



**Airport City Solar East Ltd.**

**Airport City Solar Project**

**March 20, 2024**

**Alberta Utilities Commission**

Decision 27885-D01-2024  
Airport City Solar East Ltd.  
Airport City Solar Project  
Proceeding 27885  
Application 27885-A001

March 20, 2024

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## **1 Executive summary**

1. In this decision, the Alberta Utilities Commission approves an application from Airport City Solar East Ltd. (ACSE) to construct and operate the Airport City Solar Project, and to connect the project to the FortisAlberta Inc. electric distribution system, subject to the conditions set out in this decision.

2. Two constitutional issues arose in relation to the application:

- The application triggered the Crown’s constitutional duty to consult with the Lac Ste. Anne Métis Community Association (LSAMCA). The Commission finds that in the circumstances, the duty to consult has been satisfied.
- ACSE argued that certain provincial laws would not apply to the project, including the *Water Act*, the *Environmental Protection and Enhancement Act*, the *Weed Control Act*, and the *Wildlife Act*. The Commission finds that ACSE has not met its burden to establish the inapplicability of any provincial legislation; provincial environmental laws apply to the project unless specifically indicated otherwise in the text of the legislation.

3. The Commission’s findings on whether approval of the project is in the public interest are set out in detail below and include:

- The project is sited on federal Crown land, reserved as part of the Edmonton International Airport (EIA) and zoned for industrial use.
- The project layout, as proposed, infringes on permanent watercourses, including Deer Creek, to an unacceptable degree. ACSE is therefore directed to revise its project layout so that no permanent infrastructure is located within 30 metres of any small permanent watercourse.
- The Commission is satisfied that the project will not alter stormwater drainage patterns and does not consider it reasonable to require avoidance of all project infrastructure in a floodplain, as requested by the interveners.
- Given the existing cultivation of the project site and the lack of native vegetation indicators within the Class III wetlands within the project area, the Commission considers ACSE’s commitment to maintaining a minimum distance of 10 metres from all Class III wetlands to be reasonable.
- The project is located adjacent to the EIA, which has a bird deterrent program in place for aircraft safety reasons. In these circumstances, the Commission considers the project’s risk to birds to be low.

- The Commission considers that ACSE has provided a reasonable explanation of its expected weed control measures. The Commission directs ACSE to provide a copy of its weed management plan to interveners and other stakeholders before construction and to provide a mechanism for interveners and stakeholders to give feedback on the plan.
- The Commission accepts that ACSE's approach to reclamation is sufficient for satisfying the Commission that approval of the project is in the public interest. The Commission expects ACSE to fully reclaim the project and bear the costs of doing so. The Commission understands that ACSE will be responsible for posting reclamation security in accordance with the reclamation security regime currently under development by the Government of Alberta.
- The Commission is satisfied that ACSE's proposed mitigation will reduce or eliminate glare at every potentially affected receptor. The Commission nevertheless requires ACSE to promptly address any complaints or concerns from stakeholders regarding glare once the project commences operations.
- The Commission finds ACSE's commitments to mitigate noise during the project construction to be reasonable. Because of the proximity of receptors R3, R4 and R5, the Commission directs ACSE to complete a post-construction comprehensive sound level survey to verify compliance with Rule 012: *Noise Control* at these receptors once the project commences operation.
- The Commission expects that ACSE will seek input from the members of the Sprucedale Concerned Landowners Group (SCLG), to consider if there is a landscaping program that might address these residents' concerns about visual impacts from the project.
- The Commission expects that ACSE will meaningfully involve SCLG, LSAMCA and other interested stakeholders in the development of the stakeholder engagement plan.
- The Commission authorizes the connection order, as requested by ACSE.

4. For the reasons discussed in the decision, the Commission finds that approval of the application is in the public interest, having regard for its social, economic, environmental and other effects.

## **2 Introduction**

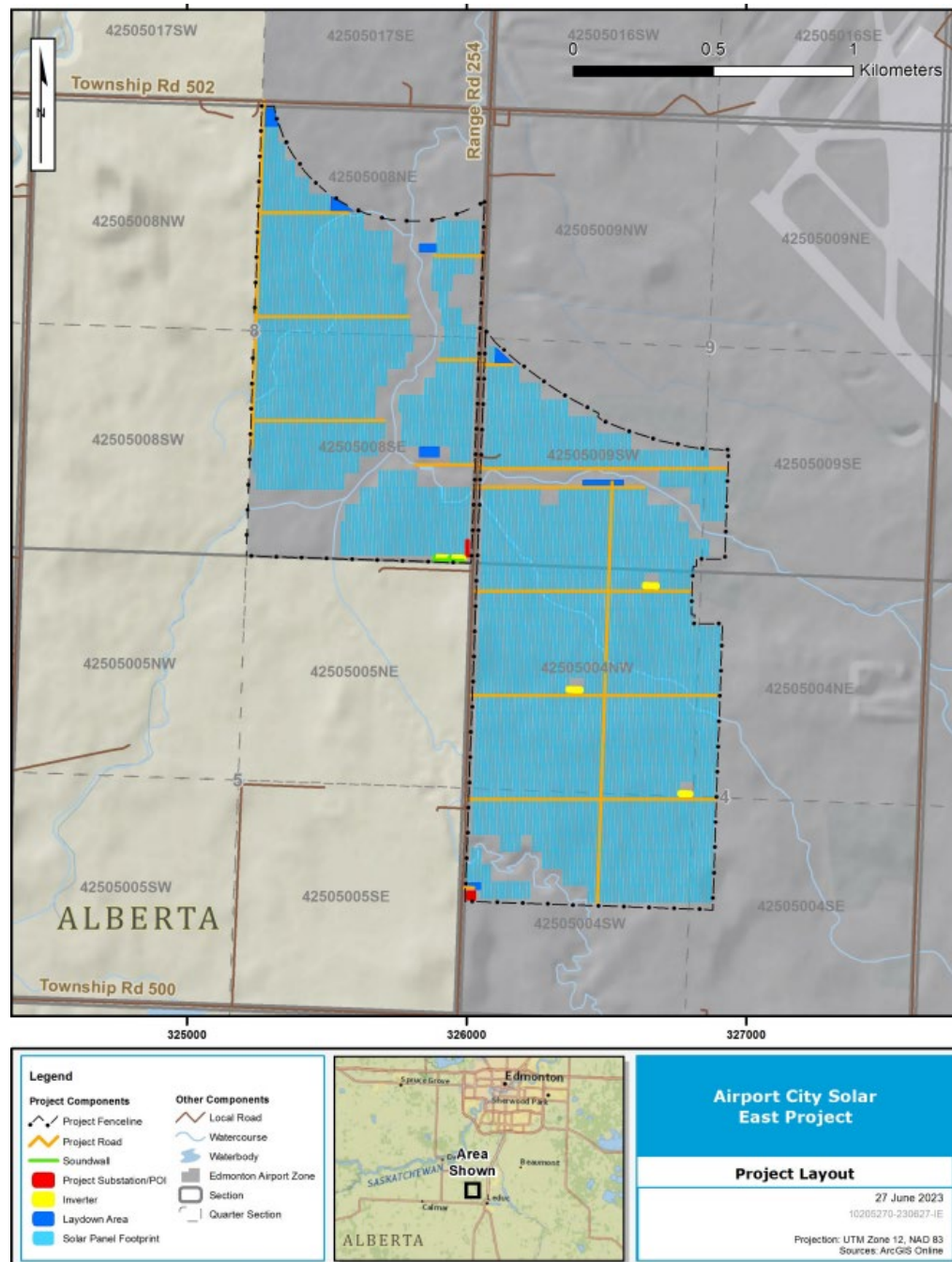
### **2.1 Application**

5. ACSE filed an application with the Commission for approval to construct and operate the 112-megawatt (MW) power plant, designated as the Airport City Solar power plant (the project) and to connect the project to the FortisAlberta Inc. electric distribution system, under sections 11 and 18 of the *Hydro and Electric Energy Act*.

6. The project is sited on approximately 595 acres of land, located less than one kilometre west of the EIA, near Leduc, Alberta, as shown on the map in Figure 1. The project is located on

federal Crown land that is leased from Transport Canada by the Edmonton Regional Airport Authority (ERAA).

Figure 1. Airport City Solar Project location<sup>1</sup>



7. ACSE proposed a project in-service date of November 1, 2025.<sup>2</sup>

<sup>1</sup> Exhibit 27885-X0146, ACSE Project Layout (Updated)\_June 27, 2023.

<sup>2</sup> Exhibit 27885-X0188, ACSE Responses to Interim Information Requirements, PDF page 2.

## 2.2 Interveners

8. The Commission issued a notice of application to local stakeholders and the following Indigenous groups: Alexander First Nation, Alexis Nakota Sioux Nation, Enoch Cree Nation, Ermineskin Cree Nation, Louis Bull Tribe, Montana First Nation, Paul First Nation, Samson Cree Nation and the Métis Nation of Alberta.

9. The Commission received statements of intent to participate from Lac Ste. Anne Métis Community Association (LSAMCA) and from nearby residents, who formed the Sprucedale Concerned Landowners Group (SCLG).

10. LSAMCA stated that its members are the contemporary descendants of the historic Lac Ste. Anne Métis community, and that the Lac Ste. Anne Métis community's traditional territory spans west-central Alberta, and includes the project location. LSAMCA stated that this traditional territory is the location where LSAMCA's members exercise rights to harvest the waters and resources for subsistence, medicinal, spiritual, economic, commercial, recreational and cultural purposes.

11. SCLG consists of individuals who own and occupy lands within 800 metres of the project. The members of SCLG are:

- James and Janet Stamper
- Clayton Sach and Sharon Bach
- LaVern and Solveig Matter
- Noel and Maureen Brezden

12. The Commission granted standing to the interveners for the reasons set out in its rulings issued on February 28, 2023, March 15, 2023, and May 25, 2023. The Commission held an oral hearing from June 27 to June 29, and on July 4, 2023, to consider the application and concerns raised. The registered participants in the proceeding and the registered appearances for the oral hearing can be found in appendixes A and B, respectively.

13. This application was subject to the approvals pause mandated by the *Generation Approvals Pause Regulation*. While the pause was in effect, the AUC conducted an inquiry (the Module A inquiry) into several land use impact issues in accordance with Order-in-Council 171/2023. The issues considered in the Module A inquiry included: reclamation security for power plants, the impact of the development of power plants on specific types or classes of agricultural or environmental land, provincial Crown land and Alberta's pristine views. The Commission provided its report on the Module A inquiry to the Minister of Affordability and Utilities on January 31, 2024, and the Module A report was publicly released on March 13, 2024.

14. On February 28, 2024, before the pause expired, the Government of Alberta signalled its intent to develop policy and legislative tools related to some topics in the Module A report and the Commission issued a bulletin confirming that each power plant application affected by the pause would be considered on its individual merits, and the Commission would assess each application to determine whether further process was required. This determination would be based on the circumstances of each application and the sufficiency of the existing evidentiary record. On March 6, 2024, the Commission issued a letter advising that no further process would be required for this proceeding.

15. The Commission's decision in this proceeding is based solely on the record of this proceeding and the Commission did not take into account or otherwise have regard for the Module A report in deciding this application.

### 3 Discussion and findings

16. For the reasons below, the Commission finds that approval of the project is in the public interest having regard to its social, economic, environmental and other effects, as required by Section 17 of the *Alberta Utilities Commission Act*.

17. The Commission has previously found that the public interest will be largely met if an application complies with existing regulatory standards, and the project's benefits to the public outweigh its negative impacts.<sup>3</sup> In determining if the application is in the public interest, the Commission must take into account the purposes of the *Hydro and Electric Energy Act* and the *Electric Utilities Act*. The Commission must also determine whether an applicant has met the requirements of Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* and Rule 012: *Noise Control*. An applicant must also obtain all approvals required by other applicable provincial and federal legislation.

#### 3.1 Question of constitutional law

18. This proceeding involved two separate constitutional law matters.

19. First, the application triggered the Crown's constitutional duty to consult with LSAMCA. The Commission addresses the specific potential impacts on LSAMCA's rights within its substantive findings throughout the decision. In Section 3.9, the Commission discusses the duty to consult and concludes that, in the current circumstances, the duty to consult has been satisfied.

20. Second, the project's siting on federal Crown land raised a question about the applicability of certain provincial laws to the project. In this section, the Commission discusses this question of constitutional law and provides its findings.

21. ACSE's application materials reference its compliance with provincial laws, including environmental laws.<sup>4</sup> However, during the evidentiary portion of the oral hearing, witnesses for ACSE suggested that certain enactments of the Legislature of Alberta do not apply to the project due to its siting on federal Crown land.<sup>5</sup>

22. Before oral argument, the Commission requested that ACSE and other interested parties address why provincial laws, regulations or standards that typically apply to the construction and operation of solar projects in Alberta would or would not apply to the project due to its location on federal Crown land. The Commission provided examples of provincial legislation that

<sup>3</sup> Alberta Energy and Utilities Board Decision 2001-111: EPCOR Generation Inc. and EPCOR Power Development Corporation 490-MW Coal-Fired Power Plant, Application 2001173, December 21, 2001, page 4.

<sup>4</sup> For example: The Environmental Impact Assessment Report (Exhibit 27885-X0005, PDF page 77) states that any fatality of a provincially listed species at risk listed under the *Alberta Wildlife Act* will be reported to AEP. The conceptual Conservation and Reclamation Plan (Exhibit 27885-X0010, PDF page 27) states that weeds will be managed pursuant to the *Weed Control Act*.

<sup>5</sup> For example: Transcript, Volume 2, page 292, lines 7-9: "In my experience, because of the location on federal lands, the *Water Act* would not apply in this case."



typically applies to a solar project, such as the *Water Act*, the *Environmental Protection and Enhancement Act* and its regulations, the *Weed Control Act*, and the *Wildlife Act*.<sup>6</sup>

23. During oral argument, ACSE counsel took the position that many provincial laws, including those provided by the Commission as examples, do not apply to the project, not only due to its location on federal Crown land but also because the designated federal authority, the ERAA, had issued a notice of determination for the project under the *Impact Assessment Act*.<sup>7</sup> ACSE submitted that applying these provincial laws, regulations or standards to the project would exceed the Commission’s jurisdiction. ACSE conceded that it was seeking approval to construct and operate the project under provincial legislation, namely the *Hydro and Electric Energy Act*. ACSE did not provide a complete list of the provincial legislation that it considered would not apply to the project.

24. The Commission considered that this issue triggered the notice requirement under the *Administrative Procedures and Jurisdiction Act*. The Commission established a process for interested parties to respond to the notice, and for ACSE to reply. The Commission received submissions from the Minister of Justice of Alberta, SCLG, LSAMCA and ACSE.

25. In response to the Commission’s direction, ACSE submitted the following constitutional law question:

Why provincial laws, regulations or standards that typically apply to the construction and operation of solar projects in Alberta would or would not apply to the proposed project due to its location on federal land. For example, the *Water Act*, the *Environmental Protection and Enhancement Act* and its regulations, the *Weed Control Act*, the *Wildlife Act*, etc.<sup>8</sup>

26. ACSE later clarified that the specific provincial environmental requirements it considers do not apply to the project include the provincial setbacks under Alberta’s Renewable Energy Directives<sup>9</sup> and the requirement to obtain a *Water Act* approval.

27. As with any constitutional challenge, the burden lies upon the party asserting the legislation is not valid or constitutionally inapplicable in the circumstances. In this proceeding, ACSE does not challenge the constitutional validity of a particular piece of provincial legislation. Rather, ACSE argues provincial environmental laws do not apply or otherwise do not operate in these circumstances.

28. For the reasons that follow, the Commission finds that ACSE has not met the burden of establishing that the provincial environmental laws do not apply in these circumstances. The Commission concludes that provincial environmental laws generally apply to the project, except for specific instances where the legislation indicates it does not apply on federal Crown land.<sup>10</sup>

<sup>6</sup> Exhibit 27885-X0170, Issue for oral argument.

<sup>7</sup> Transcript, Volume 4, page 734, line 20 to page 735, line 2.

<sup>8</sup> Exhibit 27885-X0187, ACSE Notice of Question of Constitutional Law.

<sup>9</sup> *Wildlife Directive for Alberta Solar Energy Projects*.

<sup>10</sup> For example, Section 134(f) of the *Environmental Protection and Enhancement Act*, which relates to conservation and reclamation defines “specified land” and states that “specified land...does not include land owned by the Crown in the right of Canada.”

### 3.1.1 Applicability of provincial environmental laws

29. ACSE raised two constitutional grounds in support of its position that provincial environmental laws do not apply in these circumstances: the doctrine of interjurisdictional immunity and federal paramountcy. The Commission summarizes the parties' submissions on the question of constitutional law in Section 3.1.1.1 and makes its findings concerning the asserted constitutional grounds in sections 3.1.1.2 and 3.1.1.3.

#### 3.1.1.1 Positions of the parties

30. ACSE submitted that provincial environmental laws do not apply to the project because: (i) it is located on federal Crown land, (ii) it is closely integrated to the aviation and aeronautics federal undertaking of the EIA, (iii) it is subject to federal environmental requirements, and (iv) the ERAA has exercised its statutory jurisdiction and determined that the project will not cause any significant environmental impacts.<sup>11</sup>

31. ACSE maintained that both the federal government's jurisdiction over federal Crown land pursuant to Section 91(1A) of the *Constitution Act, 1867* as well as its jurisdiction over aviation and aeronautics undertakings pursuant to Section 91(29) render provincial environmental laws inapplicable in the circumstances. ACSE argued that Alberta has no exclusive or concurrent environmental jurisdiction over these lands or the proposed project.

32. ACSE emphasized that the ERAA is the designated federal authority on behalf of Transport Canada and has already exercised its jurisdiction and approved the project as filed. The ERAA issued a notice of determination pursuant to sections 81 to 91 of the federal *Impact Assessment Act*, which ACSE claims "defines the proposed Project from the regulatory (and constitutional) perspective."<sup>12</sup> The ERAA's notice of determination, in its entirety, reads as follows:

#### Notice of Determination

**October 28, 2022** – Edmonton Regional Airports Authority has determined that the proposed Airport City Solar project is not likely to cause significant adverse environmental effects.

This determination was based on a consideration of the following factors

- Impacts on right of Indigenous peoples;
- Indigenous knowledge;
- Community knowledge;
- Comments received from the public; and
- Technically and economically feasible mitigation measures.

Edmonton Regional Airport Authority is satisfied that that the carrying out of the project is not likely to cause significant adverse environmental effects. Therefore, Edmonton Regional Airport Authority may carry out the project, exercise any power, perform any duty or function or provide financial assistance to enable the project to be carried out in whole or in part.<sup>13</sup>

<sup>11</sup> Exhibit 27885-X0187, ACSE Notice of Question of Constitutional Law.

<sup>12</sup> Exhibit 27885-X0202, ACSE Reply Submissions on NQCL, page 4.

<sup>13</sup> Exhibit 27885-X0006, Appendix F1 – ACSE PIP Report Complete-TC, PDF page 98.

33. For these reasons, ACSE maintains that Alberta Environment and Protected Areas (AEPA) did not need to review or issue any renewable energy referral report with respect to the project under the *Environmental Protection and Enhancement Act* or its regulations. Instead, ACSE provided its environmental impact analysis completed for the ERAA and its notice of determination in its application.

34. Alberta Justice, LSAMCA and SCLG all maintain that provincial environmental laws apply to the proposed project.<sup>14</sup> Alberta Justice highlighted that provincial jurisdiction over the environment flows from several different heads of power in Section 92 of the *Constitution Act, 1867* and that shared federal and provincial responsibility for environmental impact assessment has been confirmed as a central feature of environmental decision making in Canada.<sup>15</sup> LSAMCA noted that, while the federal government has exclusive jurisdiction over federal Crown land and aviation and aeronautics, these heads of power do not give the federal government exclusive jurisdiction over matters related to the environment.<sup>16</sup> In short, provincial laws of general application still apply unless demonstrated otherwise.

35. All three intervening parties in some fashion point to the modern principle of co-operative federalism, which favours the ordinary operation of statutes enacted by both levels of government in the absence of conflicting legislation. While there are limits to co-operative federalism, the parties maintain that there is a role for both federal and provincial environmental laws to apply in these circumstances. Provincial environmental laws may have incidental effects on federal Crown land and activities undertaken on such land, but this does not render these laws inapplicable or inoperative in the circumstances.

### 3.1.1.2 Interjurisdictional immunity

36. The doctrine of interjurisdictional immunity is based on the premise that the classes of subjects listed in sections 91 and 92 of the *Constitution Act, 1867* must be assured a minimum level of content that will be immune from the application of legislation enacted by the other level of government.<sup>17</sup>

37. Interjurisdictional immunity applies when two conditions are met. The impugned provision must trench on the *core* of an exclusive head of power under the *Constitution Act, 1867*, and, the effect of this overlap must *impair* the exercise of the core of the head of power.<sup>18</sup>

38. Decision makers must first identify the “basic, minimum and unassailable content... necessary to make the power effective for the purpose for which it was conferred.”<sup>19</sup> Interjurisdictional immunity is restricted to essential and vital elements of the particular head of

<sup>14</sup> Exhibit 27885-X0200, Alberta Response to ACSE NQCL (Oct 27 2003); Exhibit 27885-X0199, LSAMCA Written Response to ACSE Notice of Question of Constitutional Law; Exhibit 27885-X0196, SCLG Response to Notice of Constitutional Question FINAL.

<sup>15</sup> Exhibit 27885-X0200, Alberta Response to ACSE NQCL (Oct 27 2003), paragraph 19.

<sup>16</sup> Exhibit 27885-X0199, LSAMCA Written Response to ACSE Notice of Question of Constitutional Law, paragraph 46.

<sup>17</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 at paragraph 33; *Quebec v Canadian Owners and Pilots Association*, 2010 SCC 39, paragraph 26; *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58, paragraph 90.

<sup>18</sup> *Desgagnés*, paragraph 92.

<sup>19</sup> *Desgagnés*, paragraph 93; *Canadian Western Bank*, paragraphs 50 and 77.

federal jurisdiction.<sup>20</sup> There may be activities or projects that take place on federal Crown land or with respect to federal undertakings that are not vital or do not strike at the core of exclusive federal jurisdiction.

39. If the first step is satisfied, decision makers must then determine if the impugned law's effect impairs the core of the federal head of power.<sup>21</sup> Impairment implies serious or significant intrusion on the core of the federal power in a way that results in adverse consequences.<sup>22</sup>

40. Generally, the doctrine should not be used where the legislative subject matter in question presents a double aspect and both federal and provincial authorities have a compelling interest.<sup>23</sup> Federalism favours, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments, decision makers should avoid blocking the application of measures taken to be enacted in furtherance of the public interest.<sup>24</sup>

41. The environment is not a matter that is exclusive to either the federal or provincial level of government. Rather, the environment touches several heads of power assigned the respective levels of government.<sup>25</sup> The Supreme Court of Canada recently confirmed that both levels of government can pass laws dealing with those aspects of environmental protection that fall within their constitutional authority.<sup>26</sup>

42. Each head of power relied on by ACSE in the context of interjurisdiction immunity is considered below.

#### Federal Property (Section 91(1A))

43. The Commission finds that ACSE failed to demonstrate that provincial environmental laws, including the *Water Act* and the *Wildlife Directive for Alberta Solar Energy Projects* (Wildlife Directive), impair the core of federal jurisdiction over federal Crown land.

44. ACSE argued provincial environmental laws do not apply because the proposed project is located on federal Crown land, and these activities on federal Crown land are regulated solely and exclusively by federal legislation including the *Impact Assessment Act*. ACSE also claims that provincial environmental laws could apply if there are any off-site impacts to provincial land, which it asserts are not present.

<sup>20</sup> The term "vital" has been interpreted and used by courts to mean "essential to the existence of something; absolutely indispensable or necessary; extremely important, crucial": *British Columbia v Lafarge Canada Inc.*, 2007 SCC 23, paragraph 42.

<sup>21</sup> *Canadian Western Bank*, paragraphs 48-49.

<sup>22</sup> *Canadian Western Bank*, paragraph 48; *Canadian Owners and Pilots*, paragraph 45. The application of the doctrine of interjurisdictional immunity is triggered when the impact of a law adopted by one level of government on the exercise of a power by the other level of government increases in severity from "affecting" to "impairing." The exercise of the power does not necessarily have to be paralyzed, but the intrusion must be serious.

<sup>23</sup> *Canadian Western Bank*, paragraphs 35-38; *British Columbia v Lafarge Canada Inc.*, 2007 SCC 23 at paragraph 4; *Harvest Fraser Richmond Organics Ltd. v District Director, Environmental Management Act*, 2017 BCEAB 13, paragraph 119.

<sup>24</sup> *Canadian Western Bank*, paragraphs 35-47; *Lafarge*, paragraph 4; *Reference re Impact Assessment Act*, 2023 SCC 23, paragraph 228.

<sup>25</sup> *Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3, 1992 CanLII 110.

<sup>26</sup> *Reference re Impact Assessment Act*, paragraphs 2 and 116.

45. The Commission disagrees. The core of federal jurisdiction over federal Crown land includes rights that are generally associated with fee simple property ownership.<sup>27</sup> While these rights may be understood broadly, it does not mean that federal Crown land is immune from all provincial laws of general application. It has long been established that federal Crown land does not constitute an extra-territorial enclave within provincial boundaries and that Section 91(1A) does not prevent the application of provincial law on federal Crown land in all circumstances.<sup>28</sup>

46. Control over planning and use of federal Crown lands falls within the core of Section 91(1A) when the project or activity in question fall exclusively under federal jurisdiction. Examples of impairment to this core of Section 91(1A) include directly limiting the extent of land use, land development, or business activity.<sup>29</sup>

47. Many provincial environmental laws are concerned with environmental protection broadly and are not intended to directly regulate land use. The Commission considers that this includes the siting requirements under the Wildlife Directive and the *Water Act* approval requirement. Incidental, non-impairing effects on the core of the federal power are constitutionally permissible; the Commission finds that ACSE has failed to demonstrate that the legislation in question goes beyond those incidental, non-impairing effects.<sup>30</sup>

48. Lastly, the Commission finds that ACSE's argument in its reply submissions that provincial environmental laws could only apply to the project if there were offsite impacts to be without merit. The jurisprudence does not support this argument, and the Commission considers there is potential for offsite impacts from this project.

#### Aviation and Aeronautics (Section 91(29))

49. The Commission finds that ACSE failed to demonstrate that provincial environmental laws impair the core of federal jurisdiction over aviation and aeronautics.

50. ACSE argues that provincial environmental laws do not apply because the project is closely integrated with the federal undertaking of aviation and aeronautics, specifically the EIA, including its development plans, operations and decarbonization strategy. ACSE suggested that renewable energy generation from the project is critical to the EIA's operations and future development plans. Therefore, the project is physically, operationally, and functionally integrated into the federal aviation and aeronautics undertaking. ACSE maintains that the fact the ERAA issued its notice of determination under the *Impact Assessment Act* means that there should be no doubt that the project is part of the federal aviation and aeronautics undertaking. In ACSE's view this close integration leaves no room for the incidental application of provincial environmental law.

51. The Commission acknowledges that certain elements of airports, such as aerial navigation, have been considered by courts to be integral and vital parts of the federal

<sup>27</sup> *Mississauga (City) v Greater Toronto Airports Authority*, 2000 CanLII 16948 (ONCA), paragraph 66.

<sup>28</sup> *Construction Montcalm Inc v Quebec*, [1979] 1 SCR 754 at 777; *Lafarge*, paragraph 55; *Attorney General of Quebec v IMTT-Quebec Inc.*, 2019 QCCA 1598, paragraph 188, leave to appeal refused at 2020 CanLII 27684 (SCC).

<sup>29</sup> *Harvest Fraser*, paragraphs 140-141.

<sup>30</sup> *R v Prince Rupert Port Authority*, 2019 BCPC 298, paragraph 174; *R v Great Lakes Stevedoring Company Ltd.*, 2019 ONCJ 895, paragraphs 35-36.

jurisdiction over aviation and aeronautics.<sup>31</sup> However, not every activity or development in the context of airports is vital or closely integrated to federal aviation and aeronautics undertakings. Matters of exclusive federal jurisdiction include whether and where to build an airport, certain operational elements, aircraft refuelling, and matters essential for aerial navigation and air transportation to take place.<sup>32</sup>

52. In contrast, provincial construction and safety requirements apply to the construction site of a new airport, because these requirements relate to provincial safety regulations and have nothing to do with aeronautics. Similarly, wages paid by a contractor and the provision of liquor on flights are matters that are far removed from aerial navigation and the operation of an airport, and are accordingly subject to relevant provincial laws.<sup>33</sup> Municipal approval of certain developments, such as condominiums, apply on airport lands when those approvals do not affect a vital, essential or integral part of aviation-related facilities or the operation of the airport.<sup>34</sup> Provincial environmental laws, including municipal environmental bylaws, may apply to certain activities and developments on airport lands.<sup>35</sup>

53. ACSE has not demonstrated that the provincial environmental laws impair the core of federal undertakings of aviation and aeronautics. The Commission finds that the project, a solar power plant, is not closely integrated with the EIA such that it is vital for aerial navigation or air transportation to take place.

### 3.1.1.3 Paramountcy

54. The doctrine of paramountcy provides that when a validly enacted federal law conflicts with a validly enacted provincial law, the provincial law is rendered inoperative to the extent of the conflict. As noted above, ACSE does not challenge the validity of any provincial legislation.

55. Conflict may arise where: (i) there is an operational conflict because it is impossible to comply with both laws; or (ii) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.<sup>36</sup>

56. Under the first branch, the question is whether there is an actual conflict in operation. In other words, decision makers must consider whether both laws can operate side by side without conflict or whether both laws can apply concurrently.<sup>37</sup> If there is no conflict under the first branch, one still may be found under the second. Under the second branch, a conflict exists where the operation of the provincial law is incompatible with the federal legislative purpose, such that the effect of the provincial law frustrates the purpose of the federal law, even if there is no direct violation of the federal law.<sup>38</sup>

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<sup>31</sup> *Johannesson v Municipality of West St. Paul*, [1952] 1 SCR 292; *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, paragraph 72.

<sup>32</sup> *Mississauga*, paragraph 35.

<sup>33</sup> *Construction Montcalm Inc.*, 770-771; *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, paragraphs 72 and 74.

<sup>34</sup> *Taylor v Alberta (Registrar, South Alberta Land Registration District)*, 2005 ABCA 200, paragraphs 50-56.

<sup>35</sup> *Burlington Airpark Inc v Burlington*, 2013 ONSC 6990, paragraphs 19-20, affirmed 2014 ONCA 468.

<sup>36</sup> *Alberta (Attorney General) v Moloney*, 2015 SCC 51, paragraph 18.

<sup>37</sup> *Moloney*, paragraph 19, citing *Canadian Western Bank*, paragraphs 71-72.

<sup>38</sup> *Moloney*, paragraph 25, citing *Canadian Western Bank*, paragraph 73.

57. The burden is on ACSE to establish the necessary conflict to rely on the doctrine of paramountcy. The Commission finds that ACSE has not met this burden.

58. Mere duplication is not sufficient to trigger the doctrine of paramountcy, particularly when both laws can be complied with. ACSE relies on the notice of determination issued by ERAA under the *Impact Assessment Act* as an indication that provincial environmental laws are rendered inoperative or are otherwise constitutionally inapplicable in these circumstances. ACSE notes that provincial environmental laws may, at times, contradict applicable federal environmental requirements enforced by the EIA, including bird management, stormwater management, weed control, and other requirements.

59. The Commission finds that the mere existence of the ERAA's notice of determination does not create a conflict with provincial laws, nor has ACSE identified any provision in the *Impact Assessment Act* that creates an operational conflict with the provincial environmental laws. Further, there is no indication that the purpose of the *Impact Assessment Act* is to function as a comprehensive code for all developments located on federal Crown land, such that any operation of provincial environmental laws would frustrate this purpose.

60. While the notice of determination may satisfy federal obligations in relation to assessment of environmental impacts, this does not itself render provincial environmental laws inoperative or inapplicable. Both levels of government can pass laws dealing with those aspects of environmental protection that fall within their constitutional authority. Accordingly, the Commission finds that ACSE has failed to demonstrate any conflict that would cause the otherwise valid provincial laws to not apply.

### 3.1.2 Conclusion on question of constitutional law

61. The existence of applicable regulatory standards and guidelines, including those from municipal, provincial and federal authorities, and a proponent's adherence to these standards, are important elements in deciding if potential adverse impacts are acceptable.<sup>39</sup> The Commission expects applicants to ensure that their projects comply with all applicable laws and regulatory standards, including those which may not be discussed in the Commission's decision.

62. The Commission finds that, as general proposition, the project is subject to provincial environmental laws, regulations and standards. The Commission's approval of this project is premised on its understanding that ACSE will comply with these laws, regulations and standards. For example, the Commission expects that ACSE will work with AEPA to obtain a *Water Act* approval for any activities that require one.

63. The Commission acknowledges that there are instances where provincial laws, regulations or standards specifically exempt projects or activities conducted on federal Crown land. For example, as discussed in further detail below, the *Environmental Protection and Enhancement Act* contains provisions excluding activities on federal Crown land from the requirement to obtain a reclamation certificate. The Commission accepts that, in these limited

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<sup>39</sup> Decision 27589-D01-2023: Nova GP Inc. and AltaLink Management Ltd. - Nova Solar Power Plant and Transmission Connection, Proceeding 27589, Applications 27589-A001 to 27589-A006, July 19, 2023, paragraph 25; Decision 24751-D01-2020, Akamiik Energy Incorporated - Montana First Nation Solar Facility, Proceeding 24751, Application 24751-A001, January 10, 2020.

instances, the project will be subject to different legislative requirements than other solar projects within Alberta.

64. The Commission also recognizes that there are instances where a provincial regulatory agency may exercise discretion not to enforce particular regulatory standards or guidelines. For example, the Commission has processed this application despite ACSE not obtaining an AEPA renewable energy referral report as is ordinarily required by Rule 007. The Commission has the authority to modify its own application requirements, and has in the past accepted applications without an AEPA renewable energy referral report where, for example, a project is sited in an urban area<sup>40</sup> or where a project is sited on federal Crown land and there is sufficient environmental information available for the Commission to understand the potential effects on wildlife.<sup>41</sup> This is done as a matter of regulatory efficiency and discretion, and should not be interpreted as the Commission suggesting or endorsing the proposition that provincial standards do not apply to these projects.

### **3.2 Agricultural land**

65. The project area is mostly cultivated lands, currently used for row crop agricultural activities. SCLG members Clayton Sach and Sharon Bach, James and Janet Stamper, and LaVern and Solveig Matter currently use adjacent lands for agricultural purposes. They noted that agricultural land had been expropriated in the past for use by the EIA. SCLG members explained that the project land has been farmed for more than 100 years, and expressed concern that the construction of the project will result in the loss of high-quality agricultural land.

66. SCLG retained Brandon Green and Thomas L. Jensen to provide an opinion on the potential adverse effects on agriculture from the project. B. Green and T. Jensen submitted that the project would be located on prime agricultural land where the soil is among the highest-quality agricultural soil in Alberta and stated that this land should be retained for the purpose of food production. Should the project be approved, B. Green and T. Jensen submitted that the Commission should require regular monitoring of soil health in specified locations within the project site.

67. ACSE stated that the project lands form part of the EIA and fall within the EIA's Site Development Plan. ACSE explained that the adjacent federal Crown land will eventually be developed with a cargo logistics campus and commercial/light industrial land use. It submitted that any impacts to agricultural land should be viewed with an understanding of the numerous socio-economic benefits for the EIA, Leduc County and other project stakeholders.

68. The Commission acknowledges that this is high-quality agricultural land, including Class 2 land; however, it is also land owned by the federal government, reserved as part of the airport lands and zoned for industrial use. The loss of agricultural land in this instance is not specifically related to the project, as the subject lands were previously determined to be reserved for future development. In this regard, the evidence of B. Green and T. Jensen regarding potential crop loss was of limited value. The loss of agricultural land is one factor to be weighed

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<sup>40</sup> Decision 26892-D01-2022: ATCO Power (2010) Ltd. - Deerfoot Solar Project, Proceeding 26892, Applications 26892-A001 and 26892-A002, January 10, 2022.

<sup>41</sup> Decision 24751-D01-2020: Akamihk Energy Incorporated - Montana First Nation Solar Facility, Proceeding 24751, Application 24751-A001, January 10, 2020.



against the benefits of the project. The Commission discusses this balancing exercise in further detail in Section 4.

### **3.3 Environmental effects**

69. In this section of the decision, the Commission assesses the environmental effects of the project. First, the Commission addresses the proximity of the project to watercourses. The Commission determines that the project layout infringes on permanent watercourses to an unacceptable degree. The Commission directs ACSE to revise the project layout so that no permanent infrastructure is located within 30 metres of any small permanent watercourse as described in Exhibit 27885-X0005.<sup>42</sup>

70. Next, the Commission examines the project's predicted impact on floodplains and wetlands. The Commission then addresses issues related to wildlife risk, and in particular the risk of bird mortality. Lastly, the Commission discusses the project's approach to weed management, and conservation and reclamation.

#### **3.3.1 Watercourses**

71. The project area is mostly agricultural land and is bisected by two narrow riparian zones that follow watercourses in the northern and south-western portions of the project area. The environmental impact assessment report identified a total of seven watercourses within the project area. Four of these are small permanent watercourses, and three are ephemeral watercourses.<sup>43</sup>

72. One of the permanent watercourses is Deer Creek, and another is a tributary of Deer Creek. Deer Creek flows downstream into Whitemud Creek, a fish-bearing stream that flows into the North Saskatchewan River. Deer Creek has been identified as part of the Whitemud Creek environmentally significant area (ESA) by Leduc County. ESAs are defined as areas that are vital to the long-term maintenance of biological diversity, physical landscape features and other natural processes. Deer Creek is also an important waterbody to LSAMCA, whose members rely on it to support their cultural and traditional practices, including their exercise of rights.<sup>44</sup>

73. SCLG and LSAMCA raised concerns about the effects of the project on watercourses, including but not limited to Deer Creek. These concerns largely focused on a view that the project infrastructure is not sufficiently set back from watercourses. One of the conditions requested by LSAMCA was that measures be taken to mitigate downstream impacts of the project on surface water, fish and fish habitat.

74. ACSE's list of commitments indicates that a 10-metre setback would be maintained from all seasonal marshes and small permanent watercourses (excluding any defined watercourse

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<sup>42</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 31. See also Figure 2-2, PDF page 20.

<sup>43</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 31. See also Figure 2-2, PDF page 20.

<sup>44</sup> Exhibit 27885-X0069, LSAMCA Written Submissions - AUC Proceeding 27885, PDF pages 3 and 4.

crossing locations).<sup>45</sup> However, during the oral hearing, ACSE confirmed that the closest distance of a solar panel to the centreline of a small permanent watercourse is 2.6 metres.<sup>46</sup>

75. Cliff Wallis, from Cottonwood Consultants Ltd., was retained by SCLG to evaluate the environmental effects of the project and recommended that the project adhere to provincial guidance from Standard 100.1.10 of the Wildlife Directive. This standard states that a project is to be sited 45 metres from the top of break of intermittent and small permanent watercourses.<sup>47</sup> C. Wallis recommended that the Commission apply an additional 100-metre setback from the edge of the Whitemud Creek ESA.<sup>48</sup>

76. When asked about the effectiveness of various setback distances for this project, C. Wallis indicated that a setback between 45 and 100 metres would address concerns associated with biodiversity, as well as restoration and protection of the riparian zone, and that a minimum 45-metre setback would largely address these concerns.<sup>49</sup>

77. ACSE stated that the project's commercial viability would be impacted should the Commission enforce the watercourse setbacks contained in the Wildlife Directive.<sup>50</sup> Michelle Murphy, on behalf of DNV Canada Ltd., which prepared the environmental impact assessment report for ACSE, indicated that adopting a 45-metre or 100-metre setback to watercourses was considered. However, ACSE stated that the project siting strategy was to site infrastructure in areas that were already impacted by existing agricultural activities.<sup>51</sup> ACSE emphasized its commitment to protecting watercourses and submitted that it had developed a mitigation strategy that would improve watercourse conditions compared to those under the current agricultural land use. Ultimately, however, ACSE stated that the responsibility for maintaining creeks (i.e., Deer Creek) within the EIA property boundaries lies with the EIA.<sup>52</sup>

78. Although the Commission expects proponents to meet Standard 100.1.10 of the Wildlife Directive, the Commission has the discretion to permit solar projects within that setback if risks can be adequately mitigated.

79. ACSE has taken the position that it is not bound by the Wildlife Directive. As described earlier in this decision, the Commission finds that ACSE is subject to provincial regulatory standards, including those regarding project siting. Even if provincial standards did not apply to ACSE (which the Commission does not accept) the Commission would still need to be satisfied that the project is in the public interest having regard to its environmental effects, including effects on wildlife habitat. Accordingly, while recognizing that Standard 100.1.10 of the Wildlife Directive is not mandatory, the Commission still considers that it is relevant to the Commission's assessment of this project. Specifically, the Commission takes guidance from Standard 100.1.10 on the importance of siting projects in a manner that minimizes their adverse effects.

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<sup>45</sup> Exhibit 27885-X0175, Response to UT15, List of ACSE Project Commitments, PDF page 24.

<sup>46</sup> Exhibit 27885-X0159, Response to UT12 – Distance of Solar Panels to Watercourses, PDF page 1.

<sup>47</sup> Transcript, Volume 2, page 386, lines 4-7; and page 493, lines 14-17.

<sup>48</sup> Exhibit 27885-X0076, PDF page 79.

<sup>49</sup> Transcript, Volume 3, page 577, lines 5-12.

<sup>50</sup> Transcript, Volume 4, page 889, lines 22-25.

<sup>51</sup> Exhibit 27885-X0030, ACSE response to AUC information request round 1 -001 to 019, PDF page 4.

<sup>52</sup> Exhibit 27885-X0114, ACSE Reply Evidence (SCLG), PDF page 10.

80. The Commission finds that approving the proposed layout could compromise the integrity of the watercourses and wildlife habitat within the project area. This is because the project infrastructure would be in very close proximity to watercourses and may compromise the ecosystem services provided by riparian areas, including wildlife habitat. As noted in the environmental assessment impact report, the species present in the permanent watercourses in the project area include wood frogs and boreal chorus frogs. The existence of fixed project infrastructure, and the associated potential for erosion, creates an incremental risk that is not presented by the current agricultural practices conducted on the lands.

81. The Commission understands from photos presented in ACSE's reply evidence that the current state of the watercourses within the project boundary is not pristine.<sup>53</sup> However, the Commission does not consider that this provides a persuasive reason to exempt the project from measures that would prevent any incremental damage from occurring.

82. Accordingly, the Commission will approve the project on the condition that ACSE applies a setback that is a minimum of 30 metres from the top of break of small permanent watercourses or to the extent of the adjacent riparian zone, whichever is greater. This revision to the project design must be reflected in a final project update. In addition to reflecting the Wildlife Directive, the Commission considers that this distance is appropriate in the circumstances of this project to ensure the project does not negatively impact Deer Creek or other watercourses in a manner greater than the existing agricultural land use. Avoiding project infrastructure within this setback will protect the ecosystem services that riparian areas provide including water quality functions, flood water conveyance, bank stabilization, and contributions to habitat and biodiversity.<sup>54</sup>

83. The Commission recognizes that the top of break for the watercourses within the project area may be difficult to distinguish, and will require that the top of break for the watercourses be delineated by a qualified environmental professional and according to the best available guidance. Similarly, distinguishing the adjacent riparian zone may be difficult due to the agricultural disturbance on site.

84. The Commission observes that, under Rule 007, a final project update must comply with specified allowances, including that the total capability of the power plant cannot increase or decrease by more than 10 per cent or 10 MW, whichever is less. In the current circumstances, including that changes to the project configuration are being ordered as a condition of approval, the Commission will accept a final project update that results in a decrease in project capability of more than 10 per cent or 10 MW. Recognizing that ACSE has not finalized its selection of equipment for the project, including solar modules, inverters and transformers, the Commission imposes the following conditions of approval:

- a. Once Airport City Solar East Ltd. has finalized its equipment selection and project layout, it must file a final project update to the Commission to confirm that the project has stayed within the final project update specified allowances for solar power plants in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* or, as it relates to

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<sup>54</sup> Alberta Environment and Sustainable Resource Development. 2012. Stepping Back from the Water: A Beneficial Management Practice Guide for New Development Near Water Bodies in Alberta's Settled Region. <https://open.alberta.ca/dataset/1c70eb43-a211-4e9c-82c3-9ffd07f64932/resource/6e524f7c-0c19-4253-a0f6-62a0e2166b04/download/2012-steppingbackfromwater-guide-2012.pdf>

project changes ordered by the Commission, to explain any instances where specified allowances are not met. The final project update must be filed at least 90 days prior to the start of construction.

- b. In its final project update, Airport City Solar East Ltd. must revise the project so that no permanent project infrastructure is located within 30 metres from the top of break of any permanent watercourses. The top of break must be delineated by a qualified professional.

### 3.3.2 Floodplains

85. Intervenors raised concerns about the project's proximity to floodplains, and the potential consequences if a flood were to occur. This includes concerns that the presence of project infrastructure may exacerbate environmental damage caused by flooding, such as contamination or erosion.

86. C. Wallis noted that the 100-year floodplain is over 250 metres wide in certain places within the project area, and asserted that the project layout was insufficient to safeguard the 100-year floodplain.<sup>55</sup> Developing a project within the 100-year floodplain increases the potential risk of infrastructure damage and unintended environmental impacts such as soil erosion. C. Wallis recommended that the Commission not approve any permanent structures within the 100-year floodplain.<sup>56</sup> He noted that flood risk would not be eliminated by the adoption of a 45-metre or 100-metre setback from watercourses.<sup>57</sup>

87. LSAMCA also raised concerns regarding flooding, including concerns about how the presence of the project may affect stormwater drainage, and whether overland flooding from the project could reach the EIA's glycol containment ponds. These concerns related to stormwater generally, and were not limited to the occurrence of a 100-year flood. LSAMCA requested that the Commission impose mitigation measures to address project-related changes to stormwater drainage.

88. ACSE explained that the project will have limited risk of infrastructure damage due to flooding because no piles would be located in the floodplain, and only overhanging solar panels would be located in the floodplain.<sup>58</sup> M. Murphy also clarified that the project inverters will be located outside of the 100-year floodplain.<sup>59</sup>

89. ACSE stated that the project will result in a minimal impact to drainage and stormwater management. ACSE also stated that it will adhere to the design criteria outlined in the EIA's Sitewide Stormwater Management Plan<sup>60</sup> and all stormwater runoff from the project will be limited to pre-development flow rates.<sup>61</sup> ACSE confirmed with the EIA that its glycol ponds were designed to protect the site from flooding due to surface runoff and are not expected to be impacted by 1:100-year flood events.<sup>62</sup>

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<sup>55</sup> Exhibit 27885-X0076, Appendix E - Evidence of Cliff Wallis, PDF page 23.

<sup>56</sup> Exhibit 27885-X0076, Appendix E - Evidence of Cliff Wallis, PDF page 3.

<sup>57</sup> Transcript, Volume 3, page 577, lines 5-12.

<sup>58</sup> Transcript, Volume 2, page 285, lines 12-15.

<sup>59</sup> Transcript, Volume 2, page 283, line 25 and page 284, lines 1-4.

<sup>60</sup> Exhibit 27885-X0114, ACSE Reply Evidence (SCLG), PDF page 11.

<sup>61</sup> Transcript, Volume 2, page 281, lines 8-13.

<sup>62</sup> Exhibit 27885-X0125, ACSE Reply Evidence (LSAMCA), PDF page 8.

90. The Commission is satisfied that, having regard to the project design and stormwater management measures, the project will not alter drainage and maintain pre-development flow rates. With respect to imposing floodplain setbacks, when considering competing siting constraints, the steps taken to minimize infrastructure within the floodplain, the frequency with which such a flood event may occur, and the limited consequences in the unlikely event of a flood, the Commission does not find it reasonable to require the applicant to avoid siting any permanent structures within the 100-year floodplain.

### 3.3.3 Wetlands

91. The environmental impact assessment report stated that wetlands constitute 7.1 per cent of the project area. The wetlands identified in the report include temporary and seasonal marshes and ephemeral waterbodies. Of a total of six Class III wetlands that were identified within the project area,<sup>63</sup> three would be directly impacted by the project, meaning that project infrastructure would be in the wetland. ACSE took the position that, due to the project's siting on federal Crown land, no approval is required under the *Water Act* for those impacts. ACSE stated that it took a "conservative approach to wetland delineation which has identified wetlands based on individual attributes, rather than the collective consideration of soils, vegetation, and biological activity."<sup>64</sup>

92. C. Wallis expressed concern that the project did not comply with certain regulatory requirements intended to protect wetlands. These include "the 'no net loss' provisions of the Federal Policy on Wetland Conservation, the guidance to halt and reverse nature loss, as well as the mandatory standards and recommended best practices guidance on wetlands and stream setbacks in the Wildlife Directive for Alberta Solar Energy Projects."<sup>65</sup>

93. ACSE submitted that the project was sited to avoid all naturally vegetated Class III wetlands. ACSE stated that the project layout was not designed to avoid Class II wetlands because they were all observed to be cultivated through. Only Class III wetlands that were not cultivated were avoided, as they can provide more valuable wildlife habitat. ACSE stated that the project did not adopt the 100-metre setback in the Wildlife Directive from Class III+ wetlands, because this 100-metre setback is a siting consideration/standard but not a requirement.<sup>66</sup> ACSE clarified that impacted wetlands will not be graded. Further, it submitted that although solar array pilings will be installed within the wetland boundaries, mitigation will be implemented to reduce impacts from construction, and the wetlands will be left to regenerate post-construction and will no longer be subject to agricultural disturbances.

94. Parties disagreed in this proceeding on the ecological value of agriculturally impacted wetlands, including a debate on the applicability of research on the topic to the project area wetlands (the Rooney Study).<sup>67</sup> While the Commission accepts as a general proposition that

<sup>63</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 32. The Commission observes that the environmental impact assessment report contains a discrepancy in the total number of seasonal marshlands, as between the body of the report (which states 6) and Table 4-1 (which states 7).

<sup>64</sup> Exhibit 27885-X0114, ACSE Reply Evidence (SCLG), PDF page 8.

<sup>65</sup> Exhibit 27885-X0076, Appendix E - Evidence of Cliff Wallis, PDF page 2.

<sup>66</sup> Exhibit 27885-X0030, ACSE response to AUC information request round 1 -001 to 019, PDF page 4.

<sup>67</sup> Rooney, R.C., Foote, L., Krogman, N., Pattison, J.K., Wilson, M.J., Bayley, S.E. 2015. Replacing natural wetlands with stormwater management facilities: biophysical and perceived social values, Water Research (2015), doi: 10.1016/j.watres.2014.12.035.

natural wetlands affected by agricultural activities continue to hold biophysical value, the applicability of the Rooney Study to the project area remains unclear.

95. Given the existing agricultural activities on the project site<sup>68</sup> and the extensive cover of exotic species (i.e., lack of native species wetland indicators)<sup>69</sup> within these six Class III wetlands within the project area, the Commission considers that a departure from Standard 100.1.9 of the Wildlife Directive<sup>70</sup> is acceptable. In addition, ACSE committed to limiting the permanent loss of wetlands to temporary marshes and maintaining a minimum distance of 10 metres from all Class III marshes.<sup>71</sup>

96. The Commission imposes the following condition of approval:

c. All project infrastructure must maintain a 10-metre setback from all Class III+ wetlands.

97. The Commission considers that ACSE is subject to the *Water Act* and that ACSE will comply with the *Water Act* and all regulations, policies and codes of practice that are applicable for activities that impact or have the potential to impact wetlands, waterbodies and watercourses in the project area. Nothing in this decision should be construed as modifying any of ACSE's obligations under the *Water Act*.

### 3.3.4 Birds and other wildlife

98. The interveners expressed concern about the project's potential impacts to birds and other wildlife.

99. C. Wallis noted that the wildlife mortality risk arises from the project's location over ephemeral waterbodies and wetlands, and in proximity to an environmentally sensitive riparian area. LSAMCA expressed concern about the impact of the project on migratory birds due to "glare, removal of natural open fields, and impacts to surface waterbodies."<sup>72</sup> SCLG also identified concerns about bird mortality relating to collisions with solar panels.<sup>73</sup> LSAMCA also observed that the project area could serve as a habitat for a variety of species of wildlife including ungulates and fur-bearing animals.

100. The Commission recognizes that there is potential for the project to result in a loss or alteration of habitat, or changes to wildlife behavior during construction and operation. Fencing around the project area will limit the movement of some species. With that said, the project is sited on highly disturbed, cultivated land. Only a small portion of the project area is mapped as having a moderate risk for wildlife habitat sensitivity, with the remainder of the project area being low risk.<sup>74</sup>

<sup>68</sup> Transcript, Volume 4, page 773, lines 4-15.

<sup>69</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 30.

<sup>70</sup> Alberta Environment and Parks. 2017. Wildlife Directive for Alberta Solar Energy Projects. AEP Fish and Wildlife 2017 No. 5.

<sup>71</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 71; Exhibit 27885-X0175, ACSE Response to Undertaking No. 15 - List of ACSE Project Commitments, PDF page 24.

<sup>72</sup> Exhibit 27885-X0069, LSAMCA Written Submissions - AUC Proceeding 27885, PDF page 6.

<sup>73</sup> Exhibit 27885-X0073, Appendix A - Landowners Submissions, PDF page 8.

<sup>74</sup> Exhibit 27885-X0076, Appendix E - Evidence of Cliff Wallis, PDF pages 17-18.

101. With respect to the risk to birds, the Commission observes that this project is unique given its proximity to a major international airport. Ordinarily, the Commission assesses the degree to which a project area provides important bird habitat, and whether any potential adverse effects to birds and bird habitat are avoided or mitigated to an acceptable degree. The Commission also assesses the potential for direct interactions between birds and project infrastructure.

102. Here, the EIA has a full-time bird deterrent program in place. The purpose of the bird deterrent program is to deter birds from taking up habitat near the airport, to minimize any potential interactions between birds and aircraft, or other interference with flight safety. The EIA's bird deterrent program includes the project lands.

103. M. Murphy indicated that the project is expected to neither increase nor decrease the number of birds in the area, recognizing that bird populations are already subject to active deterrence. To decrease any bird mortality risks that do exist, C. Wallis recommended that the project incorporate highly contrasting lines on the solar panels. C. Wallis also recommended that the ACSE be required to report mortalities annually.

104. ACSE emphasized the low risk of mortality and consistent low mortality rates in provincial solar project studies. ACSE stated that C. Wallis's recommendation to add contrasting lines on solar panels is inconsistent with the low mortality risk indicated. Nevertheless, ACSE committed to using panels with contrasting lines.<sup>75</sup> ACSE confirmed that a post-construction monitoring and mitigation plan for the project would be prepared, in accordance with the Wildlife Directive. ACSE also committed to adhering to Rule 033: *Post-approval Monitoring Requirements for Wind and Solar Power Plants* and to conducting post-construction monitoring for avian mortality. ACSE stated that it would evaluate the need for further mitigation based on the results of this monitoring.

105. The Commission considers that ACSE's proposed mitigation is reasonable. The Commission accepts that the bird mortality risk for the project is low, particularly given that the project area is subject to active bird deterrence. The Commission expects that the EIA and ACSE will work together to make sure that the EIA's existing bird monitoring and deterrent program encompasses the project and remains in place for the life of the project.

### 3.3.5 Weeds

106. SCLG members stated that noxious weeds, especially scentless chamomile, are already present along the property boundary adjacent to the project land and without proper mitigation, may spread and cause financial losses for adjacent landowners.<sup>76</sup> LSAMCA requested that the Commission impose a condition prohibiting the use of herbicides containing glyphosate for weed control.

107. SCLG retained Dr. Terry Osko, from Circle T Consulting, Inc., to assess the potential for the project to introduce weeds into the project area and surrounding lands. T. Osko considered ACSE's proposed weed management methods to be generic and lack site-specific considerations of the project area. Moreover, ACSE's proposed vehicle and equipment cleaning protocols are not well-explained, and fail to address logistical issues such as debris removal and disposal of

<sup>75</sup> Response to UT15 – List of ACSE Project Commitments, PDF page 30.

<sup>76</sup> Exhibit 27885-X0073, Appendix A – Landowners Submissions, PDF page 10.

wash water.<sup>77</sup> In response, ACSE committed to gathering thorough, site-specific soil information through a pre-disturbance site assessment, which is typically done after project approval but before construction begins.<sup>78</sup> ACSE also confirmed that a detailed weed management plan will be developed prior to construction.<sup>79</sup>

108. The Commission considers that ACSE has provided a reasonable explanation of its expected weed control measures, and that these measures appear sufficient to generally address the risks associated with weeds. In particular, the Commission notes that ACSE has committed to cleaning construction vehicles and equipment regularly, particularly when leaving and/or entering the site.<sup>80</sup> ACSE has also confirmed that it will manage weeds in accordance with the *Weed Control Act*, the *Weed Control Regulation* and guidance on weed management from the Ministry of Agriculture and Irrigation,<sup>81</sup> during the construction, operation and decommissioning phases of the project.<sup>82</sup> The detailed weed management plan will further decrease the risks of project activities contributing to the spread of weeds, including noxious weeds.

109. ACSE has committed to providing a copy of the site-specific conservation and reclamation plan, including soil-specific concerns and weed-specific concerns, to interveners prior to starting construction in order to gather feedback.<sup>83</sup> The Commission considers that it is reasonable to extend the same treatment to ACSE's forthcoming weed management plan. Therefore, the Commission imposes the following condition of approval:

- d. Airport City Solar East Ltd. shall provide a copy of the weed management plan to interveners and other stakeholders prior to construction, and provide a mechanism for interveners and stakeholders to give feedback on the plan.

110. The Commission notes that LSAMCA had requested that the Commission impose a condition prohibiting the use of herbicides containing glyphosate for weed control. LSAMCA did not elaborate on its concern with glyphosate specifically, but the Commission understands that this proposed condition is intended to limit the potential for downstream environmental contamination. The Commission notes that the *Weed Control Act* mandates that prohibited noxious weeds must be destroyed and noxious weeds must be controlled. In the circumstances, and in the absence of any explanation to substantiate particular harms associated with glyphosate, the Commission does not consider it reasonable to impose such a condition. The environmental protection plan for the project specifies that ACSE will avoid the use of herbicides for any project-related activities during the construction and decommissioning phases, and that during the operations phase, herbicide applications will be localized and ACSE will avoid spraying herbicides on high-wind days. The Commission anticipates that this will help mitigate concerns about environmental contamination.

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<sup>77</sup> Exhibit 27885-X0082, Appendix J - Evidence of Dr. Osko, PDF pages 22 and 23.

<sup>78</sup> Exhibit 27885-X0114, ACSE Reply Evidence (SCLG), PDF page 9.

<sup>79</sup> Transcript, Volume 1, page 177, lines 2-7.

<sup>80</sup> Exhibit 27885-X0175, ACSE Response to Undertaking No. 15 – List of ACSE Project Commitments, PDF page 18.

<sup>81</sup> ACSE's application materials reference the ministry's former name, Agriculture, Forestry and Rural Economic Development.

<sup>82</sup> Exhibit 27885-X0010, Appendix I – ACSE Conceptual CR Plan, PDF page 27.

<sup>83</sup> Exhibit 27885-X0175, ACSE Response to Undertaking No. 15 – List of ACSE Project Commitments, PDF page 6.



### 3.3.6 Conservation and reclamation

111. ACSE's application included a conceptual conservation and reclamation plan (C&R Plan) prepared by DNV Canada Ltd. in accordance with the *Conservation and Reclamation Directive for Renewable Energy Operations* (C&R Directive). The C&R Plan stated that it would be updated periodically throughout the life of the project including prior to construction, and that the project would adhere to a conservation and reclamation timeline as detailed in the C&R Directive.<sup>84</sup> ACSE also confirmed that its lease agreement contains reclamation obligations, including a requirement to remove all of ACSE's improvements and restore the land, as is reasonably practicable, to its original condition within 12 months of termination of the lease agreement.<sup>85</sup>

112. ACSE initially indicated in the C&R Plan,<sup>86</sup> at the oral hearing,<sup>87</sup> and in its list of project-related commitments<sup>88</sup> that it would apply for a reclamation certificate once the project land had been reclaimed at its end of life. The C&R Plan states that the project would be reclaimed to "equivalent land capability" within the meaning of the *Conservation and Reclamation Regulation*, whereas the list of commitments uses the term "equivalent land compatibility."

113. SCLG retained T. Osko to review the C&R Plan. T. Osko submitted that the C&R Plan is vague and suggests that ACSE fundamentally misunderstands the concept of equivalent land capability.<sup>89</sup> T. Osko also indicated that the C&R Plan misconstrues the intent of the *Conservation and Reclamation Regulation*, by implying that alternative land uses may be appropriate if the project area cannot be reclaimed back to pre-disturbance conditions.

114. After the close of the oral hearing, ACSE declined to commit to reclaiming the project area to equivalent land capability.<sup>90</sup> ACSE subsequently filed written argument taking the position that, because the project is located on federal Crown land, the requirement to obtain a reclamation certificate, and the provisions of the *Conservation and Reclamation Regulation* that define "equivalent land capability," do not apply to the project.<sup>91</sup> In light of this argument, it is not clear to the Commission whether ACSE still intends to reclaim the project area to equivalent land capability, as described in its C&R Plan.

115. Under the provincial *Environmental Protection and Enhancement Act*, the duty to reclaim specified land excludes land owned by the Crown in the right of Canada (i.e., federal Crown land).<sup>92</sup> Accordingly, ACSE is not required under *Environmental Protection and Enhancement Act* to obtain a reclamation certificate at the end of the project's life. However, ACSE must meet the onus of demonstrating that its project is in the public interest, having regard to its environmental effects. In performing its public interest assessment, the Commission takes into consideration an applicant's ability and willingness to reclaim a project at its end of life. With respect to the standard to which a project should be reclaimed, the Commission looks to relevant

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<sup>84</sup> Exhibit 27855-X0010, ACSE Conceptual Conservation and Reclamation Plan, PDF page 8.

<sup>85</sup> Exhibit 27885-X0188, ACSE Responses to Interim Information Requirements, PDF page 1.

<sup>86</sup> Exhibit 27885-X0010, PDF page 34.

<sup>87</sup> Transcript, Volume 1, page 193, lines 9-12.

<sup>88</sup> Exhibit 27885-X0175, PDF page 5.

<sup>89</sup> Exhibit 27885-X0082, Appendix J – Evidence of Dr. Osko, PDF pages 18 and 30-32.

<sup>90</sup> Exhibit 27885-X0188, PDF page 1.

<sup>91</sup> Exhibit 27885-X0192, PDF pages 1-3.

<sup>92</sup> *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, Section 134(f).

regulatory instruments such as the *Conservation and Reclamation Regulation* and the C&R Directive to inform its understanding of best practices.

116. The Commission expects applicants to fully reclaim projects and to bear the costs of doing so. The Commission acknowledges the interveners' concerns that the C&R Plan submitted by ACSE lacks site-specific details. The Commission also recognizes the concerns advanced by T. Osko that ACSE has not consistently committed to performing reclamation to equivalent land capability, as that term is defined in the *Conservation and Reclamation Regulation*.

117. In order to be satisfied that approval of the project is in the public interest, the Commission requires assurance that ACSE will reclaim the project. The Commission therefore imposes the following conditions of approval:

- e. Airport City Solar East Ltd. must complete pre-disturbance site assessments and interim monitoring site assessments using the assessment methodology set out in the *Conservation and Reclamation Directive for Renewable Energy Operations (C&R Directive)*. Airport City Solar East Ltd. must update its conservation and reclamation plan (C&R Plan) after pre-disturbance site assessments and after each interim monitoring site assessment. The C&R Plan, as updated, must be filed with the Commission and must contain the information required in the C&R Directive.
- f. Airport City Solar East Ltd. must reclaim the project to equivalent land capability at the end of life. Airport City Solar East Ltd. must retain an independent, qualified environmental professional to perform a site assessment of reclaimed areas using the assessment methodology set out under the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands* and the *Conservation and Reclamation Directive for Renewable Energy Operations*, as amended from time to time. If, at the end of the project's life, Airport City Solar East Ltd. proposes a change in land use from pre-disturbance conditions, Airport City Solar East Ltd. must notify the Commission in advance and obtain AUC approval for the change in land use prior to engaging a qualified environmental professional to conduct the site assessment.

118. LSAMCA requested that it be included in the reclamation planning, development and implementation for the project. At the hearing, Dr. Tracy Friedel, president of LSAMCA, explained that LSAMCA's participation in reclamation planning could involve incorporating traditional ecological knowledge of species and features that support traditional land use. LSAMCA did not provide specific measures that it wishes to see implemented to facilitate its participation in reclamation planning. Accordingly, the Commission will not condition its approval of the project on this request. However, the Commission expects ACSE to include LSAMCA when circulating its updated site-specific C&R plan for feedback. The Commission also expects ACSE to respectfully solicit, consider and apply feedback from LSAMCA, including any traditional ecological knowledge, to enhance its conservation and reclamation activities, and to consider opportunities to include LSAMCA members in reclamation activities. If LSAMA chooses to provide traditional ecological knowledge, the Commission expects ACSE to reflect this in future updates to the C&R Plan.

119. SCLG raised concerns about ACSE's ability to fund reclamation at the project's end of life. The Commission asked ACSE to respond to information requests about its reclamation

security plan. In response to these information requests, ACSE provided the following information:<sup>93</sup>

- ACSE will provide reclamation security to the project lessor (ERAA), no later than the start of construction date for the project.
- The reclamation security will take the form of either a removal bond from an individual or entity engaged in the construction business and reasonably acceptable to the parties, a surety bond from an insurance company, an irrevocable letter of credit, or other security reasonably acceptable to both lessor and ACSE. A legally binding contract will be executed among the landowner, the developer and the third party guaranteeing the bond.
- The beneficiary of the reclamation security will be the lessor and, if provided by law at the time the reclamation security is set up, any applicable government entity.
- The reclamation security amount will be based on a written estimate provided by a professionally qualified and independent engineer or consultant with requisite knowledge to estimate the cost of removal of the improvements minus estimated salvage value. The amount of reclamation security will be reset every five years, based on new estimates of the removal costs and salvage value.

120. SCLG questioned the sufficiency of the reclamation security plan. SCLG's critiques related to who should determine the reclamation security amount, disclosure of the amount and details, and the reclamation security methods proposed by ACSE. In addition, SCLG questioned how much reliance can be placed on the lessor to conduct reclamation should ACSE default on its obligations. SCLG noted that the lessor in this case is ERAA, and suggested that as a non-profit organization, ERAA may have limited financial means and competing priorities that would detract from its ability to fully reclaim the project land.

121. The Commission accepts ACSE's explanation of how it will ensure funds are available for decommissioning and reclamation. The Commission notes that ERAA is a sophisticated corporate entity with significant experience in project development.

122. On February 28, 2024, the Ministry of Affordability and Utilities provided a letter to the Commission<sup>94</sup> addressing reclamation security, among others:

Government of Alberta will develop and implement the necessary policy and legislative tools to ensure developers are responsible for reclamation costs via bond or security, with appropriate security amounts and timing to be determined by Environment and Protected Areas in consultation with Affordability and Utilities. The reclamation costs will be provided directly to the Government of Alberta or could be negotiated with landowners as long as sufficient evidence is provided to the AUC. The new requirements will apply [to] all approvals issued on or after March 1, 2024.

123. Based on the information on the record of this specific proceeding, the Commission accepts that the applicant's approach to reclamation is sufficient for the purposes of satisfying

<sup>93</sup> Exhibit 27885-X0191, SCLG Argument re Information Requirements\_final.

<sup>94</sup> [Letter](#) re Policy Guidance to the Alberta Utilities Commission (28 February 2024) from Nathan Neudorf, Minister Affordability and Utilities.

the Commission that approval of the project is in the public interest. The Commission further understands that ACSE will be responsible for posting security in accordance with the reclamation security regime referenced above, given that the project has been approved after March 1, 2024.

### 3.4 Glare

124. ACSE retained Solas Energy Consulting Inc. to complete a solar glare assessment for the project in accordance with Rule 007. The glare assessment predicted that, absent mitigation, 27 of 32 evaluated receptors would receive glare from the project. Solas recommended ACSE minimize potential glare from the project by limiting the project tracker system to angles greater than or equal to 27 degrees during backtracking operations. The glare assessment and its results are discussed further in the following subsections.

125. SCLG members expressed concerns about glare impacts on their residences, the EIA, and local roads. SCLG retained Dr. Peter Georgiou of SLR Consulting to review ACSE's glare assessment report. Dr. Georgiou pointed out that Solas' glare assessment omitted three local roads in the immediate vicinity of the project and questioned the approach Solas used to divide the project solar panels into subarrays when modelling glare. In reply to Dr. Georgiou's evidence, Solas modelled the three local roads that Dr. Georgiou had identified as being omitted from the original glare assessment.

126. In this section of the decision, the Commission first summarizes the results from ACSE's glare assessment, and then discusses the use of subarrays to model glare from project solar panels. Finally, the Commission discusses glare mitigation and imposes conditions related to potential glare impacts from the project.

#### 3.4.1 ACSE's glare assessment

127. Solas modelled glare at 32 receptors, including residential receptors (i.e., dwellings), receptors related to the EIA (i.e., a control tower, approach paths for airplanes and helicopters, runways, terminal windows, and helicopter areas), the hotel attached to the airport, and transportation routes (i.e., local roads, Highway 39, Queen Elizabeth II Highway and Canadian Pacific railway). Solas recommended ACSE implement a 27-degree resting angle limit for the project backtracking system as a mitigation measure to reduce or eliminate glare effects from the project. Solas confirmed that a resting angle of 27 degrees results in no project glare to any receptors except one helipad approach path (Flight Path 5 or FP5).<sup>95</sup>

128. With respect to predicted glare on FP5, Solas explained that because the predicted glare occurs outside of the backtracking hours,<sup>96</sup> implementation of a resting angle limit is not an effective mitigation strategy for this receptor. Notwithstanding the modelling results, Solas submitted that glare impacts on FP5 were unlikely. Solas explained that the glare software was designed to model flight paths for fixed-wing aircraft, not helicopters. As such, the default length for a flight path in the software is two miles from the landing spot. Solas believes that a glare model using the default length for flight paths (i.e., two miles) overestimates the glare that helicopters using FP5 will actually experience. Solas submitted that glare at FP5 was predicted to

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<sup>95</sup> Transcript, Volume 2, page 334, lines 1-6.

<sup>96</sup> Glare at FP5 was predicted to occur during the operation time other than backtracking periods (i.e., backtracking hours are sunrise and sunset, and the glare at FP5 was predicted to occur approximately between 10 a.m. and 2 p.m.).

occur at distances between 1.8 and 2 miles from the landing spot, while STARS Air Ambulance indicated that pilots commence their approach approximately 0.5 miles away from the landing spot (as shown in the figure below). Therefore, helicopter pilots are unlikely to observe glare during their descent along FP5.<sup>97</sup>

**Figure 2. Segment of FP5 for which glare is predicted (yellow) and actual half-mile of FP5 used by helicopter pilots (purple)**



129. The Commission notes that Solas' glare model predicts that implementation of a resting angle limit is an ineffective mitigation strategy for FP5, because glare at FP5 is predicted to occur during normal operation periods rather than backtracking periods. The Commission accepts Solas' explanation that the default setting in the glare software for modelling approach paths for fixed-wing aircraft (i.e., two-mile flight path) overestimates glare for helicopters, and also accepts Solas' conclusion that glare impacts to helicopter pilots using FP5 are unlikely to occur in practice.

### 3.4.2 Modelling glare using subarrays

130. The glare assessment indicated that the project will consist of thousands of individual solar panels distributed across an area of approximately 595 acres. Within GlareGauge®, the software used for glare modelling, the project solar panels are divided into subarrays covering the full area of the project. The solar glare assessment conducted by Solas modelled the project solar panels using two large subarrays. In contrast, Dr. Georgiou recommended using a larger number of smaller subarrays.

<sup>97</sup> Exhibit 27885-X0057, ACSE response to AUC IR round 2 Q001to008, PDF page 7.

131. P. McGarrigle, from Solas Energy Consulting Inc., submitted that using large subarrays to model this project is more appropriate than using smaller subarrays because:

- The project design has not been finalized. Use of two large subarrays is conservative, because it accounts for all areas of the project where solar panels may be installed, while allowing for the removal of modules in certain areas when the design is finalized.<sup>98</sup>
- The approach Dr. Georgiou recommended (i.e., use of a larger number of smaller subarrays) “would be appropriate for undulating terrain, where you have significant topographic changes.”<sup>99</sup> However, it is unnecessary to use smaller subarrays in the glare model for the current project since the project area is generally flat.
- Glare impacts are classified based on retinal irradiance (i.e., brightness of the glare spot on an observer’s retina) and subtended source angle (i.e., physical size of the glare spot on an observer’s retina). Use of larger subarrays is a more conservative approach than use of smaller subarrays, because breaking the project area into smaller subarrays may artificially constrain the size of the glare spot and therefore reduce the predicted glare level.<sup>100</sup> P. McGarrigle was concerned that use of smaller subarrays could potentially downgrade the predicted glare from yellow to green<sup>101</sup> for some receptors.

132. Dr. Georgiou explained that modelling the project using small subarrays would more accurately account for terrain or topography within the project area, avoid concave shapes that may cause variations and over-predictions, and therefore provide more realistic results than use of larger subarrays.<sup>102</sup>

133. For the following reasons, the Commission is satisfied with the modelling conducted by Solas, including the choice of subarrays. While Dr. Georgiou’s method (use of smaller subarrays) can reflect topography more realistically than P. McGarrigle’s method (use of larger subarrays), the project area has relatively flat terrain,<sup>103</sup> and it is therefore not necessary to use smaller subarrays in the glare model. In fact, absent a compelling reason to use smaller subarrays (such as varied or complex topography), P. McGarrigle’s method is more conservative, because it reduces the risk that the software will artificially constrain the size of potential glare spots, which might result in underestimating the magnitude of potential glare impacts.

### 3.4.3 Glare mitigation

134. As described above, P. McGarrigle recommended limiting the resting angle to greater than or equal to 27 degrees during backtracking periods to reduce or eliminate glare effects at receptors.<sup>104</sup> ACSE confirmed that it will implement P. McGarrigle’s recommendation and will

<sup>98</sup> Transcript, Volume 2, page 332, lines 2-6.

<sup>99</sup> Transcript, Volume 2, page 332, lines 14-16.

<sup>100</sup> Transcript, Volume 2, page 332, lines 14-16.

<sup>101</sup> The intensity of glare and associated ocular hazard is either classified as green-level glare (low potential for after-image), yellow-level glare (potential for temporary after-image), or red-level glare (potential for retinal damage).

<sup>102</sup> Exhibit 27842-X0081, Appendix G - SLR Report and CV of Dr. Georgiou, PDF page 7.

<sup>103</sup> Transcript, Volume 1, page 142, line 25 to page 143, line 16.

<sup>104</sup> Exhibit 27885-X0123, Appendix H\_Solas Energy Glare Memo Additional Routes, PDF page 9.

use a resting angle limit greater than or equal to 27 degrees during backtracking operations (i.e., in the early morning and late evening).<sup>105</sup>

135. The Commission accepts that, with a resting angle of greater than or equal to 27 degrees, the project is unlikely to create glare or have an adverse glare effect at residential receptors, transportation routes, or receptors at the EIA. Accordingly, the Commission imposes the following condition of approval.

- g. Airport City Solar East Ltd. shall configure the project solar panels to use a resting angle greater than or equal to 27 degrees during backtracking periods to mitigate glare effects.

136. The Commission notes that the mitigation measure (i.e., use of a 27-degree resting angle limit during backtracking periods) was determined based on the current project design. The Commission expects ACSE to provide an updated solar glare assessment as part of the final project update and confirm the resting angle limit required to mitigate glare impacts to receptors.

137. While the Commission is satisfied that the proposed mitigation will reduce or eliminate glare at every potentially affected receptor, the Commission nevertheless requires ACSE to promptly address complaints or concerns from stakeholders regarding glare once the project commences operations. Therefore, the Commission imposes the following condition of approval.

- h. The Commission requires Airport City Solar East Ltd. to promptly address any complaint or concern from stakeholders regarding solar glare from the project. Airport City Solar East Ltd. shall file a report with the Commission detailing any complaint or concern it receives regarding solar glare from the project during its first two years of operation, as well as Airport City Solar East Ltd.'s response to that complaint or concern. Airport City Solar East Ltd. shall file the report annually, with the first report no later than 13 months after the project becomes operational.

138. The Commission notes that predictions in the solar glare assessment were premised upon the use of solar panels with anti-reflective coating. Therefore, the Commission imposes the following condition of approval.

- i. Airport City Solar East Ltd. shall use solar panels with anti-reflective coating.

#### **3.4.4 Consultation on the glare assessment**

139. ACSE submitted that during its initial consultation with NAV CANADA and ERAA, these two parties raised concerns about glare impacts to aviation safety.<sup>106</sup>

140. In response to a Commission information request, ACSE stated that it provided a copy of the glare assessment to Transport Canada, NAV CANADA and the EIA; and ACSE received either no concerns or it resolved concerns from these parties.<sup>107</sup> However, when answering a question from the Commission counsel at the hearing, P. McGarrigle stated that "Transport Canada was not provided with a solar glare report nor would expect to receive one."<sup>108</sup>

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<sup>105</sup> ACSE Response to Undertaking No. 15 - List of ACSE Project Commitments, PDF pages 1 and 13.

<sup>106</sup> Exhibit 27885-X0001, ACSE AUC Application Final, PDF page 14.

<sup>107</sup> Exhibit 27885-X0030, ACSE response to AUC information request round 1 -001 to 019, PDF page 3.

<sup>108</sup> Transcript, Volume 2, page 337, lines 10-12.

141. It is unclear to the Commission whether ACSE has provided the glare assessment results to Transport Canada. The Commission emphasizes that it is important to consult with Transport Canada about glare assessment results for a solar power plant close to an airport. The Commission imposes the following condition of approval.

- j. Airport City Solar East Ltd. shall provide the most up-to-date glare assessment results to Transport Canada and confirm if Transport Canada has concerns. Within 30 days of this decision, Airport City Solar East Ltd. shall submit a letter to the Commission detailing its consultation with Transport Canada about glare.

142. The Commission notes that the project equipment and layout have not been finalized yet. Once ACSE finalizes the project equipment and layout, it is required to update the glare assessment to reflect the final project design. The Commission imposes the following condition of approval.

- k. When Airport City Solar East Ltd. finalizes the project design, it shall provide any updated glare assessment results to Transport Canada, NAV CANADA, and the Edmonton International Airport and confirm whether any of these parties have concerns. Among the final project update or amendment application for the final project design, Airport City Solar East Ltd. shall submit a letter to the Commission describing its consultation with Transport Canada, NAV CANADA, and the Edmonton International Airport about the updated assessment results.

### 3.5 Noise

143. ACSE retained DNV Canada Ltd. to conduct a noise impact assessment (NIA) for the project. The initial NIA reported eight receptors located within a 1.5-kilometre radius of the project study area. The NIA established that all receptors would have daytime and nighttime permissible sound levels (PSLs) of 60 A-weighted decibels (dBA) and 50 dBA, respectively. In addition, DNV provided the sound modelling results<sup>109</sup> with the inclusion of tracker motor noise. DNV submitted that the project would be compliant with the PSLs at all receptors after the installation of two noise barriers for two inverter clusters.

144. SCLG questioned the adequacy of ACSE's noise measurement and modelling, and retained Henk de Haan of dBA Noise Consultants Inc. to review the project's NIA. ACSE retained DNV to reply to H. de Haan's evidence.

145. At the hearing, the noise experts discussed the determination of applicable ambient sound levels (ASL), construction noise including mitigation and the need for a post-construction comprehensive sound level (CSL) survey. The Commission addresses these noise issues below.

#### 3.5.1 Determination of applicable ambient sound levels

146. H. de Haan submitted that the NIA was based on theoretical assumptions that could not be verified. H. de Haan visited the project location to measure the ambient noise environment. Based on his measurements, he asserted that the measured ASL differed significantly from the assumed ASL which was used to determine the PSL limits for the receptors within the project

<sup>109</sup> Exhibit 27885-X0113, ACSE Response to AUC IR – Round 4, PDF page 4.



study area. He recommended that an A2 adjusted PSL be applied to more accurately represent the actual ambient soundscape.

147. H. de Haan raised concerns about the receptors' basic sound level of 50 dBA as stipulated in the NIA, which was informed in part by the receptors being subject to frequent aircraft flyovers. He argued that the EIA should not be considered to have frequent aircraft flyovers, within the meaning of Rule 012. During his measurements, he observed only eight aircraft takeoffs and landings during the nighttime period, falling short of the minimum of nine takeoffs and landings required for classification as a location with frequent aircraft flyovers. The Commission considers his position in this regard to be contrary to common sense and as a result unhelpful in its assessment of the project.

148. H. de Haan mentioned that although Rule 012 allows for the use of assumed ASLs in the absence of measured data, an applicant must nonetheless explain why assumed ASLs are representative of the project area.<sup>110</sup> In H. de Haan's view, ACSE failed to provide adequate justification in this regard.

149. During the hearing, Aren Nercessian of DNV affirmed that the PSLs in this NIA for all receptors were accurately established in accordance with Table 1 of Rule 012. This table provides explicit instructions on how to determine PSLs by using the assumed ASLs.

150. The Commission finds that the NIA reasonably used Table 1 of Rule 012 to establish daytime and nighttime PSLs of 60 dBA and 50 dBA, respectively. The Commission recognizes that although measured ASLs reflect the particular environmental conditions and nearby activities that are present at the time the measurements are collected, ASLs can be highly variable. The Commission's use of the assumed ASLs in Rule 012 is intended to provide a reasonable, consistent and practical mechanism for predicting and assessing cumulative sound levels in NIAs. The use of assumed ASLs is also intended to promote comparability when assessing energy-related projects in similar environments and allow for consistency when assessing noise compliance at receptors within a common project area.

151. Rule 012 does not require an applicant to conduct an ASL survey or to utilize measured ASLs in an NIA. Rather, the use of assumed ASLs is generally considered reasonable in areas where agricultural and/or oil and gas activities take place. A proponent's obligation under Section 2.6(5) of Rule 012 to demonstrate the reasonableness of using an assumed ASL in those instances (rural areas where agricultural and/or oil and gas activities take place) can be satisfied by documenting the existence of such activities. Rule 012 specifies that the ASL may be measured in areas considered to be pristine or areas that have non-energy industrial activity that would impact the ASLs. Measured ASLs for a pristine area would likely reduce the applicable PSLs, while measured ASLs for an area with non-energy industrial activity would likely increase the applicable PSLs. Given the presence of agricultural and industrial activities throughout and around the project area, the Commission finds that it was reasonable for ACSE to conclude that the assumed ASLs based on Table 1 of Rule 012 are representative of the project area.

152. As noted above, the evidence proffered by H. de Haan that this major international airport does not frequent aircraft flyovers was not helpful for the Commission. As an international airport in a major city, the Commission considers it unrealistic that the area surrounding the EIA

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<sup>110</sup> Exhibit 27885-X0074, Appendix B - NIA Review Report and CV of Henk de Haan, PDF page 23.

would not be considered to have frequent aircraft flyovers. While the number of flyovers H. de Haan measured was one short of the Rule 012 requirement during that particular period, it stretches the bounds of reason to conclude that a major international airport will not be subject to aircraft flyovers on a regular basis. In fact, while H. de Haan personally detected an average of eight nightly flyovers during the period in which he conducted measurements, he did not verify what he detected against the number of actual departures and arrivals on the EIA website. Given the circumstances of this project, the Commission considers it was unreasonable for H. de Haan to have failed to conduct this type of verification before asserting that the airport does not meet the frequent aircraft flyover standard in Rule 012. As identified by ACSE, the EIA website indicates that the airport consistently significantly exceeds nine takeoffs and landings during nighttime hours. Based on all of the evidence, the Commission accepts that ACSE's use of assumed ASLs is appropriate and does not believe it is necessary to adopt H. de Haan's method of determining A2-adjusted PSLs in this application. The Commission expects expert evidence before it to be balanced and not employ technicalities in favour of a particular position.

### 3.5.2 Construction noise mitigation

153. SCLG members raised concerns about impacts from construction noise, including that construction noise could impact the health of nearby residents.<sup>111</sup> H. de Haan recommended a construction noise assessment and management plan to manage noise during the construction phase of the project, which could last up to one year.<sup>112</sup> H. de Haan provided a list of recommendations to reduce noise impacts from the project, including construction noise mitigation measures.<sup>113</sup>

154. In response to H. de Haan's proposed mitigation measures, ACSE made a number of commitments to implementing an anti-idling program for trucks, relying on "white noise" backup beepers rather than tonal backup beepers, and prohibiting loud music from radios.<sup>114</sup> ACSE also committed to installing temporary noise barriers between the project site and nearby residences, subject to landowner consent.<sup>115</sup>

155. The Commission finds ACSE's commitments to mitigate noise during the project construction to be reasonable. The Commission does not consider it necessary to require a continuous noise monitoring program during construction.

### 3.5.3 Post-construction comprehensive sound level survey

156. H. de Haan recommended that a post-construction CSL survey be conducted at the nearest receptors (R3, R4 and R5). H. de Haan recommended that the survey be completed around the summer solstice, for a sufficient duration of time (approximately one week) and under favourable downwind conditions and maximum power production.<sup>116</sup>

157. A. Nercessian had a different opinion about the conditions under which a CSL survey should be conducted. He agreed that conducting a post-construction CSL survey is a reasonable

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<sup>111</sup> Exhibit 27885-X0099, SCLG Responses to ACSE IRs final, PDF pages 9-11.

<sup>112</sup> Exhibit 27885-X0074, Appendix B - NIA Review Report and CV of Henk de Haan, PDF page 4.

<sup>113</sup> Exhibit 27885-X0074, Appendix B - NIA Review Report and CV of Henk de Haan, PDF pages 34 and 35.

<sup>114</sup> Exhibit 27885-X0155, ACSE Response to Undertaking No. 8 - Commitment to Construction Noise Mitigations.

<sup>115</sup> Transcript Volume 2, page 318, lines 3-19; Exhibit 27885-X0175, ACSE Response to Undertaking No. 15 - List of ACSE Project Commitments, PDF pages 2 and 3.

<sup>116</sup> Exhibit 27885-X0074, Appendix B - NIA Review Report and CV of Henk de Haan, PDF pages 4 and 5; Transcript Volume 4, page 827, lines 2-15.

approach to verify project compliance with Rule 012,<sup>117</sup> but recommended a complaint-based CSL survey. A complaint-based CSL survey would respond to situations where complaints are actually occurring, instead surveying pre-selected conditions.<sup>118</sup>

158. ACSE committed to conducting a CSL survey to verify compliance with Rule 012 at receptor locations close to the project, such as receptors R3 and R4, provided that access is granted by the landowners. ACSE also committed to performing a nighttime CSL survey, if required by the AUC, provided that no condition be imposed regarding maximum power production or downwind conditions.<sup>119</sup> This is because it might not be possible to capture these conditions during nighttime hours.

159. Because of the proximity of receptors R3, R4 and R5, the Commission will require ACSE to complete a post-construction CSL survey to verify compliance with Rule 012 at these receptors once the project commences operation. The Commission imposes the following condition of approval for the project:

1. Airport City Solar East Ltd. shall conduct a post-construction comprehensive sound level survey, including an evaluation of low frequency noise, at receptors R3, R4 and R5. The post-construction comprehensive sound level survey must be conducted under representative conditions and in accordance with Rule 012: *Noise Control*. Airport City Solar East Ltd. shall file all studies and reports relating to the post-construction comprehensive sound level survey with the Commission within one year once the project commences operation.

### 3.6 Visual impacts

160. All members of SCLG expressed concerns with the visual impacts of the project. SCLG members submitted that the solar panels will detract from the rural nature of the area and the enjoyment of their properties. J. Stamper, whose residence would be located near the solar panels, asserted his opposition to having the project visible from his home. To mitigate this impact ACSE proposed a visual screening for the project consisting of a six-foot caragana hedge behind the project security fenceline to provide visual mitigation to landowner residences. However, members of SCLG were not in favour of this proposal. M. Brezden emphasized that her family did not want any visual mitigation measures that would obstruct their view, and that they would prefer a fence rather than a hedge, as they could see through it. Similarly, L. Matter and S. Matter expressed their preference for the fence without any other visual screening.<sup>120</sup> In response, ACSE confirmed that it is open to discussions with the landowners about alternative visual screening if the caragana hedge is not suitable.<sup>121</sup>

161. In general, the Commission expects applicants to identify potential methods to mitigate visual impacts on nearby residences, which can include visual screening. In the Commission's view, affected residents should be consulted on potential mitigation measures. While the Commission recognizes that it may not be possible to completely alleviate visual impacts, it expects that ACSE will seek input from James and Janet Stamper, LaVern and Solvieg Matter,

<sup>117</sup> Transcript, Volume 2, page 307, lines 15-25.

<sup>118</sup> Transcript, Volume 2, page 308, lines 6-25.

<sup>119</sup> Exhibit 27885-X0175, ACSE Response to Undertaking No. 15 - List of ACSE Project Commitments, PDF pages 2 and 3.

<sup>120</sup> Transcript, Volume 3, page 632, lines 1-7.

<sup>121</sup> Transcript, Volume 2, page 347, lines 17-23.

Noel and Maureen Brezden, Clayton Sach and Sharon Bach, to consider if there is a landscaping program that might address these residents' concerns about visual impacts from the project.

### 3.7 Property value

162. SCLG expressed concerns that the project development will have negative effects on property value for nearby landowners. SCLG retained Brian Gettel of Gettel Appraisals Ltd. To assess the impact of the project on property values.<sup>122</sup>

163. B. Gettel stated that there are a number of variables which can impact real estate values for properties adjoining operational solar farms, which include visual impacts, electromagnetic fields/radiation, damage to ecosystem, noise, increased traffic, and dust and weed problems. B. Gettel submitted that visual impacts are of primary concern, because the development of solar farms results in the rural landscape taking on an industrial character. In addition, glare from the solar panels can create a nuisance for adjacent homeowners.<sup>123</sup> The Commission notes that in this case, with the implementation of mitigation, nearby residences are not expected to experience any glare.

164. B. Gettel estimated that the property values of the properties owned by J. and J. Stamper, L. and S. Matter and N. and M. Brezden may experience a reduction in the range of five per cent to 10 per cent.<sup>124</sup> ACSE submitted that B. Gettel's report did not take into consideration local land use bylaws and zoning in arriving at the conclusion that all adjacent lands were agricultural. ACSE also stated that the factors included in B. Gettel's report were generic and not specific to the project.<sup>125</sup> ACSE asserted that, given the pace of industrial development by the airport and the city of Leduc, all of the properties would likely gain value.<sup>126</sup>

165. Performing a public interest assessment requires the Commission to balance a project's public benefits against the impacts that will be experienced by nearby landowners. As it relates to property valuation, determining likely impacts is a complex and technical matter that is influenced by a wide variety of contextual and circumstantial factors. In this case, B. Gettel acknowledged that there is not an abundance of data available to empirically calculate property value impacts, but indicated that potential value impacts may range between five and 10 per cent, based in part on the project's effects on the extensive views that currently exist and the potential for the project to detract from the pastoral farmland views. The Commission recognizes the concerns of landowners and their negative perception of the project and its effect on views; however, it is difficult to assign a value given the land is zoned industrial. This is a consequence of the project that needs to be balanced against its public benefits.

### 3.8 Participant involvement program

166. The interveners raised concerns about the sincerity and effectiveness of ACSE's participant involvement program.

167. In SCLG's view, ACSE's consultation with landowners was inadequate and did not sufficiently address concerns raised by SCLG members. SCLG stated that ACSE did not provide

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<sup>122</sup> Exhibit 27885-X0072, Appendix L - Evidence and CV of Brian Gettel.

<sup>123</sup> Exhibit 27885-X0072, Appendix L - Evidence and CV of Brian Gettel, PDF page 20.

<sup>124</sup> Exhibit 27885-X0072, PDF pages 42-43.

<sup>125</sup> Transcript, Volume 4, page 777, lines 11-18.

<sup>126</sup> Transcript, Volume 4, page 777, lines 15-23.

promised information about the project, and occasionally provided incorrect information. Additionally, SCLG members reported experiencing disrespectful and condescending behavior from a representative of ACSE during consultation. L. and S. Matters expressed privacy concerns in relation to an incident where an ACSE representative accessed their driveway and took photos of their yard without providing notice or obtaining consent.

168. LSAMCA expressed similar concerns about ACSE's willingness to share information about the project. LSAMCA explained that it had not been included in the participant involvement program, or otherwise contacted or notified about the project by ACSE or the EIA. Even after filing a statement of intent to participate (SIP) and a supplemental SIP in the proceeding, LSAMCA was not contacted by ACSE to discuss its concerns about the project. LSAMCA tried and failed on several occasions to obtain information about the project from EIA. When LSAMCA was eventually able to arrange a meeting with ACSE, after the AUC application had been filed, LSAMCA reported that the representative for ACSE appeared to lack knowledge about regulatory processes, provided vague information on aspects of the project including the benefits available to LSAMCA, and made several insensitive and harmful comments. LSAMCA submitted that ACSE has demonstrated a fundamental lack of knowledge about the requirements for Indigenous consultation and engagement.

169. Applicants are required to comply with Rule 007 and are expected to follow best practices for consultation including identifying a point of contact for external relations, keeping a detailed record of consultation, documenting all commitments, and having a process in place to monitor and follow up on those commitments. As it relates to Indigenous groups, applicants are required to ensure that the individuals conducting consultation have sufficient training and experience in conducting consultation, including awareness of the duty to consult and Section 35 of the *Constitution Act, 1982*, and the need for cultural sensitivity.

170. While ACSE's participant involvement program met the minimums for notification and consultation, ACSE appears to have employed consultation representatives who lacked knowledge of the regulatory framework in Alberta, and in some cases displayed a lack of courtesy and respect for persons potentially affected by the project. This resulted in poor relationships between the applicant and potentially affected parties, hindering ACSE's ability to resolve concerns.

171. This also contributed to inefficiency in the application review process. ACSE did not engage with LSAMCA even after LSAMCA filed a SIP in the AUC proceeding identifying itself as a Métis community recognized through the credible assertion process. The Commission expects a more diligent and pro-active effort by applicants while engaging in consultation both before and during the regulatory process.

172. While the Commission has concerns with the quality of the consultation carried out during the participant involvement program, the Commission is satisfied that potentially affected persons were ultimately provided with sufficient information to understand the application, including information about the nature, details and potential effects of the project. This information was relayed by ACSE, and by the Commission through both personal and public notification of the application. Those persons who demonstrated that their rights may be directly and adversely affected by the Commission's decision were able to participate through the Commission's process, including the oral hearing.

173. The applicant's responsibilities in relation to consultation do not end when the application is approved. Under Rule 007, applicants are required to document commitments made during its participant involvement program and have a process in place to monitor and follow up on those commitments. Applicants are also required to keep stakeholders apprised of any material changes to the project. The Commission expects ACSE to consult and work with local Indigenous groups and community members, including SCLG, proactively and in good faith as it constructs and operates the project.

174. In the environmental impact assessment report<sup>127</sup> and in the commitment list,<sup>128</sup> ACSE committed to developing a "stakeholder engagement plan with outreach and communication mechanisms to share information and gather input from external stakeholders" during construction and operation. ACSE indicated that this plan would include information about local companies that can offer services to the project. While the focus of the proposed stakeholder engagement plan appears to relate to opportunities for local and regional employment and strengthening of the local and regional economies, the Commission considers that a stakeholder engagement plan can also be used to ensure that ongoing communication and collaboration takes place between ACSE and parties affected by the project. The Commission expects that ACSE will meaningfully involve SCLG, LSAMCA and other interested stakeholders in the development of the stakeholder engagement plan.

### **3.9 Lac Ste. Anne Métis Community Association**

175. LSAMCA identified itself as the body that speaks for the collective Métis Aboriginal rights and interests stemming from its members' historical and genealogical linkages to the historic Métis of Lac Ste. Anne. LSAMCA is recognized by the Alberta government as a Métis organization for the purposes of consultation where resource development decisions may have the potential to adversely impact credibly asserted Métis Aboriginal rights.

176. LSAMCA asserted that the project would adversely impact its members' constitutional rights (such as the right to fish and harvest for subsistence and cultural purposes) due to potential environmental impacts which include, but are not limited to impacts on Deer Creek and other waterbodies due to sedimentation and changes in drainage patterns caused by project infrastructure, and impacts on wildlife habitat for a variety of species due to project infrastructure or use of herbicides. LSAMCA also stated that the project area may contain as yet undiscovered archaeological and heritage resources.

177. In the discussion below, the Commission addresses the project's potential impacts on Métis harvesting and traditional land use, as well as the conditions requested by LSAMCA. The Commission also makes findings on the duty to consult, including the scope and adequacy of consultation in relation to the project.

178. The Commission finds that the duty to consult is triggered, that consultation with LSAMCA was adequate, and that the potential impact to Métis harvesting and traditional land use arising from the project is low. In making these findings, the Commission considers that the project is proposed on previously cultivated land that forms part of the EIA, is zoned for industrial development, and is not currently accessed for traditional land use by LSAMCA members. The Commission finds that the conditions identified in Section 3.2 sufficiently

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<sup>127</sup> Exhibit 27885-X0005, Appendix E - ACSE EIAR Environmental, PDF page 73.

<sup>128</sup> Exhibit 27885-X0175, Response to UT15, List of ACSE Project Commitments, PDF page 14.

mitigate potential off-site environmental impacts from the project, and that there is a low risk of project impacting downstream Métis harvesting and traditional land use.

### ***Duty to consult***

179. Crown consultation is part of a process of fair dealing and reconciliation that derives from the historical relationship between the Crown and Aboriginal people. The Crown's duty to consult is a legal duty that flows from the honour of the Crown. The duty to consult always rests with the Crown, although the Crown may delegate procedural aspects of consultation. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right, title, or interest, and contemplates Crown conduct that might adversely affect it.

180. The content of the duty to consult is based on the strength of the claim or right asserted and the extent of the alleged infringement. Where the perceived breach is less serious or relatively minor, the content of the duty will be at the lower end of the spectrum, for example, mere notice may be sufficient. If a strong *prima facie* case for the claim is established and the potential infringement is of higher significance, deep consultation that is aimed at finding a satisfactory solution may be required; however, the duty to consult does not confer a veto power on Indigenous groups.

181. The Commission is a provincial administrative tribunal and regulatory agency that serves as the final decision maker for applications to construct and operate power plants in Alberta. The Commission is not the Crown or its agent, and it has not been delegated the Crown's duty to consult. However, an application before the Commission can trigger the duty to consult if the Commission's decision could adversely affect a recognized or asserted right.<sup>129</sup> Where the duty to consult is so triggered, the Crown may rely on the Commission's process to assess and fulfil that duty by addressing potential impacts on Aboriginal rights.

182. LSAMCA is recognized by the Alberta government as a Métis organization with credibly asserted rights for the purposes of consultation. LSAMCA asserted that the project would adversely impact its members' constitutional rights (such as the right to fish and harvest for subsistence and cultural purposes) due to potential environmental impacts which include, but are not limited to impacts on Deer Creek and other waterbodies due to sedimentation and changes in drainage patterns caused by project infrastructure; and impacts on wildlife habitat for a variety of species due to project infrastructure or use of herbicides. LSAMCA also stated that the project area may contain yet-undiscovered archaeological and heritage resources. LSAMCA was granted standing by the Commission, and participated in the proceeding. LSAMCA requested that the Commission find that the project is not in the public interest because there was a failure to consult or engage meaningfully with LSAMCA, and because the application does not account for potential impacts to LSAMCA's aboriginal rights. Should the Commission approve the project, LSAMCA requested that the Commission impose certain conditions to protect LSAMCA's rights and interests.

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<sup>129</sup> *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40.

183. The Commission acknowledges that a duty to consult arises in relation to an application filed with the Commission when the following factors are all present:<sup>130</sup>

1. The Crown has real or constructive knowledge of a proven or asserted Section 35 right.
2. An AUC decision is contemplated that could affect land or natural resources, including air and water.
3. The AUC's decision has the potential to adversely affect the continued exercise of a Section 35 right.

184. The Commission has determined that these factors were met in the current proceeding and granted standing to LSAMCA. LSAMCA's participation in the proceeding included issuing and responding to information requests, submitting written evidence, presenting a witness at the oral hearing and delivering argument and reply argument. The key issues identified by LSAMCA in this proceeding included the adequacy of consultation, and the potential for off-site environmental impacts to affect the exercise of Métis rights and traditional land use. LSAMCA requested that the project be denied, or alternatively that the Commission impose certain conditions on the project to address its potential impacts.

### ***Métis rights and traditional land use***

185. LSAMCA stated that the project will impact its members' current use of lands and resources for traditional purposes. LSAMCA stated that its members continue to exercise their harvesting rights, which include the right to hunt, fish, trap, and gather. The meaningful exercise of harvesting rights depends on accessing ample and healthy lands and resources. These resources include access routes, water quality, cultural and spiritual relationships with the land, abundant wildlife, high-quality berry crops, traditional medicines, solitude and remoteness experiences, clean air, and a sense of safety and security on the land. Additionally, suitable areas and resources for exercising harvesting rights within time and cost constraints are also crucial factors.

186. Six LSAMCA members participated in a site visit and focus group to identify potential impacts of the project on LSAMCA's rights to hunt, fish, trap, and gather food and medicinal plants. They observed that the areas within the project's fenceline would serve as suitable habitat for various wildlife species, including large ungulates, migratory birds, fur-bearing animals, multiple fish and plant species, and species at risk such as certain species of owls, grouse, cranes, and swans. They noted that several species of fish are present in the Deer Creek and Whitemud Creek watersheds that are harvested by LSAMCA members, including walleye. The LSAMCA members asserted that their traditional practices would no longer be sustainable on the project site once the project is constructed.<sup>131</sup> Further, the project's impacts, particularly on waterways, would extend beyond the project lands. LSAMCA noted that any downstream environmental impacts, such as increased sedimentation or chemical release, could have negative impacts on fishing and plant gathering activities in the Whitemud Creek and North Saskatchewan River watersheds.

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<sup>130</sup> Rule 007, PDF page 138.

<sup>131</sup> Exhibit 27885-X0108, LSAMCA Response to AUC IRs, PDF page 2.



187. The Commission notes that the project lands are leased from Transport Canada by the ERAA.<sup>132</sup> At the hearing, LSAMCA confirmed that its members do not currently have access to the project lands for the purpose of exercising rights or traditional practices.

188. While LSAMCA identified concern about the downstream impacts of the project on Métis harvesting rights and traditional land uses, the Commission was provided with very little specificity about where the exercise of rights and traditional land uses are taking place, when they are taking place, and how approval of the project may interfere with or prevent the exercise of rights and traditional land uses from taking place. LSAMCA explained that regulatory timelines and resources do not generally make it possible to carry out traditional land use studies sufficient to identify all land uses in proximity to a project. LSAMCA indicated that, in the context of studies unrelated to this project, LSAMCA members have identified sites of importance for the exercise of subsistence fishing rights in the North Saskatchewan River downstream of Whitemud Creek. Participants in the site visit also identified a fishing site at the confluence of Deer Creek and Whitemud Creek along Highway 19. It is unknown how many LSAMCA members use this site.

### ***Relief requested and Commission response***

189. LSAMCA requested that the Commission deny ACSE's application to construct and operate the project, in part due to the failure of the applicant to respectfully and meaningfully engage with LSAMCA. Should the project be approved, LSAMCA requested that the Commission impose conditions to protect LSAMCA's rights and interests. These conditions are:

1. Ongoing, meaningful engagement with LSAMCA in the spirit of reconciliation, including economic reconciliation.
2. Conditions mandating compliance with provincial requirements (with necessary modifications) including those set out in AUC Rule 033: *Post-approval Monitoring Requirements for Wind and Solar Power Plants*, the *Wildlife Directive for Alberta Solar Energy Projects*, the *Master Schedule of Standards and Conditions* (AEP 2021), the *Alberta Wetland Mitigation Directive*, and the *Soil and Groundwater Remediation Guidelines*.
3. A monitoring program developed and implemented in collaboration with LSAMCA to prevent damage to archeological sites, traditional use species and riparian areas.
4. Measures to mitigate downstream impacts on surface water, fish and fish habitat.
5. Measures to mitigate project-related changes to surface water drainage.
6. A prohibition on the use of herbicides containing glyphosate for weed control.
7. Inclusion of LSAMCA in reclamation planning, development and implementation.

190. The Commission has addressed many of these requested conditions and provided its findings within the body of this decision. Of note, the Commission has imposed a condition

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<sup>132</sup> Exhibit 27885-A001, ACSE AUC Application Final, PDF page 7.

requiring ACSE to reconfigure the project to adhere to a setback of 30 metres between project infrastructure and permanent watercourses. This condition is intended to minimize any potential off-site impacts to fish and fish habitat. The Commission has ordered that LSAMCA be provided with copies ACSE's site-specific weed management plan and updated C&R Plan prior to construction, and be given an opportunity to provide feedback on these plans. Each of these conditions responds to, or was informed by, the concerns advanced by LSAMCA.

191. The remaining conditions that LSAMCA requested for the project relate primarily to its ongoing relationship with ACSE. LSAMCA requested that a monitoring program be implemented in collaboration with LSAMCA to prevent damage to archeological sites, traditional use species, and riparian areas. As discussed, above, the Commission is satisfied that the project, as conditioned, poses a low risk to wildlife and riparian habitat and has implemented monitoring requirements to ensure that any risks that do exist are understood and mitigated.

192. With respect to archeological sites, the Commission notes that the project lands are cultivated, and that no evidence has been advanced in this proceeding to suggest that the project lands may contain archeological sites. Further, ACSE is subject to the *Historical Resources Act*, including the requirement that any chance discovery of historical resources is to be reported to Alberta Arts, Culture and Status of Women. ACSE obtained a *Historical Resources Act* approval for the project, and confirmed that it would commit to complying with Section 31 of the *Historical Resources Act*, which requires notification to the Minister of any discovery of a historic resource during excavation in relation to the project. For these reasons, and in the absence of any specific evidence to suggest that the project area contains archeological sites, the Commission does not consider it necessary to condition its approval of the project on the development and implementation of a joint monitoring program.

193. LSAMCA also requested that the Commission's approval of the project contain a condition requiring ongoing, meaningful engagement with LSAMCA in the spirit of reconciliation, including economic reconciliation. The Commission recognizes that throughout the regulatory process, there have been instances of miscommunication or a failure of communication between ACSE and LSAMCA. As described in Section 3.8, the Commission expects that ACSE will continue to engage in dialogue with LSAMCA, including through the development of its stakeholder engagement plan.

## **Conclusion**

194. The Commission has used its hearing process to understand the concerns advanced by LSAMCA. The Commission understands that LSAMCA represents members with credibly asserted Métis Aboriginal rights and that LSAMCA has concerns that its members' exercise of those rights, and traditional uses of the area including the North Saskatchewan River and related tributaries, may be affected by the project. However, based on all of the information available to the Commission, and given the conditions that have been imposed on ACSE, the Commission finds that the severity of any potential impact to LSAMCA arising from the project is low. This information includes the fact that the project is sited on cultivated land that is zoned industrial is likely to have minimal environmental impact, is expected to comply with the applicable requirements for noise, and is not expected to result in significant changes to the downstream watershed or surface water patterns. Accordingly, the Commission finds that the content of the Crown's duty of consultation in relation to the project lies at the lower end of the spectrum, and

that the consultation with LSAMCA provided through the hearing process was reasonable and sufficient to fulfil that duty.

### 3.10 Connection order

195. In addition to the power plant approval, ACSE applied to connect the project to the FortisAlberta Inc. electric distribution system. ACSE provided the location of the interconnection points,<sup>133</sup> the associated single-line diagrams and a statement from FortisAlberta agreeing to the interconnection.<sup>134</sup> The Commission is satisfied that ACSE has met the Rule 007 requirements for the application of a connection order.

196. The Commission observes that, during oral argument, in support of its position that the project would be operationally integrated with the EIA, ACSE repeatedly suggested that electricity from the project would be supplied to the airport's as yet undeveloped cargo logistics campus, in order to decarbonize the airport's ground transportation and provide feedstock for green hydrogen. Beyond making these statements in oral argument, ACSE did not provide any evidence to support these proposed uses; rather the application materials consistently state that electricity will be supplied to Alberta Interconnected Electric System (AIES) through the FortisAlberta electric distribution system.

197. The statutory scheme in Alberta imposes two basic requirements: (i) electric energy entering or leaving the AIES is to be exchanged by the power pool, and (ii) persons wishing to receive electric energy must take service from the distribution system (or, in limited circumstances directly from the transmission system).

198. There are limited exemptions to these requirements in the *Electric Utilities Act* and the *Hydro and Electric Energy Act* (sometimes referred to as "self-supply and export"). Additionally, on March 6, 2024, the *Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act* was proclaimed into force. That legislation amends the *Electric Utilities Act* to, among others, more broadly authorize electricity self-supply and export, if certain conditions are met.

199. In this decision, the Commission approves the connection order based on the evidentiary record of the proceeding and, specifically, its understanding that the project will supply electricity to the AIES. Nothing in this decision should be construed as approving or endorsing a configuration where any electricity would be directly supplied to the airport. ACSE provided insufficient evidence on this record for the Commission to assess whether such a configuration would be consistent with the *Electric Utilities Act*. Should ACSE decide to proceed with any configuration other than supplying its electricity to the AIES, it is responsible for ensuring that the project supplies electricity in a manner that is consistent with the statutory scheme and applicable regulatory requirements.

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<sup>133</sup> Exhibit 27885-X0057, ACSE response to AUC IR round 2 Q001to008, PDF page 16.

<sup>134</sup> Exhibit 27885-X0003, Appendix B - ACSE FortisAlberta Letters and diagrams.

## 4 Conclusion

200. In conclusion, the Commission summarizes its findings made above, and applies the legislative scheme in light of those findings. In doing so, the Commission weighs the benefits of the project against its negative impacts.

201. In accordance with Section 17 of the *Alberta Utilities Commission Act*, in addition to any other matters it may or must consider, the Commission must give consideration to whether approval of the Airport City Solar Project is in the public interest having regard to the social and economic effects and effects on the environment. In general, the Commission considers that the public interest will be largely met if an application complies with existing regulatory standards, and the project's public benefits outweigh its negative impacts, including those experienced by more discrete members of the public. When dealing with applications that engage Aboriginal rights and interests, the Commission also considers the goal of reconciliation within its public interest assessment.

202. In the current circumstances, the Commission has determined that in order to proceed, the project must be conditioned to include a setback from watercourses so as to avoid compromising the integrity of watercourse health and wildlife habitat within the project area. The Commission has also imposed other conditions relating to the project's environmental effects. With these conditions, the Commission is satisfied that the environmental impacts of the project, including impacts to wetlands, wildlife features and birds, can be adequately mitigated.

203. Through the hearing process, the Commission has heard and understood the concerns of LSAMCA. The Commission is satisfied that the project's potential impacts on Métis harvesting rights and traditional land uses are minimal, in light of the project's low risk of environmental harm and siting on cultivated land. Nevertheless, the Commission understands that LSAMCA is interested in ongoing, meaningful engagement with LSAMCA in the spirit of reconciliation, including economic reconciliation. The Commission has imposed conditions to require ACSE to continue to engage with LSAMCA and incorporate feedback it receives into its weed management plan and C&R Plan.

204. The Commission has found that the project will result in some adverse social and economic effects. These include the conversion of land previously used for agriculture, and the potential to impact property values for adjacent landowners. While the Commission recognizes the adverse effects, the Commission considers that they must be viewed in context, which includes the fact that the project land is in close proximity to the Edmonton International Airport and has been zoned for industrial use.

205. Given that the project will result in some negative impacts, the Commission must weigh these impacts against the project's public benefits, in order to determine whether the project is in the public interest. The benefits of the project include its ability to generate emissions-free electricity and to contribute to the diversification of Alberta's energy resources. ACSE advised that the project is expected to generate \$10.7 million in provincial and \$18.4 million in federal tax revenues.<sup>135</sup> In addition, the project will create jobs during construction, as well as permanent local jobs to support its ongoing operation and maintenance.

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<sup>135</sup> Exhibit 27885-X0139, ACSE Opening Statement, PDF page 4.

206. Overall, the Commission finds that the negative impacts associated with the Airport City Solar Project are outweighed by the benefits of the project. For the reasons outlined in the decision, and subject to the conditions in this decision, the Commission finds that, in accordance with Section 17 of the *Alberta Utilities Commission Act*, approval of ACSE's application is in the public interest having regard to the social, economic, and other effects of the projects, including the effects on the environment.

## 5 Decision

207. The Commission directs Airport City Solar East Ltd., as soon as practicable, to advise the Commission of the total generating capability of the project, factoring in the changes to the project resulting from the requirement to maintain a 30-metre setback from any small permanent watercourses and 10-metre setback from Class III+ wetlands, and to file an updated site plan showing the resulting changes to the project layout.

208. Under sections 11, 18 and 19 of the *Hydro and Electric Energy Act*, the Commission approves the application, subject to the conditions identified in this decision, and grants Airport City Solar East Ltd. the following approvals:

- Appendix 1 – Power Plant Approval 27885-D02-2024, to construct and operate the Airport City Solar Project, excluding construction or operation of the power plant facilities on the portion within the watercourse and wetland setbacks.
- Appendix 2 – Connection Order 27885-D03-2024, to connect the Airport City Solar Project to the FortisAlberta Inc. electric distribution system.

209. The appendixes will be distributed separately, but only once Airport City Solar East Ltd. provides the total generating capability of the project without the portion within the watercourse and wetland setbacks, as directed above.

Dated on March 20, 2024.

### Alberta Utilities Commission

*(original signed by)*

Renée Marx  
Panel Chair

*(original signed by)*

Cairns Price  
Commission Member

## Appendix A – Proceeding participants

<b>Name of organization (abbreviation)</b> <b>Name of counsel or representative</b>
Airport City Solar East Ltd. Nick Bryanskiy
Sprucedale Concerned Landowners Group Richard C. Secord Ifeoma M. Okoye
Lac Ste. Anne Métis Community Association Meaghan Conroy Erica Klassen
Minister of Justice of Alberta Wendy-Anne Berkenbosch
Alberta Utilities Commission  Commission panel Renée Marx, Panel Chair Cairns Price, Commission Member  Commission staff Meghan Anderson (Commission counsel) Mohib Khan Daria Serba Amanda Spyce Brittney Sammons Joan Yu Muhammad Younus

**Appendix B – Oral hearing – registered appearances**

<b>Name of organization (abbreviation) Name of counsel or representative</b>	<b>Witnesses</b>
Airport City Solar East Ltd. Nick Bryanskiy	Adrian Ioance Michelle Murphy, B.Sc., EP Aren Nercessian, B.Eng. Paula McGarrigle, P.Eng., MBA
Sprucedale Concerned Landowners Group Richard C. Secord Ifeoma M. Okoye	Cliff Wallis Henk de Haan Brian Gettel Thomas Jensen Peter Georgiou Terry Osko Clayton Sach James Stamper Noel and Maureen Brezden LaVern and Solveig Matter
Lac Ste. Anne Metis Community Association Meaghan Conroy Erica Klassen	Tracy Friedel

## Appendix C – Summary of Commission conditions of approval in the decision

This section is intended to provide a summary of all conditions of approval specified in the decision for the convenience of readers. Conditions that require subsequent filings with the Commission will be tracked as directions in the AUC's eFiling System. In the event of any difference between the conditions in this section and those in the main body of the decision, the wording in the main body of the decision shall prevail.

The following are conditions of Decision 27885-D01-2024 that require subsequent filings with the Commission and will be included as conditions of Power Plant Approval 27885-D02-2024:

- a. Once Airport City Solar East Ltd. has finalized its equipment selection and project layout, it must file a final project update to the Commission to confirm that the project has stayed within the final project update specified allowances for solar power plants in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* or, as it relates to project changes ordered by the Commission, to explain any instances where specified allowances are not met. The final project update must be filed at least 90 days prior to the start of construction.
- e. Airport City Solar East Ltd. must complete pre-disturbance site assessments and interim monitoring site assessments using the assessment methodology set out in the *Conservation and Reclamation Directive for Renewable Energy Operations (C&R Directive)*. Airport City Solar East Ltd. must update its conservation and reclamation plan (C&R Plan) after pre-disturbance site assessments and after each interim monitoring site assessment. The C&R Plan, as updated, must be filed with the Commission and must contain the information required in the C&R Directive.
- j. Airport City Solar East Ltd. shall provide the most up-to-date glare assessment results to Transport Canada and confirm if Transport Canada has concerns. Within 30 days of this decision, Airport City Solar East Ltd. shall submit a letter to the Commission detailing its consultation with Transport Canada about glare.
- k. When Airport City Solar East Ltd. finalizes the project design, it shall provide any updated glare assessment results to Transport Canada, NAV CANADA, and the Edmonton International Airport and confirm whether any of these parties have concerns. Among the final project update or amendment application for the final project design, Airport City Solar East Ltd. shall submit a letter to the Commission describing its consultation with Transport Canada, NAV CANADA, and the Edmonton International Airport about the updated assessment results.
- l. Airport City Solar East Ltd. shall conduct a post-construction comprehensive sound level survey, including an evaluation of low frequency noise, at receptors R3, R4 and R5. The post-construction comprehensive sound level survey must be conducted under representative conditions and in accordance with Rule 012: *Noise Control*. Airport City Solar East Ltd. shall file all studies and reports relating to the post-construction comprehensive sound level survey with the Commission within one year once the project commences operation.



The following are conditions of Decision 27885-D01-2024 that may not or do not require subsequent filings with the Commission:

- b. In its final project update, Airport City Solar East Ltd. must revise the project so that no permanent project infrastructure is located within 30 metres from the top of break of any permanent watercourses. The top of break must be delineated by a qualified professional.
- c. All project infrastructure must maintain a 10-metre setback from all Class III+ wetlands.
- d. Airport City Solar East Ltd. shall provide a copy of the weed management plan to interveners and other stakeholders prior to construction, and provide a mechanism for interveners and stakeholders to give feedback on the plan.
- f. Airport City Solar East Ltd. must reclaim the project to equivalent land capability at the end of life. Airport City Solar East Ltd. must retain an independent, qualified environmental professional to perform a site assessment of reclaimed areas using the assessment methodology set out under the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands* and the *Conservation and Reclamation Directive for Renewable Energy Operations*, as amended from time to time. If, at the end of the project's life, Airport City Solar East Ltd. proposes a change in land use from pre-disturbance conditions, Airport City Solar East Ltd. must notify the Commission in advance and obtain AUC approval for the change in land use prior to engaging a qualified environmental professional to conduct the site assessment.
- g. Airport City Solar East Ltd. shall configure the project solar panels to use a resting angle greater than or equal to 27 degrees during backtracking periods to mitigate glare effects.
- h. The Commission requires Airport City Solar East Ltd. to promptly address any complaint or concern from stakeholders regarding solar glare from the project. Airport City Solar East Ltd. shall file a report with the Commission detailing any complaint or concern it receives regarding solar glare from the project during its first two years of operation, as well as Airport City Solar East Ltd.'s response to that complaint or concern. Airport City Solar East Ltd. shall file the report annually, with the first report no later than 13 months after the project becomes operational.
- i. Airport City Solar East Ltd. shall use solar panels with anti-reflective coating.