agreement) are the Niagara Mohawk Power Corporation d/b/a National Grid (Permittee or NG); the United States Fish and Wildlife Service (Service). These entities may be referred to collectively as the "Parties" and individually as a "Party." The New York State Department of Environmental Conservation (NYDEC) is not a signatory to this Agreement; however, the Service and NYDEC may be referred to collectively as the "Wildlife Agencies."

2.0 RECITALS AND PURPOSES

2.1 Recitals. The parties have entered into this Agreement in consideration of the following facts:

- (a) Permittee's properties and rights of way areas defined as Covered Lands below have been determined to provide, or potentially provide, habitat for the federally listed and state-listed Karner blue butterfly (*Lycaeides melissa samuelis*) (KBB);
- (b) Permittee's Covered Lands have also been determined to provide, or potentially provide, habitat for the state-listed threatened and federally unlisted frosted elfin (*Callophrys irus*);
- (c) Permittee has developed a series of measures, described in the Habitat Conservation Plan (HCP), to minimize and mitigate to the maximum extent practicable the effects of take of Covered Species incidental to Permittee's Covered Activities; and
- (d) The Parties recognize that the history of rights-of-way management by the Permittee and its predecessors has contributed to the sustained presence of KBB habitat on the Covered Lands.

2.2 Purposes. The purposes of this Agreement are:

- (a) To ensure implementation of each of the terms and conditions of the HCP and the incidental take permits issued by the Service;
- (b) To describe remedies and recourse should any Party fail to perform its obligations as set forth in the HCP and this Agreement;
- (c) To provide assurances to Permittee that as long as the terms of the HCP, the permits, and this Agreement are properly performed, no additional mitigation will be required of Permittee, with respect to the Covered Species, except as provided for in this Agreement or required by law;

- (d) To define the Parties' roles and responsibilities and provide a common understanding of actions that will be undertaken to minimize and mitigate the effects on the Covered Species caused by the Covered Activities within the Covered Lands and to avoid jeopardy to the listed Covered Species; and
- (e) To recognize that as consideration for the management restrictions and other actions to be undertaken by the Permittee on approximately 335 acres of Covered Lands within New York State, approximately 2100 acres of Covered Lands within the state are encompassed under and benefitted by the issuance of an Incidental Take Permit (Permit), thereby allowing the Permittee to conduct otherwise lawful activities on those approximately 2100 acres of Covered Lands which might constitute a "take" of endangered or threatened species.

2.3 Service Jurisdiction. 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 Federal Endangered Species Act (16 U.S.C. § 1531 et seq.) (ESA), the Migratory Bird Treaty Act (16 U.S.C. § 701 et seq.), the Bald and Golden Eagle Protection Act (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.).

2.4 The ESA. 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 USC § 1539(a)), 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 Permit, the applicant must submit a HCP describing, among other things, the steps the applicant will take to minimize and mitigate to the maximum extent practicable the impact of such take. The Permittee has submitted its HCP to the Service, and applied for a Federal Permit authorizing incidental take of Covered Species within the Covered Lands. The Permit issued by the Service based on the HCP will be issued concurrently with the execution of this Agreement.

2.5 Primary Focus of the HCP. The primary focus of the HCP and this Agreement is on the impact to Covered Species during projects resulting in temporary or permanent impairment of habitat upon which the Covered Species depend. The HCP provides a Conservation Strategy that is intended to avoid, minimize, and compensate for all direct and indirect harm resulting from Take of Covered Species.

2.6 Adequate Consideration. Adequate consideration supports this Agreement. The Permittee is agreeing to substantial commitments of land, natural resources, financial resources, human resources, and other assets to conserve and manage the Covered Species and their habitats in exchange for the assurances provided by the Service in this Agreement.

3.0 DEFINITIONS

Terms used in this Agreement and specifically defined in the ESA or in regulations adopted by the Service under the ESA have the same meaning as in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

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

3.1 “Adaptive Management” means to use the results of new information gathered through the monitoring program of the HCP to adjust management strategies and practices to achieve the goals and objectives stated in the HCP and to assist in providing for the conservation of Covered Species, as provided in sections 4, 5 and 6 of the HCP.

3.2 “Authorized Take” or “Take Authorization” means the extent of incidental Take of Covered Species authorized by the SERVICE in the Federal Permit issued to the Permittee pursuant to section 10(a)(1)(B) of the ESA.

3.3 “Changed Circumstances” means, pursuant to 50 CFR section 17.3, changes in circumstances affecting a Covered Species or the geographic area covered by the HCP that can reasonably be anticipated by the Parties to the HCP and that can be planned for in the HCP. Changed circumstances and the planned responses to those circumstances are described in section 5.4 of the HCP and section 12.3 of this Agreement. Changed circumstances are not Unforeseen Circumstances.

3.4 “Conservation Strategy” means the conservation and management measures provided in the HCP to avoid, minimize, and mitigate the impacts of Authorized Take of the Covered Species, as described at sections 4, 5 and 6 of the HCP, including those measures described in section 5.4 of the HCP to respond to Changed Circumstances.

3.5 “Covered Activities” means certain activities carried out by Permittee on Covered Lands that may result in Authorized Take of Covered Species during the term of the HCP. Covered Activities includes the following activities provided that these activities are otherwise lawful: electric and natural gas operations and maintenance; reconstruction and new construction of electric transmission, sub-transmission and distribution operations and maintenance; electric substation operations and maintenance; natural gas pipeline and associated facilities operations and maintenance; general rights-of-way maintenance; vegetation management/maintenance; right-of-way repair, regrading, and revegetation; access road operations and maintenance; facility inspection; land clearing; vegetation disposal; earthwork; access road construction; electrical and natural gas facility installation; regrading, stabilization, and restoration; and spill occurrence, prevention, containment, and control. Covered Activities also includes the Permittee’s activities listed in Chapter 2 of the HCP.

3.6 “Covered Individuals and Entities” means NG’s officers, directors, employees, agents, subsidiaries, successors, contractors, and subcontractors, and their officers, directors, employees and agents who engage in any Covered Activity.

3.7 “Covered Lands” means the lands upon which the permit authorizes take of Covered Species and the lands to which the HCP's conservation and mitigation measures apply as specified in section 1.2 of the HCP and as modified under sections 11.2 and 12 of this Agreement. Covered Lands includes property owned by Permittee, property where Permittee holds a right-of-way easement, and mitigation areas for impacts resulting from Covered Activities. As more specifically described in section 1.2, Covered Lands include all fee, easement, or rights-of-way lands for Permittee's electric and gas transmission and distribution facilities and system within 20 United States Geological Survey map quadrangles in eastern and central New York State. These Covered Lands encompass approximately 2100 acres which do not contain hydric soils, non-sandy soils, wetlands, urbanized areas, or active agricultural lands.

Several subsets of the Covered Lands have been identified for more focused management and initially constitute approximately 335 acres. These lands include:

- Lands known or presumed to contain wild blue lupine habitat (Covered Lands A);
- Lands containing nectar plants and/or grass within a 200-meter buffer surrounding Covered Lands A (Covered Lands B);
- Five-acre mitigation site in Queensbury, New York (Covered Lands C);
- Two sections of electrical transmission rights-of-way in Queensbury, New York as Enhancement Areas (Covered Lands D1 and D2);
- 23 Acre Mitigation Right-of-Way in Albany County, New York (Covered Lands E);
- Three sections of electrical transmission rights-of-way in Queensbury, New York for additional restrictions on illegal trespass (Covered Lands F)

Covered Lands C-F are discrete locations described specifically in section 1.2 of the HCP. Covered Lands A and B may occur anywhere throughout the Covered Lands, depending upon local habitat conditions, and while initially illustrated with red or blue hatching on the HCP maps, the locations of Covered Lands A or B may shift throughout plan implementation as documented by the periodic surveys provided for in the HCP.

3.8 “Covered Species” means the following species: the endangered Karner blue butterfly (*Lycaeides melissa samuelis*) (KBB) and the state-listed threatened frosted elfin (*Callophrys irus*). The Permittee intends to conserve and protect these species through the HCP.

3.9 “Effective Date” means the date the Permit is issued, which follows execution of this Agreement by both Service and NG.

3.10 “ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C. section 1531 et seq.), including all regulations promulgated pursuant to that act.

3.11 “HCP” means the National Grid Habitat Conservation Plan for the Karner blue butterfly and frosted elfin for Permittee's New York-North Utility Activities prepared pursuant to ESA section 10(a)(1)(B) and section 10(a)(2)(A).

3.12 “Listed Species” means a species (including a subspecies or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the ESA.

3.13 “NEPA” means the National Environmental Policy Act (42 U.S.C. section 4321 et seq.).

3.14 “NG” means Niagara Mohawk Power Corporation d/b/a/ National Grid, also referred to as the “Permittee.”

3.15 “NYDEC” means New York Department of Environmental Conservation.

3.16 “NYECL” means section 11-0535 of the Environmental Conservation Law of the State of New York, as amended, including all regulations promulgated pursuant to that Law.

3.17 “Party” or “Parties” means any or all of the signatories to this Agreement.

3.18 “Permit” means the incidental take permit issued by the Service to NG pursuant to section 10(a)(1)(B) of the ESA for take incidental to Covered Activities on NG’s Covered Lands, as it may be amended from time to time.

3.19 “Permittee” means Niagara Mohawk Power Corporation d/b/a/ National Grid, also referred to as “NG.”

3.20 “Service” means the United States Fish and Wildlife Service.

3.21 “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted Covered Species. Harm means an act that actually kills or injures a member of a Covered Species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a Covered Species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

3.22 “Unforeseen Circumstances” means changes in circumstances affecting a species or geographic area covered by the HCP that could not reasonably have been anticipated by the plan’s developers during negotiation and development and that result in a substantial and adverse change in the status of the Covered Species.

3.23 “Unlisted Species” means a species (including a subspecies or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under the ESA.

4.0 RELATIONSHIP BETWEEN THE HABITAT CONSERVATION PLAN AND THE IMPLEMENTATION AGREEMENT

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. This Agreement is intended to specify, in contract language, the obligations of the Parties under the HCP, recognizing that the HCP describes the components of a habitat conservation plan and was not drafted as a contract. In the event of any direct contradiction, conflict, or inconsistency between the HCP and this Agreement, the terms of this Agreement shall control. In

all other cases, the provisions of the HCP and this Agreement shall be interpreted to be consistent with and complementary to each other.

5.0 LEGAL RIGHTS and OBLIGATIONS OF THE SERVICE

5.1 Service Findings

As further described in the section 10(a)(1)(B) Permit issued by the Service, the Service has found that the HCP satisfies the Permit issuance criteria under section 10(a)(2)(B) of ESA for each Covered Species that is a federally Listed Species within the jurisdiction of the Service.

For each Covered Species that is not a federally Listed Species as of the Effective Date, the Service has found that the HCP satisfies the Permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply as if such Covered Species were a federally Listed Species.

5.2 Service Obligations

Concurrent with the execution of this Agreement by all Parties and after satisfaction of all other requirements, the Service agrees to issue the Permittee a Permit under section 10(a)(1)(B) of the ESA, authorizing the incidental Take by the Permittee of each Covered Species resulting from Covered Activities on Covered Lands. The Permit is conditioned on compliance with the terms and conditions of the Permit, the HCP, and this Agreement. The Service shall monitor NG's implementation of the HCP and compliance with the Permit. The Service shall also provide technical assistance and timely collaboration and consultation to NG regarding implementation of the HCP, as provided in the HCP and this Agreement, throughout the duration of the Permit.

5.3 Environmental Review-NEPA

Approval of the HCP and issuance of the Permit under section 10(a)(1)(B) of ESA to NG by the Service are actions subject to review under the NEPA. The Service is the Federal lead agency under NEPA. Prior to the Effective Date, the Service evaluated the HCP pursuant to NEPA in the NG Environmental Assessment and made a Finding of No Significant Impact, thereby determining that an Environmental Impact Statement was not required for these actions.

6.0 LEGAL RIGHTS AND OBLIGATIONS OF THE PERMITTEE

6.1 Implementation of the Conservation Strategy

NG will fully and faithfully perform all obligations assigned to it under this Agreement, the HCP, and the Permit, including but not limited to the terms of this section 6, section 7 (Implementation of the HCP), section 8 (Monitoring, Reporting, and Adaptive Management) and section 9 (Funding).

NG will implement all of the conservation, management and monitoring measures or such measures as they may be modified through Adaptive Management, as described in this Agreement and the HCP, whether or not such conservation, management, and monitoring measures are specifically referenced in this Agreement. For the purposes of this Agreement, all of these measures are collectively referred to as the "Conservation Strategy."

As of the Effective Date, NG may Take the Covered Species while carrying out Covered Activities on Covered Lands as authorized by and subject to the conditions of the Permit, this Agreement and the HCP. The Covered Activities include all activities described in section 2 of the HCP.

The authority issued to NG hereunder and under the Permit and HCP applies to all Covered Individuals and Entities. As specified in the HCP, NG shall provide training to fully inform all such individuals and entities of the terms and conditions of the Permit, and NG shall be responsible for supervising their compliance with those terms and conditions. Moreover, any Covered Individual or Entity who engages in Covered Activities will be required to comply with relevant provisions of the Permit, this Agreement, and the HCP.

6.2 Permit Coverage.

The Permit will identify all Covered Species. Following execution of this Agreement by both the Service and NG, the Permit (and the HCP and this Agreement) will take effect for Covered Species at the time the Permit is issued. Subject to compliance with all other terms of this Agreement, the Permit will take effect for an unlisted covered species upon the listing of such species.

7.0 IMPLEMENTATION OF THE HCP

7.1 Overview of the Conservation Strategy

In accordance with the Conservation Strategy of the HCP, NG shall, to the maximum extent practicable, avoid impacts and minimize and mitigate impacts to Covered Species and their habitat. As specified in the HCP, compensation for Authorized Take of Covered Species and their habitat shall include establishing and managing compensation habitat.

7.2 Conservation Strategy Limited to NG Fee Lands and NG Right-of-Access

Nothing in this Agreement or the HCP shall be construed to require NG to conduct any action on land to which NG does not possess legal access, nor shall NG be required to obtain permission from any third party for access to any such land.

7.3 Pre-Covered Activity Reviews

Prior to conducting any Covered Activities, as specified in the HCP, NG shall conduct training for all persons described in section 6.1 of this Agreement. Prior to conducting any Covered Activities, those Covered Individuals and Entities to be participating in, planning for, or implementing in any fashion, a Covered Activity shall conduct a pre-activity review of the Covered Lands and Subsets identified in section 1.2 of the HCP, as amended, including the most current surveys of the locations of the Covered Species and of wild blue lupine.

Each pre-activity survey will be sufficient to identify which avoidance and minimization measures ("AMM") shall be implemented for each Covered Activity to be performed.

7.4 Avoidance and Minimization Measures

Tables 3, 4, and 5 and section 4.3 of the HCP lists the Avoidance and Minimization Measures "AMM's" that NG will implement as appropriate before and during Covered Activities. NG shall avoid and minimize Take of Covered Species where practicable, "Practicable" here means physically possible and not conflicting with other regulatory obligations or safety considerations.

7.5 Mitigation and Enhancement Mechanisms.

NG shall implement the Mitigation and Enhancement Mechanisms set out in tables 3, 4, and 5 and section 4.4 of the HCP in each of the areas specified.

7.6 Compensation

In order to fully mitigate the impacts of Authorized Take, NG shall fund and carry out the training, the AMM's, the Mitigation and Enhancement Mechanisms, and the Monitoring, Reporting, and Adaptive Management Programs for the benefit of Covered Species, all as specified in the HCP and in accordance with the Permit and this Agreement. The Service has determined that these measures and expenditures in the aggregate adequately compensate for the impacts of the Authorized Take.

7.6.1 Requirements for Compensation

The compensation summarized in section 7.6 above was determined by estimating the acres of potential permanent and temporary habitat disturbance or loss that could occur over the 50-year life of the Permit as a result of NG's Covered operations and maintenance Activities. Acres of habitat disturbance or loss are being utilized for this Permit as a surrogate for the quantity of Take of Covered Species due to the difficulty of locating and calculating actual Take of the Covered Species in its various life stages.

The area of permanent and temporary habitat loss will be compensated for through the placement by NG of a conservation easement on existing lands owned by NG, by undertaking various land management actions on NG-owned "protected lands," by making a financial contribution to a conservation organization to enhance habitat on "protected lands," and by making a financial contribution to a conservation organization to enhance the population density of Covered Species on "protected lands," as approved by the Service.

Compensation lands shall be considered "protected lands" when (1) for Covered Lands E, such mitigation lands are subject to a management agreement with the Albany Pine Bush Preserve Commission (APBPC) (or other suitable entity) and (2) for Covered Lands C, a conservation easement is recorded (or other restriction acceptable to the Service); and (3) for both Covered Lands C and E: (a) the landowner is obligated to manage the lands in accordance with a long-term

management plan that will protect the land's conservation values, and (b) adequate funding is provided to implement the management plan.

7.6.2 Mitigation Will Be Implemented Concurrently with Authorized Take

Prior to or after issuance of the permit, NG will (a) execute and fund the management agreement with the APBPC (or other suitable entity) regarding Covered Lands E, (b) will execute a conservation restriction, conservation easement, or other document with enforceable restrictions binding on NG and its successors, acceptable to Service and NG, relating to Covered Lands C, and (c) will execute this agreement.

As specified and qualified in the Permit, the Permittee will have up to 90 days to execute the management agreement with the APBPC specified in (a) above and up to 30 months to officially record the conservation easement (or other form of restriction acceptable to the Service) specified in (b) above. However, upon issuance of the Permit, the Permittee will begin implementing the mitigation and enhancement measures described in section 4.6 and table 3 of the HCP and meet the annual expenditure obligations specified in table 5.

Provided that NG is in material compliance with its avoidance, mitigation, and enhancement obligations in the HCP, including the annual expenditure obligations specified in table 5 of the HCP, NG's mitigation shall be presumed to be implemented concurrently with Authorized Take.

8.0 MONITORING, REPORTING, AND ADAPTIVE MANAGEMENT

8.1 General Approach to Monitoring, Reporting and Adaptive Management

NG shall implement each of the monitoring, reporting, and adaptive management programs described in chapter 5 of the HCP, whether or not they are specifically referenced in this Agreement. NG's obligation to fund the implementation of the HCP as further specified in section 9 of this Agreement includes the obligation to fund all monitoring programs described in the HCP.

8.2 Annual Reporting

As described in section 5.2 of the HCP and further detailed in the Permit, Permittee will submit annual reports describing its activities and results of the monitoring program provided for in the HCP and its work plan and other implementation actions anticipated for the ensuing year.

8.3 Other Reports or Additional Information

Permittee will provide, within 30 days of being requested by the Service, any additional information in its possession or control related to implementation of the HCP that is requested by the Service for the purpose of assessing whether the terms and conditions of the Permit, the HCP, and this Agreement, including the HCP's adaptive management plan, are being fully implemented.

The Parties acknowledge the HCP and the Permit include compliance and effectiveness monitoring, other reporting obligations, and an adaptive management program that, when taken together, the Parties believe will provide sufficient information for the Service to monitor, assess, and ensure the effectiveness of and NG's compliance with the Permit, the HCP, and this Agreement. The Parties also acknowledge that, in unusual circumstances, information in addition to that required by the monitoring and reporting program and the adaptive management program in the HCP may be necessary for the Service to evaluate NG's compliance with the Permit, the HCP, and this Agreement. If the Service determines such additional information is necessary, any request to NG for such information shall have a reasonable basis and be designed by the Service to generate, obtain, and provide the information in a manner least intrusive to NG's operations while permitting the Service to carry out its oversight responsibilities.

Subject to 50 C.F.R. sections 13.27 through 13.29, 17.22, and 17.32, NG shall be required to provide only reasonably available information in its current state. Nothing in this Agreement shall compel NG to disclose communications that are subject to the attorney-work-product or attorney-client privilege or any other privilege applicable at the time the information request is made. NG may designate, by notifying the Service in writing, any trade secrets or commercial, proprietary, or financial information (Confidential Information). Confidential Information that is requested by the Permittee is exempt from disclosure by the Service pursuant to a request made under the Federal Freedom of Information Act (FOIA) because such trade secret and/or information so designated (1) is Confidential Information, (2) has not been disclosed to the public by NG, and (3) to NG's knowledge is not routinely available to the public from other sources. Should Confidential Information be requested pursuant to FOIA, the Service will contact NG sufficiently prior to releasing any such information so as to allow NG a reasonable opportunity to protect the Confidential Information from release. This provision is not intended to limit the applicability of FOIA.

8.4 Certification of Reports. All reports will include the following certification from a responsible company official who supervised or directed preparation of the report:

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

8.5 Monitoring by the Service.

The Service may conduct inspections and monitoring in connection with the Permit in accordance with its regulations. (See 50 C.F.R. sections 13.47 and 220.47.)

8.6 Permittee-Initiated Adaptive Management. Permittee will implement the adaptive management provisions in section 5.3 of the HCP when changes in management practices are necessary to achieve the HCP's biological objectives or to respond to monitoring results or new scientific information. Permittee will make such changes it determines to be necessary without awaiting notice from the Service and will report to the Service on any actions taken pursuant to this section. If Permittee is uncertain about the necessity of such changes, Permittee may request the opinion of the Service before commencing such changes.

8.7 Service-Initiated Adaptive Management. If the Service determines that one or more of the adaptive management provisions in the HCP have been triggered and that Permittee has not changed its management practices in accordance with section 5.3 of the HCP, the Service will so notify Permittee and will direct Permittee to make the required changes. Within 30 days after receiving such notice, Permittee will make the required changes and report to the Service on its actions. Such changes are provided for in the HCP and hence do not constitute unforeseen circumstances or require amendment of the Permit or HCP, except as provided in this section.

8.8 Reductions in Mitigation. Permittee will not implement adaptive management changes that may result in less mitigation than provided for covered species under the original terms of the HCP, unless the Service first provides written approval. Permittee may propose any such adaptive management changes by notice to the Service, specifying the adaptive management modifications proposed, the basis for them, including supporting data, the anticipated effects on covered species, and other environmental impacts. Within 120 days of receiving such a notice, the Service will approve the proposed adaptive management changes, approve them as modified by the Service, or notify Permittee that the proposed changes constitute permit amendments that must be reviewed under section 10 of this Agreement.

8.9 No Increase in Take. This section does not authorize any modifications that would result in an increase in the amount and nature of take, or increase the impacts of take, of Covered Species beyond that analyzed under the original HCP and any amendments thereto. Any such modification must be reviewed as a Permit amendment under section 10 of this Agreement.

9.0 FUNDING

9.1 Primary Funding and Demonstration of Availability

NG warrants that it has, and will expend, such funds as may be necessary to fulfill its obligations under the HCP, the Permit, and this Agreement. NG will promptly notify the Service of any material changes in NG's financial ability to fulfill its financial obligations. By April 30 of each year, the HCP Administrator (described in section 4.2.1 of the HCP) will describe, in the annual HCP Monitoring Report, the work plan and other implementation actions anticipated for the ensuing year, as set out in sections 4, 5, and 6 of the HCP, and will confirm that funding is available or committed for full implementation of the HCP for the ensuing year. Permittee will provide the Service with reasonably available financial information, which can be in electronic format, that the parties agree will provide adequate evidence of Permittee's ability to fulfill its obligations.

9.2 Material Change in Resources

NG will promptly notify the Service of any material change in NG's funding resources. A material change in NG's funding resources is any change in the financial condition of NG or the availability of its funds that will impair NG's ability to carry out its obligations under this Agreement, the HCP, and the Permit.

10.0 MODIFICATIONS AND AMENDMENTS

10.1 Exceptions to the Conservation Strategy

Nothing in the Adaptive Management or Changed Circumstances provisions of this Agreement or the HCP, or any other provision that provides for an exception for the application of any measure included in the Conservation Strategy, authorizes an increase in the amount of Take or an increase of the impacts of Take of Covered Species beyond that authorized by the Permit. Any modification that would result in such an increase in Take beyond that authorized by the Permit must be approved as an amendment under section 10.3.2 of this Agreement.

10.2 Amendment of this Agreement

This Agreement may be amended only with the written consent of each of the Parties. NG may object to any amendment proposed by the Service upon any reasonable basis.

10.3 Amendment of the HCP

The HCP may be amended only with the written consent of each of the Parties. NG may object to any amendment proposed by the Service upon any reasonable basis.

10.3.1 Minor Amendments

10.3.1.1 Scope of Minor Amendments

Minor Amendments to the Permit, this Agreement, and the HCP pursuant to this subsection may include but are not limited to the following:

- (a) Corrections of typographical, grammatical, and similar editing errors in the HCP and this Agreement that do not change the intended meaning;
- (b) Correction of any maps or exhibits to correct errors in mapping;
- (c) Minor changes to survey, monitoring or reporting protocols;
- (d) Changing any measure(s) in the Conservation Strategy to respond to a Changed Circumstance identified in section 12.3 of this Agreement;
- (e) Correction of any tables or appendices in the HCP to reflect previously approved amendments to the HCP or the Permit;
- (f) Changes to maps of Covered Lands that reflect geographic shifts of Covered Lands A and B over time;
- (g) Changes to maps, descriptions, and increases in Covered Lands associated with new information (e.g. 5-year surveys) allowing for an increase of up to 50 additional acres of occupied wild blue lupine habitat in the Covered Lands; or
- (h) Transfers of ownership or control (including easement rights) of Covered Lands as provided in section 11.2.

- (i) Other amendments that would not result in new adverse effects on the environment or Listed Species that are significantly different from those analyzed in the HCP.

Any other modifications to the HCP or IA will be processed as major amendments of the Permit in accordance with subsection 10.3.2 of this section.

10.3.1.2 Processing Minor Amendments

10.3.1.2.1 Notice and Response

Any Party may propose a Minor Amendment to the Permit, this Agreement, and the HCP by providing written notice to the other Party. Such notice shall include a statement of the reason for the proposed amendment, an analysis of its environmental effects, if any, including any effects on Covered Activities and on Covered Species, and any other information required by law. The non-initiating Party shall respond in writing to the proposed amendment and use its best efforts to respond within 60 days of receipt of such notice.

10.3.1.2.2 Objection by the Service

The Service may object to a proposed Minor Amendment only upon a written statement that the Permit or the HCP, after giving effect to such amendment, would not meet the requirements of section 10(a)(2)(B) of the ESA, provided, however, that the Service may not propose or approve as a Minor Amendment any revision to the Permit, the HCP, or this Agreement if the Service determines that such amendment would result in adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP or that such amendment would result in additional Take not analyzed in connection with the original HCP.

Where possible, before rejecting a proposed Minor Amendment, the Service shall first consult with NG and suggest reasonable conditions or alterations to the proposal which, if agreed to by NG, would permit the Service to approve the proposed Minor Amendment.

10.3.1.2.3 Objection by NG

NG may object to a proposed Minor Amendment upon any reasonable basis.

10.3.1.2.4 Unresolved Objections

If the Service reasonably objects to a Minor Amendment proposed under this subsection 10.3.1.2.2 and the objection is not resolved by any conditions or alterations, the proposed amendment must be processed, if at all, as a Major Amendment of the Permit in accordance with section 10.3.2 of this Agreement.

10.3.1.2.5 Date that a Minor Amendment Becomes Effective

Minor Amendments of the Permit shall become effective upon Service approval.

10.3.2 Major Amendment

All changes to the Permit, this Agreement and the HCP that do not qualify under section 10.3.1 of this Agreement shall be processed as a Major Amendment in accordance with all applicable laws and regulations, including but not limited to the ESA, the Service's Permit regulations, and NEPA. The Party proposing the Major Amendment shall provide a statement of the reasons and an analysis of its environmental effects, if any, including its effects, if any, on Covered Species and Covered Activities under the HCP, and any other information required by law. The Service shall use its best efforts to process the proposed Major Amendment within 180 days of submission of the application, except where longer times are required by law. NG may, in its sole discretion, reject any Major Amendment proposed by the Service.

11.0 LAND TRANSACTIONS

11.1 Acquisition of Land by Permittee. Nothing in this Agreement, the HCP, or the Permit limits Permittee's right to acquire additional lands or property interests. Any lands or property interests that may be acquired will not be covered by the Permit except upon amendment of the Permit as provided in section 10 of this Agreement.

11.2 Disposal of Land by Permittee. Permittee's transfer of ownership or control (including easement rights) of Covered Lands that will pose adverse impacts on the Covered Species and their habitat as defined by the HCP will require an amendment of the Permit in accordance with section 10.3.2 of this Agreement, except that such transfers of ownership or control (including easement rights) of Covered Lands may be processed as minor amendments in accordance with section 10.3.1 of this Agreement if:

- (a) The land or property interest will be transferred to an agency of the Federal government and, prior to transfer, the Service has determined that transfer will not compromise the effectiveness of the HCP based on adequate commitments by that agency regarding management of such land;
- (b) The land or property interests will be transferred to a non-Federal entity that has entered into an Agreement acceptable to the Service (e.g., an easement held by the state fish and wildlife agency with the Service as third-party beneficiary) to ensure that the lands will be managed in such a manner and for such duration so as not to compromise the effectiveness of the HCP;
- (c) The land or property interests will be transferred to a non-Federal entity that, prior to completion of the land transaction, has agreed to be bound by the HCP as it applies to the transferred land and has obtained an incidental take Permit following normal Permit procedures covering all species then covered by the Permittee's Permit;

- (d) The Service determines that the property transfer will not have a material impact on the ability of the Permittee to comply with the requirements of the HCP and the terms and conditions of the Permit; or
- (e) The transfer of ownership or control (including easement rights) of Covered Lands will be to or from a subsidiary or parent corporation of the Permittee, provided that the Service is provided with a letter from an officer of the relevant subsidiary, division, or parent corporation of the Permittee with either ownership or control (including easement rights) over Covered Lands or with management responsibility for any of the obligations of the HCP or the Implementation Personnel described in section 4.2.2 of the HCP stating that their particular subsidiary, division, or parent corporation is aware of its responsibilities under the HCP and will continue to implement them and that the transfer of ownership or control will not involve any change in the financial condition of such subsidiary or parent corporation which could impair the ability to carry out any obligations of the HCP, the Permit, or this Agreement.

12.0 MUTUAL ASSURANCES AND CHANGE

12.1 Purpose

A primary purpose of the HCP and this Agreement is to formalize and authorize a plan under which NG may implement its Covered Activities within the Covered Lands in a way that minimizes and mitigates impacts to the Covered Species and their habitat. Based on and in consideration of this Agreement, the HCP, and the Permit, the Service hereby provides assurances pursuant to its regulatory authorities to NG with regard to the following provisions contained in this Section 12.0.

12.2 No Surprises/Unforeseen Circumstances

12.2.1 "No Surprises" Assurances

Consistent with the No Surprises Rule at 50 C.F.R. sections 17.3, 17.22(b)(5), and 17.32(b)(5), as the regulations are written as of the Effective Date and provided that NG is properly implementing the HCP, and other than under Unforeseen Circumstances, the Service shall not require NG to provide additional land, water, or other natural resources or financial compensation or incur additional restrictions on the use of land, water, or other natural resources beyond the level provided for under the HCP, this Agreement, and the Permit with respect to Covered Activities without the consent of NG. Adaptive Management and Changed Circumstances are provided for under the HCP and therefore are not subject to the restrictions on additional mitigation contained in the No Surprises Rule.

In the event there are changes to the No Surprises Rule after the Effective Date that materially affect the assurances provided by this Agreement, NG may elect to relinquish the Permit and terminate this Agreement pursuant to section 13.6 of this Agreement.

12.2.2 Unforeseen Circumstances Finding

In the event that the Service or NG believes that unforeseen circumstances may exist, it shall immediately notify the other Party. If the Service believes unforeseen circumstances exist, it shall clearly document the basis for a proposed finding regarding the existence of unforeseen circumstances. The Service shall follow the requirements of 50 C.F.R. sections 17.22(b)(5)(iii)(C) and 17.32(b)(5)(iii)(C).

Within 15 days of receiving such notice, the Parties shall meet or confer to consider the proposed finding and any potential changes to the Conservation Strategy, subject to the “No Surprises” Assurances provided in section 12.2.1 of this Agreement. The Service shall make an unforeseen circumstances finding based on the best scientific evidence available, after considering any responses submitted by NG. The Service shall have the burden of demonstrating that unforeseen circumstances exist.

12.2.3 Effect of Unforeseen Circumstances Finding

In the event the Service makes a finding of unforeseen circumstances and additional conservation and mitigation measures are deemed necessary to respond to such unforeseen circumstances, the Service may require additional conservation measures from NG, but only if such measures are limited to modifications that maintain the original terms of the HCP to the maximum extent possible. Additional conservation measures shall not involve the commitment of additional land, water, natural resources or financial compensation or additional restrictions on the use of land, water, or other natural resources, without the consent of NG.

12.2.4 Interim Obligations Upon a Finding of Unforeseen Circumstances

If the Service makes a finding of unforeseen circumstances, NG, during the period necessary to determine the nature and location of additional or modified mitigation, will avoid appreciably reducing the likelihood of the survival and recovery of the affected species in the Covered Lands, subject to any conflicting regulatory mandate.

12.2.5 Service Response to a Finding of Unforeseen Circumstances

The Service shall utilize its authorities and resources to protect Covered Species in the event of unforeseen circumstances. The Service may utilize land acquisition and exchange, habitat restoration and enhancement, translocation, and other management techniques beyond those provided in the HCP. The Service may work with other Federal, State, and local agencies, tribes, environmental groups, and private entities to provide for the continued conservation of the Covered Species in the wild in the event of a finding of unforeseen circumstances.

12.3 Changed Circumstances

12.3.1 Existence of Changed Circumstances

Changed Circumstances and planned responses to those circumstances, as further described in section 5.4 of the HCP, include: vandalism or other intentional, destructive illegal human activities; natural catastrophic events other than major floods, invasion of exotic species or diseases; impacts to compensation lands as a result of NG's need to carry out emergency activities; listing of a species in the Covered Lands that is not a Covered Species; labor disputes; and actions of non-participating agencies. In the event that the Service or NG believes that any of these Changed Circumstances as further defined in section 5.4 of the HCP may exist, it shall immediately notify the other Party. The Parties agree to follow the remedial measures for responding to Changed Circumstances provided in sections 4 and 5 of the HCP. The Service will not require NG to carry out any measure not identified in sections 4 and 5 of the HCP.

The existence of any condition or the occurrence of any event that might fit the Federal definition of changed circumstances that is not specifically identified as a Changed Circumstance in Chapter 5 of the HCP will be deemed an unforeseen circumstance and subject to section 12.2 of this Agreement.

12.3.2 Permitee-Initiated Response to Changed Circumstances.

Permittee will give notice to the Service within seven days after learning that any of the Changed Circumstances listed in section 5.4 of the HCP has occurred. As soon as practicable thereafter, but no later than 30 days after learning of the Changed Circumstances, Permittee will modify its activities in the manner described in section 5.4 of the HCP, to the extent necessary and practicable to mitigate the effects of the Changed Circumstances on Covered Species, and will report to the Service on its actions. Permittee will make such modifications without awaiting notice from the Service.

12.3.3 Service-Initiated Response to Changed Circumstances

If the Service determines that Changed Circumstances have occurred and that Permittee has not responded in accordance with section 5.4 of the HCP, the Service will so notify Permittee and will direct Permittee to make the required changes. Within 30 days after receiving such notice, Permittee will make the required changes and report to the Service on its actions. Such changes are provided for in the HCP and hence do not constitute Unforeseen Circumstances or require amendment of the Permit or HCP.

12.3.4 Unidentified Circumstances Deemed Unforeseen Circumstances

The existence of any condition or the occurrence of any event that might fit the definition of Changed Circumstances that is not specifically identified as a Changed Circumstance in section 5.4 of the HCP will be deemed an Unforeseen Circumstance and subject to section 12.2 of this Agreement.

12.4 New Listings of Covered Species

The Parties agree that it is the intent of this Agreement that the Covered Lands will be administered so as to enhance their value for all Covered Species. Provided NG is properly implementing the HCP and this Agreement, the Permit shall automatically become effective as to each Covered Species that is not a Federal Listed Species concurrent with the listing of such species under ESA.

12.5 Critical Habitat Designation for Covered Species

The Service agrees that it will consider the HCP in the preparation of any proposed determination of new critical habitat or revision of existing critical habitat for any Covered Species. The Service agrees that if critical habitat is designated for any Covered Species and NG is properly implementing the terms of the HCP, the Service will not require NG to commit new, additional, or different conservation or mitigation beyond that provided for under the HCP and this Agreement.

12.6 Species that are Not Covered Species.

(a) When and if a species that is not a Covered Species is listed under ESA or a Listed Species other than a Covered Species is identified in the Covered Lands and is found to be affected by the Covered Activities, the Parties shall follow the procedures of this section 12.6.

(b) If a species which is not included as a Covered Species in the HCP is proposed for listing under ESA during the term of this Agreement, including a proposal for listing on an emergency basis, and the Service determines that the species may be affected by the Covered Activities, the Service will endeavor to notify the Permittee of the proposed listing as early as feasible. Similarly, the Service may notify the Permittee if other Listed Species are found to be present in the Covered Lands.

(c) Upon notice or discovery, the Permittee shall evaluate the potential effect of the Covered Activities on the species identified in paragraphs (a) and (b) above, based on the HCP, the information developed through the ongoing management of the Covered Lands, and other relevant information, and the Permittee shall inform the Service in writing of its determination with regard to such potential effect.

(d) If the Permittee notifies the Service that the Covered Activities may affect the species, or if the Service disagrees with the Permittee's determination that the Covered Activities will not affect the species, the Parties shall meet and confer in order to develop an appropriate response.

(e) If the Service determines after consultation with the Permittee, that feasible modifications in the AMM Program or minor adjustments in the Covered Activities can be used to assure that the Covered Activities do not result in take, jeopardy, or adverse modification of designated critical habitat of the species, the Permittee will implement those changes and process the addition of the newly Covered Species as a minor amendment to the HCP. If the Service determines after consultation with Permittee that more substantial modifications are necessary in order to avoid take, jeopardy, or adverse modification of designated critical habitat of the species, such modification will be made by a major amendment.

12.7 Federal Consultations

Nothing in this Agreement will limit the right or obligation of any Federal agency to engage in consultation with the Service as required under section 7 of ESA (16 U.S.C. section 1536(a)). However, in any consultation with the Service with regard to Covered Species that may be required pursuant to section 7, subsequent to the Effective Date in connection with Covered Activities, the Service shall, to the maximum extent permitted by law and regulation, rely upon, and utilize the section 7 biological opinions issued during the approval of this HCP and ensure that any conservation and mitigation for the incidental take of Covered Species in such subsequent section 7 biological opinion conforms to the conservation and mitigation provided under the HCP and does not impose any new, additional, or different conservation or mitigation measures on NG beyond the requirements provided for under the HCP and this Agreement. The Service agrees that subsequent section 7 biological opinions shall not conflict with or interfere with the implementation of the Conservation Strategy.

13.0 ISSUANCE AND ENFORCEMENT OF INCIDENTAL TAKE AUTHORIZATIONS

13.1 Take Authorization

As of the Effective Date, NG may take the Covered Species while carrying out Covered Activities in the Covered Lands, as authorized by and subject to the conditions of the Permit, the HCP, and this Agreement.

The authority issued to NG hereunder also applies to all Covered Individuals and Entities who engage in any Covered Activity. NG shall conduct an educational program to inform all such persons and entities of the terms and conditions of the Permit, the HCP, and this Agreement. NG shall be responsible for ensuring the compliance of those terms and conditions by all such persons and entities. All contracts between NG and such persons and entities shall require compliance with the Permit, the HCP, and this Agreement.

13.2 Original Term

The Permit will take effect on the Effective Date and be effective for 50 years, unless amended, terminated, suspended or revoked before that time.

13.3 Remedies In General

Except as set forth below, each Party shall have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the HCP, and the Permit and to seek remedies and compensation for any breach or violation thereof, consistent with and subject to the following:

- (a) None of the Parties shall be liable in damages to the other Party or to any other person or entity for any breach of this Agreement, any performance or failure to

perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement. Notwithstanding the foregoing, each Party shall retain whatever liability it would possess for its present and future acts or failure to act apart from, and independent of, this Agreement.

- (b) The Parties acknowledge that the Covered Species are unique and that the HCP protects individuals, the species, and the habitat of the Covered Species, the loss of which would be irreparable and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

13.4 Suspension And/Or Revocation

The Service may suspend or revoke the Permit, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. As of the Effective Date, these regulations are codified at 50 C.F.R. sections 13.27 through 13.29, 17.22, and 17.32.

Partial suspension or revocation of the Permit may include removing only certain species from the list of Covered Species, only certain activities from the list of Covered Activities, or only certain areas from the Covered Lands.

Except where the Service determines that emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend or revoke the Permit without first (1) requesting NG to take appropriate remedial actions and providing adequate time for implementation of such actions and (2) providing NG with written notice of the facts or conduct which may warrant the suspension or revocation and an adequate and reasonable opportunity for NG to demonstrate why suspension or revocation is not warranted.

Any specific decision or order suspending the Permit shall specify either a date or the fulfillment of a condition or conditions on which the suspension will terminate. The Parties agree that in the event of any total or partial suspension of the Permit, all Parties shall act expeditiously and cooperatively to reinstate the Permit. In the event a suspension has not been terminated within 6 months of its effective date, at NG's request, the Service shall within 30 days either terminate the suspension or commence a proceeding to revoke the Permit. Such suspension or revocation may apply to the entire Permit or may apply only to specified Covered Species or Covered Activities.

13.5 NG's Obligation During Suspension and Revocation

During the period of suspension, NG shall remain obligated to implement the Conservation Strategy and adhere to this Agreement. Notwithstanding revocation, NG shall remain obligated to compensate, as determined pursuant to section 13.8 of this Agreement, for the impacts of all Take that occurred under the Permit prior to revocation in accordance with the Permit, this Agreement, and the HCP. Upon compensating for such Take, NG shall have no further obligations under the Permit.

13.6 Relinquishment

NG may relinquish the Permit. Such relinquishment shall be in accordance with the regulations in force, if any, on the date of such relinquishment. If no such regulations exist, NG shall provide 90 days written notice to the Service of its intent to relinquish the Permit. Notwithstanding its relinquishment of the Permit, NG shall remain obligated to compensate, as determined pursuant to section 13.8 of this Agreement, for the impacts of all Take that occurred under the Permit prior to relinquishment in accordance with the Permit, this Agreement and the HCP. Upon compensating for such Take, NG shall have no further obligations under the Permit.

13.7 Dispute and Issue Resolution

The Parties recognize that disputes concerning implementation or interpretation of this Agreement, the HCP, and the Permit may arise from time to time. The Parties agree to work together in good faith to resolve such disputes using the informal dispute resolution procedure set forth in this section or such other procedures upon which the Parties may later agree. Any Party may seek any available remedy without regard to this section 13.7 if the Party concludes that circumstances so warrant. However, unless the Parties agree upon another dispute resolution process or unless a Party has initiated administrative proceedings or litigation related to the subject of the dispute in Federal court, the Parties agree to use the following procedures to attempt to resolve disputes.

13.7.1 Meet and Confer

If the Service objects to any action or inaction by the NG on the basis that the action or inaction is inconsistent with the HCP, the Permit, or this Agreement, it shall so notify NG in writing, explaining the basis of such objection. NG shall respond to the notice within 30 days of receiving it, stating what actions the NG proposes to take to resolve the objection or, alternatively, explaining why NG believes the objection is unfounded. If the response resolves the objection to the satisfaction of the objecting agency, the agency shall so notify NG, and NG shall implement the actions, if any, proposed in the response to the Service. If the response does not resolve the objection to the Service's satisfaction, the Service shall notify NG accordingly, and the Service and NG shall meet and confer to attempt to resolve the dispute. The meeting shall occur within 30 days after NG receives the Service's response, or at such later time as NG and the Service may agree. NG shall take notes at the meeting, summarize the outcome, and distribute meeting notes to each Party in attendance for its review.

NG shall use the same procedure to resolve objections to any action or inaction of the Service and the Service shall respond in the same manner to notices delivered by NG.

13.7.2 Elevation of Dispute

If the Parties do not resolve a dispute after completing the dispute resolution procedure in section 13.7.1, any one of the Parties may elevate the dispute to a meeting of the chief executives of the Parties. For purposes of this provision, "chief executive" shall mean the Service Field Supervisor, and NG's Manager, Manager-Environmental Upstate New York, or equivalent environmental

department managerial personnel. Each Party shall be represented in person by its chief executive at the meeting, and the meeting shall occur within 45 days of a request by any Party following completion of the dispute resolution procedure.

13.8 Obligation to Compensate for Actual Impacts

Upon any early termination of the Permit, whether through revocation or relinquishment, NG shall have no further obligations under this Agreement, the HCP, or the Permit, unless the Service determines in writing that the impacts of Take of Covered Species that occurred under the Permit have not been compensated for. The Service shall have the burden of proving both (a) the measures implemented and funded by NG through the date of revocation or relinquishment did not adequately mitigate the impacts of the actual Take and (b) the extent and nature of the uncompensated impacts. NG and the Service shall work together to assess and determine whether and to what extent impacts of Take of Covered Species that occurred under the Permit have not been compensated for. The Service may request additional information pertinent to the assessment and determination, provided, however, that any such request for additional information shall be made within 30 days of the early termination.

To determine "compensation," the Service shall compare the amount and impact of authorized Take of the Covered Species that occurred prior to termination with the amount and effect of compensation provided up to that time. This analysis will take into consideration, among other things, the duration the Permit has been in effect, the location, quantity and quality of compensation lands that have been enhanced, and the extent to which Conservation Strategy objectives have been achieved. Any determination by the Service that compensation has not been achieved at the time of revocation or relinquishment shall have a reasonable, factual basis and be issued in writing within 60 days after termination or, if the Service has requested additional information as described above, within 30 days of receiving the requested information. The determination shall specify which measures of the Conservation Strategy NG will be obligated to continue to apply, and for how long. If the Service determines that NG must provide additional compensation, the Service and NG shall identify the amount of compensation required, and it shall set a practicable schedule with which the NG must comply to achieve compensation, including what habitat types the compensation shall conserve. If the Service fails to inform NG that additional compensation is required in writing within 60 days after termination, NG shall be deemed to have provided compensation for any impacts of Take under the Permit and shall be relieved of any further obligation to provide compensation under the Permit, the HCP, and this Agreement.

In no case shall NG be obligated to provide compensation for authorized Take in excess of the actions that would have been required of NG had the Permit not been terminated.

14.0 MISCELLANEOUS

14.1 Force Majeure

In the event that NG is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault

or negligence of NG (force majeure), including but not limited to acts of God, third party actions, sudden actions of the elements, or actions of Federal or state agencies or other local jurisdictions, NG shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach of this Agreement, provided that nothing in this section shall be deemed to authorize any Party to violate ESA and provided further that:

- (a) The suspension of performance is of no greater scope and no longer duration than is required by the force majeure;
- (b) Within 2 weeks after the occurrence of the force majeure NG gives the Service written notice describing the particulars of the occurrence;
- (c) NG uses its best efforts to remedy its inability to perform (however, this paragraph shall not require the settlement of any legal action on terms which in the sole judgment of NG are contrary to its interest); and
- (d) When NG is able to resume performance of its obligations, NG shall give the Service written notice to that effect.

14.2 Notices

All notices, demands, and communications from one Party to another shall be in writing and may be personally delivered, sent by U.S. Mail, or sent by a recognized overnight delivery Service to the names and addresses provided in this section. The notice shall be effective at the time of receipt of the personal or overnight delivery, or 5 days after deposit in the U.S. Mail. Notices shall be transmitted so that they are received within the specified deadlines.

For the Service:

Field Office
United States Fish and Wildlife Service
New York Field Office
3817 Luker Rd.
Cortland, NY 13045
Telephone: 607-753-9334
Telefax: 607-753-9699

Assistant Regional Director, Ecological Services
United States Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035-9589
Telephone: 413-253-8300
Telefax: 413-253-8308

For the Permittee:

Phillip B. George
Manager-Environmental Upstate New York
National Grid
Environmental Services, A-3
300 Erie Boulevard West
Syracuse, NY 13202
(315) 428-6685

Kim Goslant, Esq.
National Grid
40 Sylvan Road
Waltham, MA 02451
(781) 907-1870

Any Party may change the name and address to which such notices, demands, or other communications may be sent by giving the other Parties written notice of such change.

When signed documents are necessary, the Parties agree to accept signed documents transmitted by facsimile, portable document format (e.g., document.pdf), or other similar reprographic technology and to rely upon such documents as if they bore original signatures. The Parties agree to provide, within 72 hours after transmission of such documents, the original signed documents to each of the other Parties.

14.3 Severability

If any provision of this Agreement or the HCP is found invalid or unenforceable, such provision shall be enforced to the maximum extent possible and all other provisions shall remain in effect to the extent they can be reasonably applied in the absence of such invalid or unenforceable provision, subject to relinquishment per section 13.6.

14.4 Entire Agreement

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between the Parties. It supersedes any and all prior agreements, either oral or in writing, between the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters; and each Party acknowledges that no representation, inducement, promise, or agreement, oral or otherwise, has been made by the other Party or anyone acting on behalf of the other party that is not embodied herein.

14.5 Attorneys' Fees

If any action at law or equity, including any action for declaratory relief, is brought by a Party to this Agreement to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs. If any action at law or equity, including any action for declaratory relief, is brought by a third party to enforce or interpret the provisions of this

Agreement, the Parties shall negotiate a joint defense agreement, as appropriate, at the time the litigation is filed. The Parties may also execute a cost-sharing agreement to address the costs associated with the defense against the third party action or proceeding.

14.6 Duplicate Originals

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

14.7 Availability of Funds

The duty of the Service to carry out its obligations under this Agreement, the HCP, and the Permit shall be subject to the Federal Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement shall be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U. S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.8 Elected Officials

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

14.9 Governing Law

This Agreement shall be governed by and construed in a manner consistent with the statutory and regulatory authority of the Service under the ESA, its implementing regulations and other applicable Federal laws. Nothing in this Agreement is intended to or shall be construed to limit or compromise the authority of the Service to fulfill its responsibilities under the ESA.

14.10 No Third-Party Beneficiaries

This Agreement is solely for the benefit of the people of the United States of America by and through the Service and NG. Without limiting the applicability of rights granted to the public pursuant to the ESA or other Federal law, this Agreement shall not create any right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a Party to this Agreement to maintain a lawsuit or claim for personal or other injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed under existing law.

14.11 Counterparts

This Agreement may be executed in counterparts. This Agreement shall become operative as soon as one counterpart has been executed by each Party. The counterparts so executed shall

constitute one Agreement notwithstanding that the signatures of all Parties do not appear on the same page.

14.12 References to Regulations

Unless otherwise specified, any reference in this Agreement, the HCP or the Permit to any regulation or rule of the Service or NYDEC shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.13 No Partnership. Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

14.14 Relationship to the ESA and Other Authorities. The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable Federal or state law. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

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

14.15 Applicable Laws. All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable state and Federal laws and regulations.

14.16 Successors and Assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permit shall be governed by the Service's regulations in force at the time.

14.17 Due Authorization

Each Party warrants that the signatory is authorized to execute this Agreement on behalf of that Party.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date that the Service issues the Permit.

Dated: JUL 12 2012 UNITED STATES FISH AND WILDLIFE
SERVICE

By: 

Title: Acting Regional Director

Dated: July 17, 2012

NIAGARA MOHAWK POWER COMPANY
d/b/a NATIONAL GRID

By: 

Title: Senior Vice President,
Network Strategy

STOP & F. 100

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