



## Phillips Lytle LLP

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

May 12, 2022

Re: Genesee County Industrial Development Agency d/b/a Genesee County  
Economic Development Center Response to Comments on the Initial  
Assessment for the Power Line Reroute 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 April 22, 2022 (“**Comment Letter**”) from the Tonawanda Seneca Nation (“**Nation**”) with respect to the Initial Assessment prepared for the Power Line Reroute 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 initial assessment of each project at STAMP that requires any permitting from NYSDEC for potential impacts to the Nation’s Territory as a potential property of religious and cultural significance based on the National Register Criteria for eligibility. The initial assessment is provided to the Nation for a 30 day review and comment period, and NYSDEC and SHPO must then 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 March 11, 2022. Pursuant to requests by the Nation, the GCEDC agreed to extend the Nation’s 30 day comment period to April 22, 2022.

ATTORNEYS AT LAW

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



We have reviewed the Nation's comments and note that many of the Nation's comments to the Project IA refer back to the Nation's prior comments to the initial assessments for the Plug Power and Wastewater Treatment Facility projects, in particular with respect to the scope of the Project IA. In particular, once again the Nation has suggested that the GCEDC must gather primary source material from the Nation in order to bolster the Project IA.

As we noted in responding to those comment letters, and as discussed further below, 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. GCEDC has consistently reiterated that the goal of the initial assessment process as laid out in the LOR is not to usurp the Nation's efforts to undertake and complete 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. 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. 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.

### **Power Line Reroute Consultation Background**

GCEDC and the Nation's discussion of the Project dates back to at least 2018. At the recommendation of NYSDEC, GCEDC began conducting direct consultation with the Nation with respect to the Project. Over the course of approximately 18 months, GCEDC provided the Nation with information relating to the Project including design plans, and conducted site visits with representatives of the Nation in order to assist the Nation in better understanding any potential impacts of the Project on the Nation's Territory.



Ultimately, the Nation expressed its opinion via letter dated June 5, 2019, that all planning for the Project should cease “until potential impacts on the Nation and its cultural resources of such development can be assessed following completion of the TCP study.” As NYSDEC is aware, GCEDC is unable to delay development of the STAMP Site until such time as the Nation completes its TCP investigation which is now several years behind schedule. Indeed, the LOR process expressly provides moving forward in the absence of a completed TCP investigation to ensure that STAMP’s development can continue.

### **Settlement Agreement Terms Regarding Project**

Subsequent to the above-referenced consultation, the Nation, GCEDC, and Plug Power entered into a settlement agreement (“**Settlement Agreement**”) to resolve the lawsuit the Nation brought against the approval of the Plug Power project, a copy of which is attached as **Exhibit A**. The Settlement Agreement was negotiated between the parties and executed following Justice Zambito’s dismissal of the Nation’s Article 78 proceeding against the Plug Power project. The parties agreed not only to the relocation of the power lines, but also the exact location of the 100’ wide area in which the power lines would be placed. The Settlement Agreement clearly states that “the future easement to National Grid associated with the power line reroute on the STAMP Site” will be located partially “within the Restricted Protected Property Area.” The Settlement Agreement went so far as to acknowledge the terms and conditions of pesticide usage in connection with the Project. Moreover, by placing the powerlines along the course of the proposed reroute, there has been a significant expansion of the buffer area between the Nation and STAMP - in essence, everything west of the powerline reroute has now been designated as protected buffer area. Thus, locating the Project anywhere else would run contrary to the Settlement Agreement.

### **Preparation of Project IA**

In this context, once NYSDEC confirmed that an initial assessment for the Project pursuant to the terms of the LOR would be required late last year, GCEDC moved forward to prepare the same. NYSDEC previously indicated that GCEDC should take



special care to consider potential visual impacts of future projects on the Nation's Territory. Accordingly, GCEDC retained Saratoga Associates in order to prepare a visual impact assessment of the Project on the Nation's Territory.

On January 21, 2022, GCEDC reached out to the Nation via email as a part of GCEDC's weekly outreach to the Nation, informing the Nation that GCEDC had retained Saratoga Associates to conduct field work to gather background visual data to be utilized in future impact assessments. Further, GCEDC requested permission from the Nation to allow Saratoga Associates to enter the Nation's Territory to gather visual data. GCEDC noted in its email correspondence that a Nation representative would be welcome to accompany Saratoga Associates when they were in the field. Unfortunately, the Nation declined to respond to this offer. On January 28, 2022, GCEDC informed the Nation via email that Saratoga Associates had completed its field work. The Nation then requested background information on the scope of that work on that same date, which was provided to the Nation via email on February 4, 2022. No feedback was received from the Nation thereafter.

Considering the extensive prior consultation on the Project, the negotiated location of the Project in the Settlement Agreement, and the clear results of the Project IA, GCEDC submits that the Project clearly will not have an adverse impact on the Nation's Territory as a property of religious and cultural significance based on the National Register criteria for eligibility. Nevertheless, the Nation's specific comments on the Project IA, together with GCEDC's response to each comment, are detailed below.

### **Responses to Comment Letter**

1. **Nation Comment:** As a preliminary matter, the Nation strongly objects to (1) GCEDC's decision to conduct a visibility analysis for the power line project that included no consultation with the Nation; and (2) the suggestion that the document produced by Saratoga Associates is a "visual impacts analysis." Visual impacts from the proposed project are a grave concern for the Nation and its citizens, and the nature of those impacts on the Nation cannot be assessed or understood without the Nation's involvement. The massive steel towers and



road proposed for the new power line will dramatically alter the landscape as viewed from the Nation by Nation citizens, as well altering views of the Nation from the elsewhere. The document produced by Saratoga Associates erases Nation citizens from the landscape altogether and fails to meet even the most basic standards for visual impacts assessments. See, e.g., "Guide to Assessing Visual Impact Assessments for Renewable Energy Projects," National Park Service, at 18-19, (summarizing elements of the "complex multistep process" required to conduct an adequate visual impact assessment, including "gathering information about [viewshed] users" and analyzing "sensitivity of the viewers to changes in the landscape"); "Evaluating Photosimulations for Visual Impact Assessment," National Park Service; DEC Program Policy on Assessing and Mitigating Visual and Aesthetic Impacts. The Nation calls on GCEDC to initiate consultations with the Nation on an actual visual impact assessment comporting with state and federal guidelines, and to incorporate that assessment into a revised PLIA. Careful analysis of visual impacts is particularly important for projects like the power line project, where it is far from clear any need exists to justify creation of adverse visual impacts on the Nation and its citizens.<sup>1</sup>

*GCEDC Response: As detailed above, GCEDC did initiate consultation with the Nation with respect to the visual impact assessment prepared by Saratoga Associates. GCEDC was disappointed that the Nation elected not to respond to this consultation, however, GCEDC proceeded with the preparation of a visual impact assessment to give the Nation a clear picture of the Project's visibility from the Nation's Territory. Following completion of field work, the Nation was given additional information with respect to the work done and the intention of the work. At no point in the three months since the Nation was given this detail did the Nation choose to share any feedback with respect to the work being prepared.*

*With respect to the Nation's general criticisms of the visual impact assessment, the visual impact assessment clearly and accurately demonstrates that the Project is well-screened from the Nation's Territory, with such screening likely to become improved by the*

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<sup>1</sup> We note that URLs found in the Comment Letter have been removed for the convenience of the reader, and reference is made to the Comment Letter for the same.



*provision of the Settlement Agreement which designates the area between the Project and the Nation's Territory to become a protected buffer area. Far from erasing the Nation's citizens, the only perspective given in the visual impact assessment is the perspective of those located on the Nation's Territory. The impact of the Project on tenants of the STAMP site or others has no place in the Project IA, which is concerned solely with the impact of the Project on the Nation's Territory as a potential property of religious and cultural significance based on the National Register criteria for eligibility.*

2. Nation Comment: Reviewing the PLIA in the context of previous Initial Assessments and Nation comments on them, the Nation finds the approach taken by GCEDC and kta to the Initial Assessment process to be cynical, misleading, and shameful. Kta has not only ignored the Nation's feedback on key concerns, but has doubled down in its approach, embracing a methodology that expressly "privilege[s] non-Indian perspectives and perceptions," and admittedly contains only "limited" "culturally specific information." (p. 21). This methodology is very familiar to the Nation, which has faced centuries of efforts to erase and ignore it. Most historians have moved past this blatantly Eurocentric approach. It is disgraceful that kta continues to issue reports embracing Eurocentrism at the expense of Native perspectives while claiming to assess impacts on Native cultural resources. The LOR requires assessment of "adverse impact to the Nation's Territory as a property of religious and cultural significance." By designing an Initial Assessment template that intentionally excludes Nation perspectives and Nation culture, kta (with funding and direction from GCEDC) undermines the Nation's culture and poisons the LOR process. This approach must be changed.

*GCEDC Response: As GCEDC has repeatedly stated in prior responses to Nation comments on previous initial assessments, to the extent the Nation believes that information or perspective is missing from the Initial Assessment, the Nation is welcome to provide alternative sources of information and/or any of the results of the Nation's TCP investigation completed to date for incorporation into initial assessments. Indeed, GCEDC and kta have repeatedly asked for such information. 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. As GCEDC has also reiterated in the past, 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.*

*GCEDC has consistently reiterated that 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, nor is the GCEDC or any other entity outside of the Nation itself, in a position to prepare such a study on behalf of the Nation. 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. Moreover, 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."*

*GCEDC and kta welcome any and all specific recommendations that the Nation may have with respect to sources to be included in initial assessments. Merely criticizing kta's sources, without providing alternatives, is extremely unhelpful.*

3. Nation Comment: Any study of impacts on the Nation's cultural resources must take into account the uses of the Nation's Territory by its citizens. Kta acknowledges the availability of information about these uses, and even includes Nation citizen testimony about certain uses in the report, but fails to analyze impacts on even the uses documented in the PLIA. For example, the PLIA



contains information about hunting, fishing and ceremonial activities that are conducted in the Big Woods. (pp. 41-43). Nonetheless, the PLIA fails to consider how the power line project with its massive steel towers and roadway within 500 feet of the Big Woods, might impact those activities.

*GCEDC Response: It is unclear how the Project could have any impact on hunting, fishing, or ceremonial activities that are conducted in the Big Woods. To the extent the Nation has concerns as to how the Project may impact such activities, the Nation has declined to explain the same to date. In any event, and as detailed in the Project IA, no significant visual, audible, or water-related impacts will result from the Project to the Nation's Territory.*

4. Nation Comment: Actually seeing the Territory is necessary to developing any basic level of understanding of the Nation and its cultural resources, and no one should purport to assess impacts on the Nation without ever having visited the Nation. Physical presence on Nation Territory is also necessary to assess the presence of cultural and historic resources.

*GCEDC Response: We incorporate by reference our prior responses to similar comments in earlier response letters to initial assessments. Specific to this Project, however, we reiterate that GCEDC's request to coordinate with the Nation to allow for Saratoga Associates to visit the Nation's Territory were ignored.*

5. Nation Comment: The Nation strongly objects to GCEDC's and kta's stated efforts to exclude any research or study that may potentially be included in the Nation's TCP study. (See, for example, the Letter of Adam Walters 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. 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."*

*As previously and repeatedly stated, to the extent the Nation believes that information or perspective is missing from the Initial Assessment, the Nation is welcome to provide alternative sources of information and/or any of the results of the Nation's TCP investigation completed to date for incorporation into initial assessments. Indeed, GCEDC and kta have repeatedly asked for such information. 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 scope of the Initial Assessment recognizes that the Nation, not GCEDC, is the only party suited to undertake and complete the TCP investigation.*

6. Nation Comment: By limiting its eligibility determination to historic events that occurred in the mid-1800s, the PLIA locates eligibility in a way that makes it virtually impossible for any modern day development, even one that would radically change 1,200 acres directly adjacent to the Nation, to be found to have



significant adverse impacts on the Nation's Territory as National Register Eligible.

*GCEDC Response: We reiterate that, to the extent the Nation has specific sources or information it would like to see included in future initial assessments, we welcome such specific feedback from the Nation. We note, however, that the development of the Project has been carefully managed to avoid any actual impacts on the Nation's Territory pursuant to National Register Criteria.*

7. Nation Comment: The PLIA fails to include sufficient information regarding the scope and design of the power line project for assessment of impacts on the Nation. Specifically, the PLIA includes no information whatsoever about design of the proposed roadway that would travel along the proposed power line, aside from the fact that "there may be USACE approvals associated with" it. (p. 12) The PLIA lacks any information regarding grading of the roadway, earthmoving required for its construction, sediment controls, or anything else. By email subsequent to transmission of the PLIA, GCEDC has informed the Nation that the project has been modified such that no USACE approvals will be needed. GCEDC refused the Nation's request that the PLIA be updated to include accurate information about plans for the roadway, instead providing an aerial view detail of a planned portion of the roadway. The detail depicts the road, instead of crossing a wetland directly linked to the Nation, ending at either edge of the wetland, with "timber matting (elevate)" superimposed on the wetland in place of road. This detail raises more questions than it answers. The PLIA must be revised to include accurate, detailed information about the road, which the PLIA acknowledges to be "part of the project." (p. 12). Accurate, detailed project information must also include information about the impacts on wetlands that span the boundary between STAMP and the Nation. The PLIA's conclusory statement that "project impacts to wetlands are limited to the STAMP site and do not include any discharge into wetlands on the Nation's Territory," p. 44, is belied by the nature of wetlands and publicly available information demonstrating that wetlands do not end neatly at the STAMP boundary.



*GCEDC Response: The Project IA included, among other details, maps depicting the exact layout of the Project (see Figures 1-3, 6) including the proposed access drive. In addition, the visual impact assessment provided a clear depiction of the proposed gravel access road. On April 4, 2022, GCEDC provided the Nation with additional information regarding the access road in response to an inquiry from the Nation. Specifically, GCEDC explained that the access road would no longer permanently impact a small section of wetland (approximately 100' in length), as National Grid would use matting to cross over the wetland during construction and when maintenance is needed.*

8. Nation Comment: The PLIA includes irrelevant information about the proposed project, including the odd claim that "[t]iming of the project is critical, because facility construction is slated to begin in Summer 2022," (p. 14) which appears to mean that timing is critical because the developer wants it to be. This opinion on the need for hasty construction has no place in an analysis of impacts on cultural resources.

*GCEDC Response: Information with respect to the timing of construction has been provided to ensure that the Nation is kept fully-informed on the continued development of the STAMP Site. Specifically, the Project is timed to coincide with National Grid's broader power line work off of the STAMP Site, the development of the STAMP substation, and the needs of Plug Power. Far from being hasty, the Project has been contemplated for several years and has undergone rigorous review and consultation with the Nation starting in 2018 as well as NYSDEC, USACE, and the Town of Alabama.*

Nation Comment: The PLIA fails to adequately explore the need for the project, suggesting by implication that the project is intended to upgrade existing power lines while deemphasizing the fact that the plan would create a large bow in a currently straight power line, adding nearly a mile of new lines, 10 additional towers, and a new road, among other things. According to the PLIA, the current tack of the power line "represents a barrier to efficient space utilization of the STAMP property," p. 14, suggesting that a desire to maximize profits drives the project.



*GCEDC Response: As detailed above, the need for the Project has been expressed to the Nation repeatedly over the course of the last four years. As NYSDEC and SHPO are aware, the existing power line bifurcates the main manufacturing campus of STAMP, rendering development of the same infeasible. Indeed, if such development were to occur, it would necessarily require development further from the power lines and closer to the Nation's Territory. National Grid has previously detailed the infeasibility of routing the power lines further east, leaving the Project as the only possible solution. Lastly, the existing power lines on the STAMP Site are insufficient to service either future tenants of STAMP or Plug Power. Nevertheless, GCEDC submits that all of the data and documentation made available to NYSDEC, SHPO, and the Nation demonstrates that the Project will not have any adverse impact on the Nation's Territory as a potential property of religious and cultural significance based on the National Register criteria for eligibility.*

**Nation Comment:** The PLIA fails to consider the cumulative impacts on the Nation of the components of the STAMP project. By segmenting development at STAMP into discreet projects and analyzing each in isolation from the others, the PLIA denies the real-world implications of the development as a whole. This is particularly true of the power line project, which appears to include as a component a new substation, see p. 14, as well as rebuilt lines to the north and south of the project area, neither of which is included in the PLIA.

*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"). It is unclear how else the review of the development of the STAMP Site could proceed - as projects are proposed, each is evaluated against the baseline SEQRA documentation and findings set forth in the 2012 Final Generic Environmental Impact Statement and SEQRA Findings (as subsequently amended/updated). Moreover, pursuant to the terms of the LOR, **each project** subject to NYSDEC permitting authority (but not subject to USACE permitting authority)*



*undergoes a further, individual review to confirm whether such projects will have any actual adverse impact on the Nation's Territory.*

*Further, while the Nation is correct that National Grid is working on a broader work on its existing power lines in the area, that work is unrelated to the development of STAMP. In addition, as NYSDEC and SHPO are aware, an initial assessment for the development of a substation on the STAMP Site (necessary for both the development of STAMP as well as the Plug Power project), has already been prepared and submitted to the Nation, NYSDEC, and SHPO. To the extent the Nation raises any specific concerns with respect to the development of the same, GCEDC looks forward to working with the Nation, SHPO, and NYSDEC to address those concerns.*

Nation Comment: The PLIA is based on flawed definitions of "direct" and "indirect" impacts, p. 44. The fact the project "will not physically occur within the [Nation's Territory]" does not preclude it having direct impacts. See, e.g., DEC SEQR Handbook (clarifying that impacts outside a defined project area may be direct).

GCEDC Response: *This comment appears to be a matter of semantics. GCEDC notes that, as stated in prior initial assessments, the Project is not located on the Nation's Territory, and as such will not have direct impacts on the same. NYSDEC's SEQRA guidebook explanation of direct and secondary impacts is not relevant to the Project IA, though to the extent the Nation considers any potential impacts of the Project to be direct rather than indirect, to clarify, the Project IA evaluates any and all potential impacts resulting from the development of the Project on the adjacent STAMP site to the Nation's Territory as a potential property of religious and cultural significance based on the National Register criteria for eligibility.*

Nation Comment: The PLIA fails to assess impacts as required by the State Historic Preservation Act. See, e.g., SHPA Section 428.7, which requires that "alteration of the property's environment" and "introduction of visual, audible or atmospheric elements which are out of character with the property or alter its setting" be considered.



*GCEDC Response: GCEDC respectfully disagrees with this comment and submits that the visual impact assessment provided by Saratoga Associates, as well as the analysis of the audible impacts of the Project's construction, is in full compliance with the requirements of SHPA.*

Nation Comment: The PLIA fails to assess how noise from construction of the steel towers and access road; use of the access road over time; or presence of the towers in migrating bird habitat (including threatened and endangered species) might impact the Nation's citizens or the environment, including avian and aquatic species that are important to the Nation and that freely cross the boundary between STAMP and the Nation. The contention on p. 44 that "noise impacts will be similar to other commercial construction activities in the area" is wholly insufficient to constitute a noise impacts analysis, particularly since there has never been any commercial construction in the project area.

*GCEDC Response: As NYSDEC is aware, the STAMP Site has had various construction activities take place over the last several years, and more recently has seen the commencement of the construction of the Plug Power project, which has been under construction for several months. In addition, it is important to remember that the STAMP Site sections not subject to construction activities are in active agricultural production (as they have been for many, many years). The SEQRA record for the development of STAMP shows background noise levels in the vicinity of the border of the STAMP Site regularly exceeds 60 dBA. As detailed in the Project IA, the Project involves the relocation of existing power lines on the STAMP Site. As such, it is unclear how the moving of the towers would result in any adverse impact on migrating birds from the STAMP Site to the Nation's Territory. Indeed, recently identified winter raptors on the STAMP Site will not be present during construction (which will be conducted when the birds have migrated north for the warmer month seasons). In addition, the habitat of the Big Woods is not conducive to these winter raptors which rely on grassland habitat. Further, as the Project proposes no impact to any wetlands, it is unclear how any aquatic species could be impacted by the Project.*

Nation Comment: The Nation remains concerned about impacts to the Nation and its cultural resources from the power line project, including construction of



David Witt, Ph.D.  
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the massive steel towers and new road as well as operation of the project and use of the road in the future. The Nation urgently requests a supplemental environmental impact survey be conducted, incorporating Nation participation to adequately assess any such impacts, including direct, indirect, and cumulative impacts.

*GCEDC Response: As NYSDEC is aware, and as the Project IA 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. The Project does not propose any new significant adverse impacts not previously addressed in the STAMP GEIS and which would require preparation of a supplemental environmental impact statement.*

Pursuant to the LOR, NYSDEC must now determine whether the Project will result in an adverse effect on the Nation's Territory as a potential 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, and that the extensive Project documentation provides a strong record to demonstrate that the Project will not have any such adverse impacts.

Very truly yours,

Phillips Lytle LLP

By /s/ *Adam S. Walters*

Adam S. Walters

ASW

Doc #10389262.2

# Exhibit A

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF GENESEE

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In the Matter of the Application of  
TONAWANDA SENECA NATION,

**NOTICE OF ENTRY**

Plaintiff-Petitioner,

Index No. E69171

For a Judgment Under Article 78 of the Civil Practice  
Law and Rules,

- against -

STEVEN HYDE, in his official capacity as President and  
Chief Executive Officer of the Genesee County Economic  
Development Center, MARK MASSE, in his official  
capacity as Senior Vice President of Operations of the  
Genesee County Economic Development Center, PETER  
ZELIFF, in his official capacity as Chairman of the  
Genesee County Economic Development Center Board of  
Directors, MATTHEW GRAY, in his official capacity as  
Vice Chair of the Genesee County Economic  
Development Center Board of Directors, GENESEE  
COUNTY ECONOMIC DEVELOPMENT CENTER,  
and PLUG POWER, INC.,

Defendants-Respondents.

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**PLEASE TAKE NOTICE** that attached as **Exhibit A** is a true copy of a  
Stipulation of Settlement and Order (NYSCEF Dkt. No. 257) that was signed by the Hon.  
Charles N. Zambito, A.J.S.C., and entered and filed in the Genesee County Clerk's Office  
on October 18, 2021, in the above-captioned proceeding.

Dated: Buffalo, New York  
October 18, 2021

PHILLIPS LYTTLE LLP

By: Steven B. Salcedo

Adam S. Walters  
Craig R. Bucki  
Matthew J. Fitzgerald  
Steven B. Salcedo

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TO: EARTHJUSTICE

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Doc #10006452.1

**A**

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF GENESEE

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In the Matter of the Application of

TONAWANDA SENECA NATION,

Plaintiff-Petitioner,

For a Judgment Under Article 78 of the Civil Practice  
Law and Rules,

- against -

STEVEN HYDE, in his official capacity as President and Chief  
Executive Officer of the Genesee County Economic  
Development Center, MARK MASSE, in his official capacity as  
Senior Vice President of Operations of the Genesee County  
Economic Development Center, PETER ZELIFF, in his official  
capacity as Chairman of the Genesee County Economic  
Development Center Board of Directors, MATTHEW GRAY, in  
his official capacity as Vice Chair of the Genesee County  
Economic Development Center Board of Directors, GENESEE  
COUNTY ECONOMIC DEVELOPMENT CENTER, and  
PLUG POWER, INC.,

Defendants-Respondents.

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**STIPULATION  
OF  
SETTLEMENT  
AND ORDER**

Index No. E69171

IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned, the attorneys of record for Plaintiff-Petitioner Tonawanda Seneca Nation ("Nation"), Defendants-Respondents Steven Hyde, Mark Masse, Peter Zeliff, Matthew Gray, and the Genesee County Economic Development Center ("GCEDC") (collectively, "GCEDC Respondents") and Defendant-Respondent Plug Power, Inc. ("Plug") that:

**WHEREAS**, GCEDC is working on the development of the Western New York Science & Technology Advanced Manufacturing Park ("STAMP"), an advanced manufacturing technology campus on approximately 1,262 acres located on the west side of New York State Route 63/77, approximately five miles north of the I-90/New York State Thruway ("STAMP Site") in the Town of Alabama, New York; and

**WHEREAS**, the STAMP site lies within the Nation's ancestral territory; and

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**WHEREAS**, the Tonawanda Reservation Territory ("Territory") of the Nation, a federally recognized Indian Nation, abuts the STAMP Site immediately to the west; and

**WHEREAS**, Plug has proposed the construction and operation of a "green energy" hydrogen production, storage and transportation facility known as Project Gateway ("Project Gateway") and located on approximately 30 acres ("Plug Project Site") toward the center of the STAMP Site; and

**WHEREAS**, the Nation has commenced this Article 78 proceeding challenging the adequacy of the environmental review performed by GCEDC relative to Project Gateway; and

**WHEREAS**, the Nation alleges that GCEDC violated Article 8 of the New York Environmental Conservation Law ("ECL"), Chapter 43-B of the Consolidated Laws of New York, as amended ("SEQR") and the regulations adopted pursuant thereto by the Department of Environmental Conservation of the State of New York ("NYSDEC"), being 6 NYCRR Part 617, et. seq., as amended (the "SEQR Regulations") by failing to adequately consider and address the potential impacts of Project Gateway upon the Territory and the Nation's traditional cultural activities on the Territory; and

**WHEREAS**, the parties to this proceeding seek to settle this matter without further litigation; and

**WHEREAS**, this Stipulation of Settlement and Order ("Stipulation") was negotiated by the parties in good faith to avoid expensive and protracted litigation and the provisions, terms, and conditions of this Stipulation shall be deemed to bind the parties to this matter;

**AND THE PARTIES HAVING STIPULATED AND AGREED TO THE ENTRY OF THIS ORDER, IT IS ORDERED AS FOLLOWS:**

**1. Permanent Protection of the Buffer Area and Additional Wooded Areas on the STAMP Site Adjacent to the Territory.**

GCEDC shall place a conservation easement pursuant to ECL Section 49-0303 on approximately 204 acres of the STAMP Site adjacent or in proximity to the Territory which shall be permanently protected property to be maintained as a natural forested sanctuary and buffer between development on the STAMP Site and the Territory as shown on the map attached hereto as *Exhibit A* ("Permanently Protected Property"). In addition, the conservation easement shall also restrict development on two (2) one hundred foot strips of land immediately adjacent to the Permanently Protected Property as shown on *Exhibit A* totaling approximately 6.7 acres of the STAMP Site ("Restricted Protected Property"). GCEDC shall have the Permanently Protected Property and the Restricted Protected Property surveyed at GCEDC expense with appropriate field markings to be placed by the surveyor to mark the eastern boundary of the Permanently Protected Property/ Restricted Protected Property. A representative of the Nation shall be invited to monitor

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the survey field work. The conservation easement shall prohibit any type of development on the Permanently Protected Property and prevent residential, commercial, industrial, transportation-related and/or agricultural uses of the Permanently Protected Property with the intent that the Permanently Protected Property shall remain forever in its natural condition. The conservation easement shall prohibit the construction of any buildings on the Restricted Protected Property although STAMP related infrastructure including without limitation, utilities and/or storm water measures may be installed on the Restricted Protected Property. The Nation shall identify a suitable party to act as the grantee of the conservation easement. In consultation with the grantee, the specific terms of the Conservation Easement shall be negotiated between GCEDC and the Nation in good faith to achieve the purposes outlined herein.

**2. Pesticide Usage Near the Territory.**

GCEDC and Plug agree to not use pesticides (including herbicides, fungicides, or insecticides) on or near (within 50 feet) the Permanently Protected Property and/or the Restricted Protected Property including, subject to National Grid consent, the future easement to National Grid associated with the power line reroute on the STAMP Site a portion of which is within the Restricted Protected Property. If an issue occurs that cannot be mitigated without the use of pesticides, such as an issue with an invasive plant or insect, GCEDC, Plug, and the Nation agree to meet and confer in an attempt to address the situation and any agreement to use pesticides must be in writing signed by the Nation.

**3. Archeological Monitoring for Project Gateway Ground Disturbance.**

Plug will retain a third party archeological expert to monitor initial ground disturbance activities during construction of Project Gateway on the Plug Project Site. In the event that unexpected significant archeological resources are discovered, all excavation will be conducted in accordance with the procedures laid out in section 9 of that certain Programmatic Agreement between the United States Army Corps of Engineers Buffalo District; New York State Office of Parks, Recreation and Historic Preservation State Historic Preservation Office regarding STAMP, provided however that all references therein to the "Corps" shall be replaced with "NYSDEC" and further provided that the application of section 9 shall apply to both human remains and discoveries that may be human remains. The Nation will be invited to have a Nation representative present to monitor initial ground disturbance activities on the Plug Project Site during construction of Project Gateway and GCEDC shall pay the costs of said Nation monitor consistent with past archeological field monitoring activities by the Nation. The Nation agrees to have a representative promptly available to conduct such monitoring, but failure to be available in a timely manner will not prevent work from being conducted as scheduled.

**4. Waiver of Project Gateway New York State Litigation for Current Project Phase.**

**A.** The Nation agrees that it will not bring any litigation or any legal challenge, whether in State Court, Federal Court or in any Administrative State or Federal

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Tribunals, and otherwise waives brining any legal claims against Plug or GCEDC or any other agency regarding any approvals, decisions, permits or any other similar administrative determinations made by any Federal, State or local agency with respect to Project Gateway and/or the Plug Project that was reviewed and approved by GCEDC and the Town of Alabama as reflected in the below identified GCEDC and Town of Alabama Resolutions:

1. By Resolution identified in part as Resolution of the Genesec Industrial Development Agency d/b/a Genesee County Economic Development Center Pursuant to the State Environmental Quality Review Act Concerning Project Gateway, dated February 4, 2021, as well as subsequent resolutions by GCEDC identified as Authorizing Resolution dated March 4, 2021 and Final Resolution dated March 25, 2021, as well as GCEDC's related Resolution dated June 3, 2021 identified as Resolution of the Genesee Industrial Development Agency d/b/a Genesee County Economic Development Center (The "Agency") (i) acknowledging the supplemental public hearing by the Agency on Monday, June 3, 2021 with respect to the Plug Power Inc. (the "Company") amended project, (ii) authorizing an increase in the financial assistance to be provided by the Agency to the Company, (iii) ratifying and confirming the findings of the Agency on March 4, 2021 and March 25, 2021, and (iv) if necessary, authorizing the execution and delivery of related documents, GCEDC reviewed and issued certain approvals/determinations concerning Plug Power's Project Gateway and its two proposed construction phases (Phase I – building a daily production capacity for approximately 45 metric tons of liquid hydrogen along with all the ancillary services to support the full plan operation, and Phase II --which would add an additional 30 metric tons of production capacity).
  2. The Town of Alabama, New York, is currently reviewing Project Gateway, in the same or substantially similar form as was reviewed by GCEDC, including as to the proposed Phase I and Phase II developments, and made the following determinations/approvals concerning Project Gateway: a) Town of Alabama Town Board Resolution for 9/12/2021 Meeting (adopted on 9/12/2021), Motion to Confirm Conformance with the Findings and Amended Findings Issued by the Alabama Town Board, as SEQR Involved Agency, to Approve the Community Investment Agreement with Plug Power Facility at the STAMP Site, and b) Town of Alabama Planning Board Resolution for 9/27/2021 Meeting(adopted 9/27/2021), Motion to Confirm Conformance with the Findings Issued by the Alabama Town Planning Board, as SEQR Involved Agency, for Preliminary Site Plan Approval for the Plug Power Facility at the STAMP Site.
- B.** The Parties acknowledge that Plug Power has further submitted certain applications to the U.S. Department of Energy ("DOE") as to financing and/or loans related to Project Gateway. The Nation agrees that it will not bring any litigation or any legal challenge, whether in State Court, Federal Court or in any Administrative State or Federal Tribunals, and otherwise waives brining any legal claims regarding any approvals, decisions, permits or other administrative determinations made by the DOE

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related to Plug's application for financing and/or loans with respect to Project Gateway and/or the Plug Project that was reviewed and approved by GCEDC and the Town of Alabama as reflected in the above identified GCEDC and Town of Alabama Resolutions.

C. For the purposes of clarification, the Parties acknowledge that the foregoing waivers and releases by the Nation relate solely to challenging permits, approvals, determinations and other similar types of administrative actions solely related to Project Gateway and its two phases as reviewed and approved by GCEDC and the Town of Alabama as reflected in the above identified GCEDC and Town of Alabama Resolutions.

D. The Parties acknowledge that the Nation retains all rights to pursue all remedies available to it arising from or related to alleged damages or harm suffered as a result of any operations and/or physical activities at the Plug Project Site and Project Gateway now or in the future, as well as rights involving future undisclosed phases of Project Gateway and/or Plug Power Project Site that were not reviewed and approved by GCEDC and the Town of Alabama as reflected in the above identified GCEDC and Town of Alabama Resolutions.

E. The Nation also retains all of its rights to consult with, comment on, and otherwise provide input and feedback to all Federal, State, or local governmental entities regarding administrative actions/decisions concerning Project Gateway.

**5. Ongoing Discussions.**

GCEDC shall endeavor in good faith to assist the Nation in its efforts to obtain low cost power, if available, and water infrastructure for the Territory by facilitating discussions with local, state, and federal agencies with control over such infrastructure resources. Plug shall endeavor in good faith to coordinate with the Nation to make available to citizens of the Nation employment opportunities resulting from the development of Project Gateway. Plug and GCEDC shall also endeavor in good faith to allow the Nation's participation in any emergency preparedness and/or emergency response trainings or meetings that may be offered to the Alabama Fire Department, Genesee County EMS or other first responders.

**6. Changes by GCEDC to all Future SEQR Actions on the STAMP Site.**

For purposes of any future SEQR reviews at STAMP, GCEDC shall identify the Nation as an Interested Agency (as that term is defined by the SEQR Regulations), for all SEQR updates, revisions and/or processes undertaken by GCEDC relative to Actions (as that term is defined by the SEQR Regulations) taking place at the STAMP Site. In addition, GCEDC shall provide notice and information to the Nation regarding possible tenants at STAMP at least two months before official final action is taken pursuant to SEQR and shall complete the initial assessment required by the LOR and receive Nation input on same pursuant to the terms of that certain Letter of Resolution among NYSDEC; the New York State Office of Parks, Recreation and Historic

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Preservation; and GCEDC regarding STAMP (Dkt. 226), prior to making any final determinations under SEQOR relating to or about future development projects at the STAMP Site.

7. Dismissal.

This action is dismissed with prejudice for the reasons set forth in this Court's Decision and Order entered on October 5, 2021 (NYSCEF Dkt. Nos. 254 & 255), from which the Nation will not take any appeal to the Appellate Division, Fourth Department.

Dated: October 12, 2021

EARTHJUSTICE

By *Suzanne Novak*

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Dated: October 13, 2021

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Dated: October 13, 2021

YOUNG SOMMER LLC

By \_\_\_\_\_  
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SO ORDERED  
\_\_\_\_\_  
Hon. Charles Zambito, A.J.S.C.

Entered: \_\_\_\_\_

**FILED: GENESEE COUNTY CLERK 10/18/2021 12:04 PM**

**FILED: GENESEE COUNTY CLERK 10/18/2021 10:53 AM**

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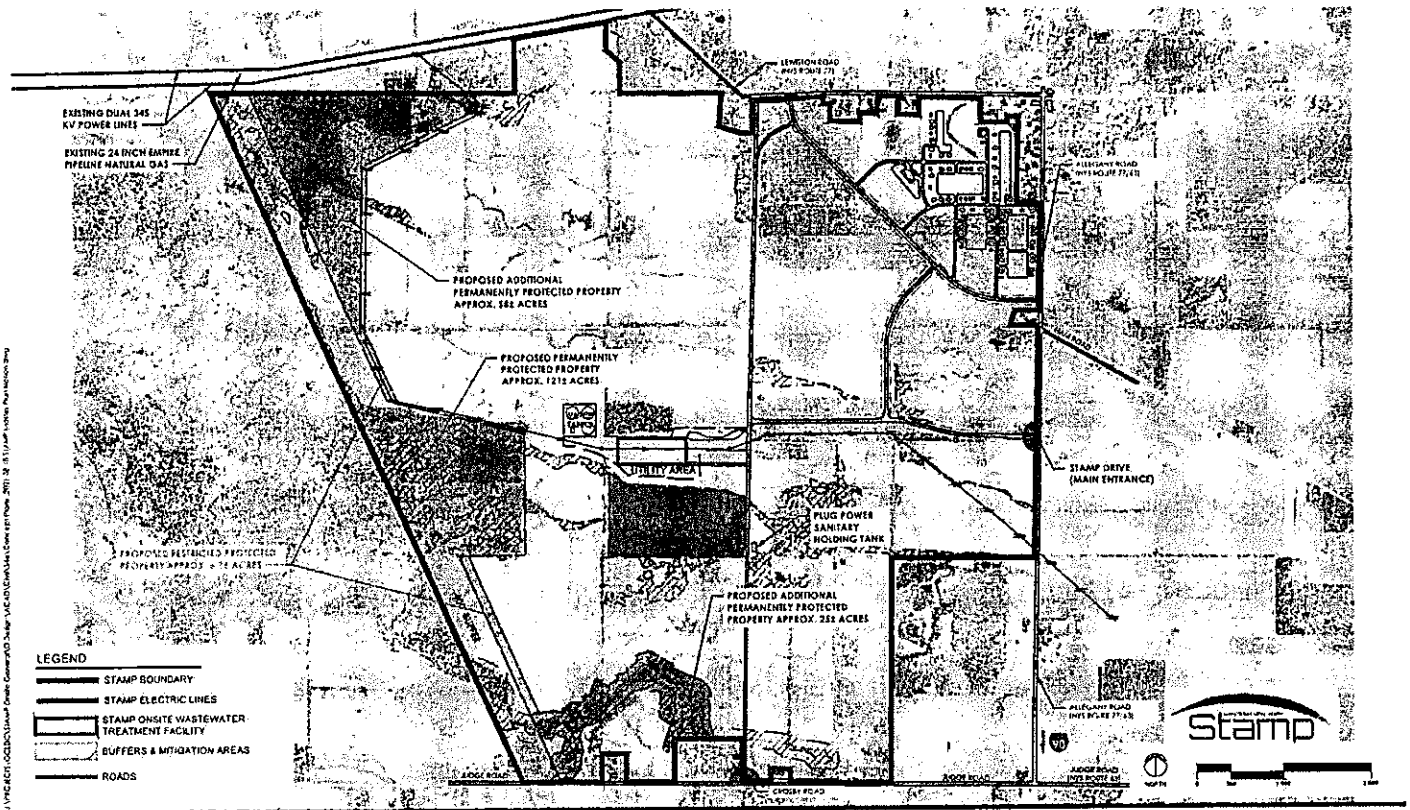
INDEX NO. E69171

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RECEIVED NYSCEF: 10/18/2021

RECEIVED NYSCEF: 10/15/2021

## Exhibit A



### STAMP - MASTER PLAN

WHY SCIENCE AND TECHNOLOGY ADVANCED MANUFACTURING PARK (STAMP)  
OCTOBER 2021