



## Phillips Lytle LLP

David Witt, Ph.D.,  
Indian Nations Affairs Coordinator  
NYS Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203

October 19, 2021

Re: Genesee County Industrial Development Agency d/b/a Genesee County  
Economic Development Center Response to Comments on the Initial  
Assessment for the Wastewater Treatment Facility Project

Dear Dr. Witt:

As you know, we represent the Genesee County Economic Development Center ("GCEDC") with regard to the development of the Western New York Science and Technology Advanced Manufacturing Park ("STAMP") campus in the Town of Alabama, New York. We are in receipt of a comment letter dated October 4, 2021 and received October 5, 2021 ("Comment Letter") from the Tonawanda Seneca Nation ("Nation") with respect to the Initial Assessment prepared for the Wastewater Treatment Facility Project ("Project") pursuant to the Letter of Resolution dated March 23, 2021 ("LOR") between the New York State Department of Environmental Conservation ("NYSDEC"), the New York State Office of Parks, Recreation and Historic Preservation ("SHPO"), and the GCEDC.

As you know, the LOR requires the GCEDC to prepare an assessment of each project at STAMP that requires any permitting from NYSDEC for potential impacts to the Nation's Territory as a property of religious and cultural significance based on the National Register Criteria for eligibility. The Initial Assessment is provided to the Nation for comment and NYSDEC and SHPO must make a determination of whether there are adverse impacts to the Nation's Territory.

The Initial Assessment for the Project ("Project IA") was provided to the Nation, NYSDEC and SHPO on August 27, 2021. Pursuant to agreement between the Nation and the GCEDC, the Nation's 30 day comment period was extended to 45 days or

ATTORNEYS AT LAW

ADAM S. WALTERS PARTNER DIRECT 716 847 7023 AWALTERS@PHILLIPSLYTTLE.COM



October 4, 2021. The Nation's comments to the Project IA are very similar (with a few exceptions) to its comments to the initial assessment for the Plug Power project. As we noted in responding to that comment letter, and as both NYSDEC and SHPO are aware, the Nation has been conducting its own TCP investigation since 2018 to evaluate the eligibility of the Nation's Territory for listing on the National Register as a property of religious and cultural significance. Once the TCP investigation is completed, or an Evaluation of Eligibility is prepared by the Nation, pursuant to the express terms of the LOR, the GCEDC must use those materials to assist in preparing future Initial Assessments.

As both NYSDEC and SHPO are also aware and as detailed below, the goal of the Initial Assessment process as laid out in the LOR is not to usurp the Nation's efforts to conduct its own TCP investigation. Rather, the Initial Assessment (in the absence of a completed TCP investigation) can only make use of the resources readily available to kta. Under the terms of the LOR, neither GCEDC nor kta is responsible for collecting primary source material from the Nation in order to bolster the Initial Assessment - since at least 2016, it has been well understood that the Nation would gather such information. As SHPO noted in its October 8, 2021 letter which confirmed that Plug Power would have no adverse impact on historic and/or archaeological resources:

Traditional cultural properties, such as those located on the Tonawanda Nation's Territory, are often difficult to recognize, and their existence and significance are best defined by knowledgeable users of such areas. For future SHPA impact determinations at STAMP, special consideration should be given to a Traditional Cultural Property investigation or a National Register Evaluation of Eligibility document, if provided by the Tonawanda Seneca Nation.

It is also worth noting that at the meeting between kta and the Nation on September 29, 2021 to discuss the Plug Power initial assessment, Jare Cardinal, a historian familiar with the Nation's history, noted that she did not approve of the sources utilized by kta in preparing the Plug Power initial assessment. Despite requests from kta and the GCEDC that it do so, the Nation has chosen not to recommend alternative or additional



sources in the Comment Letter, other than to recommend that kta essentially undertake its own TCP investigation. In fact, the Comment Letter incorporates by references the prior comment letter that the Nation provided to the GCEDC relative to the Plug Power project with four modifications, as detailed below. As such, kta has made a number of revisions to the Project IA based on the Comment Letter. A copy of the revised Initial Assessment is attached hereto. Further, we have outlined below the specific changes made to the Project IA in response to each of the Nation's comments in the Comment Letter.

### **Responses to Comment Letter**

1. **Nation Comment:** To the extent kta intends to revise the "Study Area" to include the Nation's entire territory, the Nation requests that impacts on the revised Study Area be studied and analyzed prior to completion of a final draft WWTF Initial Assessment. For example, such study should take into account the uses of the Nation's Territory by its citizens as demonstrated in publicly available sources. In addition, prior to completing the report, kta should visit the Territory. Actually seeing the Territory is necessary to developing any basic level of understanding of the Nation and its cultural resources. Physical presence on Nation Territory is also necessary to assess the presence of cultural and historic resources, WWTF Initial Assessment at 11, 33-34, which cannot possibly be identified solely through the use of CRIS or "Google Streets, aerial photography, or the Genesee County Web Mapping website." Id. at 33, 34.

*GCEDC Response: As detailed below, the Study Area has been revised to include the entirety of the Nation's Territory. As with the Plug Power initial assessment, the GCEDC strongly objects to this comment to the extent that it requests that the GCEDC conduct an investigation that parallels the Nation's TCP study. As NYSDEC is well aware, the LOR specifically provides that the GCEDC shall incorporate the results of the Nation's TCP investigation to the extent that the Nation completes the TCP investigation and provides its results to NYSDEC, SHPO and GCEDC for review. To date, the only information relative to the Nation's cultural practices, traditions, and beliefs that has been provided to GCEDC has come in the form of affidavits relating to the Nation's litigation regarding the GCEDC's grant of financial incentives to Plug Power.*



*Those affidavits are specifically included in the Initial Assessment. GCEDC's role in preparing the Initial Assessment is not (and was never intended to be) to usurp the Nation's efforts to prepare its own TCP investigation. Rather, it is understood in the LOR that results of the TCP investigation would be utilized by GCEDC to the extent such results are available. Lacking such information from the Nation, the Initial Assessment relies on the resources that are available (map analysis, literature review, archival research, and satellite images). To the extent the Nation has specific comments with respect to the impacts of the Project on the Nation's cultural and historic resources, the Nation has not provided such comments to date.*

2. Nation Comment: The Nation strongly objects to characterizations of the Initial Assessment process as necessarily excluding any research or study potentially included in the Nation's TCP study. (See, for example, the Letter of Adam Walter to David Witt, September 30, 2021, at 3, stating that "looking at the direct impact on the people who live on the Nation's Territory... would necessitate research consistent with what is required in a TCP investigation, which is being handled solely by the Nation and is entirely outside the scope of the Initial Assessment process laid out in the LOR." (emphasis added)). Nothing in the LOR limits the sources of information to be consulted or methods to be employed in preparing an Initial Assessment. Any such limit would be nonsensical, because the same sources would likely be useful to each inquiry and because the TCP Study has not yet been completed, meaning there has been no final determination what sources and methods will and will not be utilized as a part of it.

*GCEDC Response: As discussed above, the goal of the Initial Assessment process as laid out in the LOR is not to usurp the Nation's efforts to conduct its own TCP investigation. Rather, the Initial Assessment (in the absence of a completed TCP investigation) can only make use of the resources readily available to kta. Under the terms of the LOR, neither GCEDC nor kta is responsible for collecting primary source material from the Nation in order to bolster the Initial Assessment - since at least 2016, it has been well understood that the Nation would gather such information. In fact, the Enhanced Public Participation Plan for the Project prohibits the GCEDC from directly contacting the citizens of the Nation. Moreover, as noted above, in its determination that Plug Power would have no adverse impact on historic and/or archaeological resources, SHPO stated:*



*“Traditional cultural properties, such as those located on the Tonawanda Nation’s Territory, are often difficult to recognize, and their existence and significance are best defined by knowledgeable users of such areas. For future SHPA impact determinations at STAMP, special consideration should be given to a Traditional Cultural Property investigation or a National Register Evaluation of Eligibility document, if provided by the Tonawanda Seneca Nation.”*

*To the extent the Nation believes that information or perspective is missing from the Initial Assessment, we note that the Nation is free to provide any or all of the results of the TCP investigation for incorporation into future initial assessments. As noted above, however, the only information relative to the Nation’s cultural practices, traditions, and beliefs that has been provided to GCEDC has come in the form of affidavits relating to the Nation’s litigation regarding the GCEDC’s grant of financial incentives to Plug Power. Far from being nonsensical, the limited scope of the Initial Assessment recognizes that the Nation, not GCEDC, is the party best suited to undertake and complete the TCP investigation.*

3. Nation Comment: Please disregard paragraph 3, which relates specifically to Plug Power

GCEDC Response: Acknowledged.

4. Nation Comment: Certain page numbers changed as between the Plug Power Initial Assessment upon which the Nation's August 31, 2021 comments were based, and the WWTF Initial Assessment. References to Plug Power Initial Assessment page numbers in the Nation's August 31, 2021 comments should be translated as follows: 12 = 15-16; 15 = 18; 22 = 25; 23 = 26; 24 FN51 = 27 FN51; 30-31 = 33-34; 35 = 38.

GCEDC Response: Acknowledged.



### **Responses to Prior Comment Letter**

As noted above, the Nation's comments to the Project IA incorporate by reference the Nation's comments to the initial assessment for the Plug Power project. With respect to those comments, we refer NYSDEC to our September 30, 2021 response letter wherein we provided detailed responses to each of the Nation's comments. We note that the final comment in the prior comment letter was specific to the environmental review undertaken for Plug Power. The closing paragraph of the Comment Letter, however, is reproduced below as it closely mirrors the Nation's prior comment and is specific to the Project.

Nation Comment: In addition to the concerns the Nation has expressed about the approach taken by kta in the Initial Assessment about Plug Power, the Nation is very concerned about specific impacts to the Nation and its cultural resources from the Wastewater Treatment Facility. Specifically, there has been no assessment of how noise and odor from the WWTF might impact the Nation's citizens or the animals the Nation's citizens hunt in the Big Woods, which lies downstream and less than a mile from the WWTF. Nor has anyone examined how spillage from accidental leaks or overflow at the WWTF could impact the Nation's waters or the plants, animals, or people. The Nation calls on the GCEDC and the DEC to require a supplemental environmental impact survey that incorporates Nation participation to adequately assess any such impacts.

GCEDC Response: *As NYSDEC is aware, and as the Initial Assessment documents in detail, STAMP as a whole has undergone an exhaustive environmental review. That environmental review has been constantly updated and supplemented over the course of the last decade. Further, information relative to the Project was drawn from the environmental record developed specifically for the Project in accordance with the State Environmental Quality Review Act ("SEQRA") during the GCEDC's review of the Project, which concluded in August of 2020. It is unclear where else the Nation would expect kta to draw from while reviewing potential impacts of the Project, and indeed the Nation does not provide any specific reasoning explaining what possible impacts the Project could have on the Nation's Territory as a TCP. While GCEDC appreciates that the Nation may have specific concerns with respect to the Project, the Nation has not laid*



*out what those concerns are, other than vague references to impacts on plants, animals, and people resulting from noise, odor or impacts on water which were all specifically addressed in the 2020 review of the Project pursuant to SEQRA. A copy of the GCEDC's 2020 SEQRA determination for the Project is attached hereto. As detailed therein, GCEDC undertook a thorough review of potential impacts to all relevant environmental resources pursuant to SEQRA and, based upon the voluminous supporting documentation produced during the environmental review of the Project, appropriately concluded that the Project would not result in any significant adverse environmental impacts. We also note that the Nation's Territory is not located downstream from the Project's discharge location (which is approximately 12 miles from the STAMP site and the Nation's Territory). GCEDC further submits that the exhaustive environmental record fully supports the conclusion of the Initial Assessment, that the Project will not have an adverse effect on the Nation's Territory as a TCP.*

Pursuant to the LOR, NYSDEC must now determine whether the Project will result in an adverse effect on the Nation's Territory as a property of religious and cultural significance. GCEDC submits that the Nation has not alleged any specific adverse impacts that the Project could have on the Nation's Territory which is almost a half mile from the Project site, and that all of the documentation available to GCEDC, NYSDEC, SHPO and the Nation demonstrates that the Project will not have any such adverse impacts.

Very truly yours,

Phillips Lytle LLP

By /s/ *Adam S. Walters*

Adam S. Walters

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