

STATE OF NEW YORK
SUPREME COURT : COUNTY OF GENESEE

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.

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

Attorneys for Defendants-Respondents Steven Hyde, Mark Masse, Peter Zeliff, Matthew Gray, and Genesee County Economic Development Center (collectively, "GCEDC Respondents")
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

TO: EARTHJUSTICE

Attorneys for Petitioner

Suzanne Novak & Michael Youhana, Esqs., Of Counsel

Northeast Regional Office

48 Wall Street, 15th Floor

New York, New York 10005

Telephone No.: (212) 823-4981

- and -

Gussie Lord & Laura Berglan, Esqs., Of Counsel

Tribal Partnerships Program

633 East 17th Street, Suite 1600

Denver, Colorado 80202

Telephone No.: (720) 402-3764

BERKEY WILLIAMS LLP

Alexandra Page, Esq., Of Counsel

Attorneys for Petitioner

616 Whittier Street NW

Washington, DC 20012

Telephone No.: (202) 302-2811

YOUNG/SOMMER LLC

Attorneys for Defendant-Respondent Plug Power, Inc.

Joseph F. Castiglione, Esq., Of Counsel

5 Palisades Drive, Suite 300

Albany, New York 12205

Telephone No.: (518) 438-9907

Doc #10006452.1

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STATE OF NEW YORK
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For a Judgment Under Article 78 of the Civil Practice
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Economic Development Center Board of Directors, GENESEE
COUNTY ECONOMIC DEVELOPMENT CENTER, and
PLUG POWER, INC.,

Defendants-Respondents.

**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 SEQR 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*

Suzanne Novak
Michael Youhana
Gussie Lord
Laura Berglan
Northeast Regional Office
48 Wall Street, 15th Floor
New York, NY 10005
Tel: 212-823-4981

BERKEY WILLIAMS LLP

By: Alexandra Page
616 Whittier St. NW
Washington, D.C. 20012
Tel: (202) 302-2811

Attorneys for Petitioner Tonawanda Seneca Nation

Dated: October 13, 2021

PHILLIPS LYTTLE LLP

By *Craig R. Bucki*

Craig R. Bucki, Esq.
Attorneys for Respondents Steven Hyde, Mark Masse, Peter Zeliff, Matthew Gray, and Genesee County Economic Development Center
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

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Dated: October 13, 2021

YOUNG SOMMER LLC

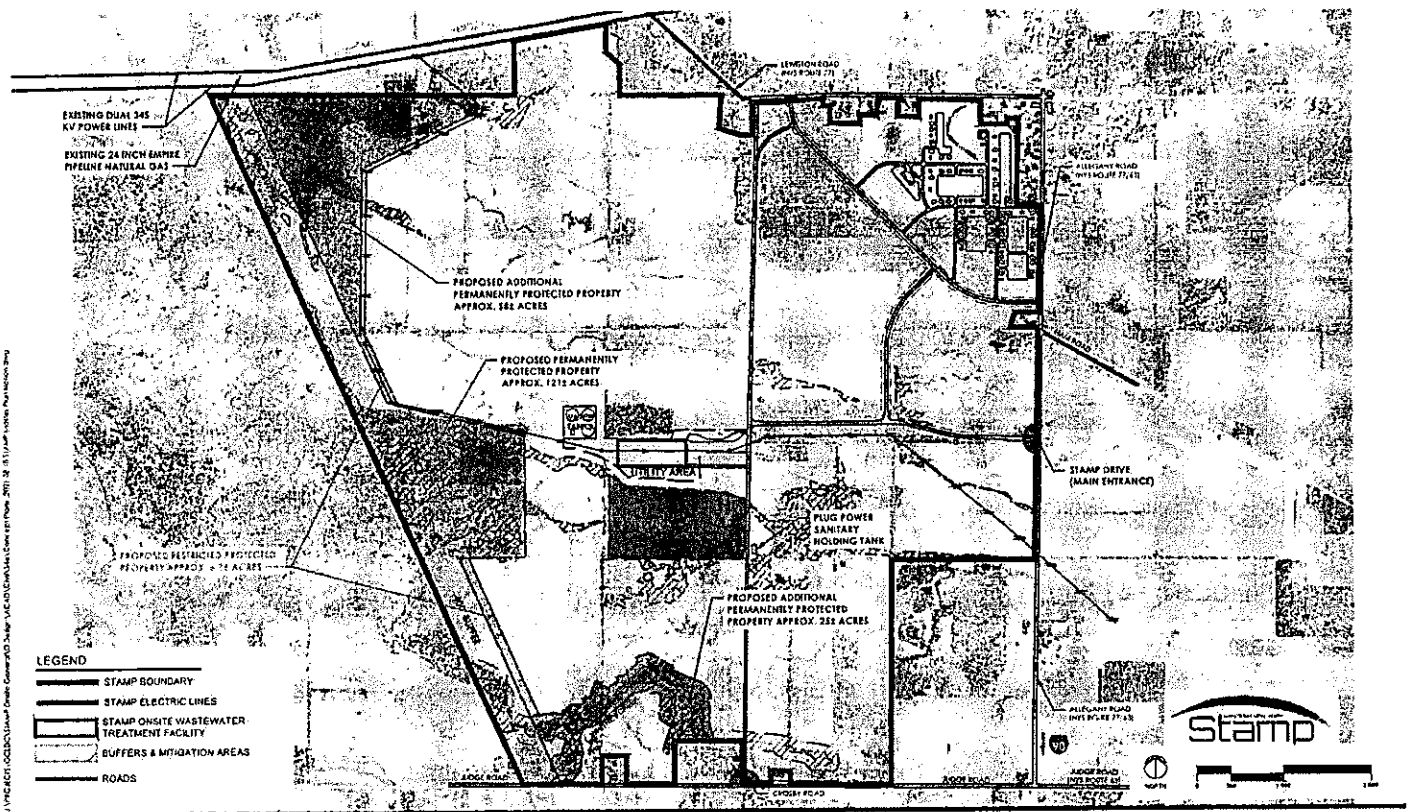
By _____
Joseph F. Castiglione, Esq.
Attorneys for Defendant-Respondent Plug Power, Inc.
5 Palisades Drive, Suite 300
Albany, NY 12205
(518) 438-9907

SO ORDERED

Hon. Charles Zambito, A.J.S.C.

Entered: _____

Exhibit A



STAMP - MASTER PLAN

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