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January 13, 2022

Via email to Kimberly.Merchant@dec.ny.gov

Kimberly Merchant

NYSDEC

6274 E. Avon-Lima Rd

Avon, NY 14414

**RE: Comments Opposing Proposed SPDES Permit for STAMP Facility
SPDES No. NY 027 2078**

Nya:wëh Sgë:nö', Ms. Merchant:

On behalf of the Tonawanda Seneca Nation, Council of Chiefs, I'd like to extend greetings to you and your associates and give thanks that all are enjoying good health.

The Tonawanda Seneca Nation strongly objects to permitting of a Wastewater Treatment Facility (WWTF) directly adjacent to the Nation's Reservation Territory and within the Nation's ancestral territory. The Nation requests that DEC carefully consider the Nation's input, including comments submitted by the Nation below; at a meeting with DEC on December 17, 2021; and in letters of December 3, 2021 and October 22, 2021; and that, prior to taking any action to approve the Permit, DEC meet with the Nation and representatives of the United States Environmental Protection Agency (EPA) to discuss the Nation's concerns. Although the Permit Applicant has characterized the Nation's ability to submit comments as "frankly nonsense," DEC has a legal obligation to consider input from the Nation and ensure any permit it issues meets relevant State and Federal standards. And although DEC informed the Nation by letter on December 23, 2021 that the Nation's comments must be submitted by "1 o'clock in the afternoon on January 14, 2022," DEC still has not responded to the Nation's letter of October 22, 2021, pointing out an apparent violation of the Clean Water Act in the terms of the draft Permit.

The Nation remains extremely concerned about impacts to the Nation and its cultural resources from the Wastewater Treatment Facility. Specifically, there has been no assessment of how noise or odor from the WWTF might impact the Nation's citizens and cultural practices. There has been no assessment of the possible effects of the WWTF on the animals that freely travel on and around the Nation, including animals that Nation citizens hunt in the Big Woods, which lies

downstream and less than a mile from the WWTF. Nor has any entity examined how spillage from accidental leaks or overflow at the WWTF could impact the Nation's waters or the plants, animals, or people. Species of critical importance to the Nation and to our cultural practices rely on clean water and air, as well as undeveloped surroundings, to thrive. Construction of a WWTF designed to handle 6 million gallons of wastewater per day will dramatically alter the conditions that have supported the plants and animals on and around Nation Territory for centuries.

Even more critically, there has been no comprehensive assessment of the potential adverse impacts of development of the STAMP site as a whole on the Nation's cultural resources. The cumulative impacts – first Plug Power, next the WWTF, and whatever additional projects may come to STAMP – pose a grave threat to the Nation and its environment. The Nation calls on DEC to require a supplemental environmental impact survey that incorporates Nation participation to adequately assess any such impacts of the WWTF and other facilities, both individually and cumulatively

In addition, the Nation requests that DEC deny the WWTF SPDES permit, and, in the event the permit is not denied, that DEC work with the Nation and EPA to modify the permit so as to ensure robust protections for the Nation and the environment. The Nation raises specific concerns about the SPDES permit below.

I. Oak Orchard Creek is an Inappropriate Discharge Location for a New Sewage Treatment Plant and Future Industrial Discharges from the STAMP Site.

A. The proposed Permit cannot legally authorize a new Phosphorus discharge into Upper Oak Orchard Creek.

The Permit's receiving water is Oak Orchard Creek upstream, or south, of Medina. This portion of Oak Orchard Creek is considered "Upper" Oak Orchard Creek with Hydro Unit Code 0413000104.¹ This segment of Oak Orchard Creek is listed on New York's Final 2018 Section 303(d) List as impaired for Phosphorus.² Inclusion of Oak Orchard Creek on the 2018 303(d) List as impaired for Phosphorus means that Oak Orchard Creek is currently not meeting its water quality standards relative to Phosphorus.

The Permit includes a Total Phosphorus monthly average limit of 0.5 mg/L and a limit of 4.2 lbs/day. The Clean Water Act prohibits issuance of a permit "[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the

¹ See DEC's description of the Oak Orchard Creek Watershed, at 8 [https://www.dec.ny.gov/docs/water_pdf/wilkontwoakorhard_\(1\).pdf](https://www.dec.ny.gov/docs/water_pdf/wilkontwoakorhard_(1).pdf).

² Final 2018 303(d) List at 26, https://www.dec.ny.gov/docs/water_pdf/section303d2018.pdf; see also Sulkin Declaration ¶ 12 ("photos from a recent site inspection... show significant foam at the discharge site... which may be indicative of existing worrisomely elevated levels of Phosphorous").

violation of water quality standards.”³ Specifically, Clean Water Act regulations require “[t]he owner or operator of a new source . . . proposing to discharge into a water segment which does not meet applicable water quality standards . . .” and for which the state has performed a “pollutants load allocation for the pollutant to be discharged” must demonstrate, “before the close of the comment period” that: (1) there are “sufficient remaining pollutant load allocations to allow for the discharge” and (2) the “existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with water quality standards.”⁴

Because this facility proposes a new Phosphorus discharge into Upper Oak Orchard Creek, which is impaired for Phosphorus and there is no existing Total Maximum Daily Load containing a pollutants load allocation, the Clean Water Act prohibits this proposed discharge.

This Clean Water Act violation could have grave consequences for Oak Orchard Creek. Discharging more Phosphorous into a water body already impaired for Phosphorus is “likely to cause or exacerbate pollution due to low dissolved oxygen and algal growth, including harmful algal blooms.”⁵ The Nation informed DEC of its concerns about this matter in a letter sent to the agency on October 22, 2021, but has yet to receive a response.

B. The proposed discharges will overwhelm Oak Orchard Creek.

The Permit authorizes a 1 million gallon a day discharge and authorizes the applicant to build a pipeline “designed for a future capacity of” 6 million gallons a day discharge into Oak Orchard Creek.⁶ The stream receiving effluent from the facility and any other entities utilizing the outfall pipeline is at risk of becoming effluent dominated, meaning that the water body’s flow could become “predominately made up of treated wastewater.”⁷ The reason that this portion of Oak Orchard Creek may become effluent dominated is that these receiving waters have a 7Q10 flow 0.46 MGD—a fraction of the millions of gallons per day that STAMP Sewage Work intends that it and future industrial users will pump into the creek.⁸

Transforming Oak Orchard Creek into an effluent dominated stream would violate the state’s water quality standards. New York law prohibits flows into Class C streams, such as Oak Orchard Creek, “that will impair the waters for their best usages.”⁹ Among other problems, effluent dominated streams often emit foul odors that make the water body “less desirable for

³ 40 C.F.R. § 122.4(i); *see also* ECL § 17-0511; 6 CRR-NY 750-1.3(d).

⁴ 40 C.F.R. 122.4(i).

⁵ Sulkin Declaration ¶ 13; 6 CRR-NY 703.2 (describing the narrative water quality standard for phosphorous as “[n]one in amounts that will result in growths of algae, weeds and slimes that will impair the waters for their best usages”).

⁶ Notice of Complete Application at 2.

⁷ Sulkin Declaration ¶ 20.

⁸ *Id.* ¶ 19.

⁹ 6 CRR-NY 703.2; Sulkin Declaration ¶¶ 19-20.

recreational users”¹⁰ such as fishers or swimmers.

The applicant failed to examine the impact of a 6 MGD discharge into Oak Orchard Creek at low flow, as represented by the 7Q10. The applicant’s hydrology study only looked at the impact of the proposed discharge during periods of high-flow to examine the potential flooding impacts. However, inundating a stream with a 7Q10 of 0.5 MGD with 6 MGD of flow could have disastrous impacts for the existing aquatic community that relies on the current flow levels.¹¹

II. The Permit’s Monitor-only Approach for the First Six Months of the Facility’s Operation Fails to Protect Water Quality.

The Permit’s effluent limits only become effective six months after DEC accepts the certificate of construction. For the first six months of the facility’s operation, the Permit does not limit the facility’s discharge: “The interim limits are monitor only until the final effluent limitations become effective.”¹² Allowing unlimited pollution from the facility for the first six months of its operation fails to protect water quality or comply with water quality standards, particularly for Phosphorus.¹³ DEC has provided no justification or evidence in the record explaining how this permit provision protects water quality or is necessary for operation of the facility.

III. The Permit’s Limits and Monitoring Requirements Fail to Comply with the Law or Reflect Reasonable Decision-Making.

A. The Permit’s temperature limits and monitoring requirements fail to comply with the law.

New York’s temperature water quality standard prohibits discharges that raise stream temperatures by more than 5 degrees higher than the temperature prior the receipt of effluent.¹⁴ The law also requires that “[a]ll permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility.”¹⁵ The Permit sets the temperature limit at 90F and requires compliance testing at the end of the treatment process, not in stream.¹⁶ This approach fails to comply with the law.

¹⁰ *Id.* ¶ 21.

¹¹ *See id.* ¶ 21.

¹² Permit at 5; *see also* Sulkin Declaration ¶ 11.

¹³ *See, e.g.*, ECL § 17-0809(1) (“SPDES permits issued pursuant hereto shall contain applicable effluent limitations as required by the Act and as may be promulgated by the department”); § 17-0815; 40 CFR §§ 122.43-45.

¹⁴ 6 CRR-NY 704.2(b)(1); *see also* Sulkin Declaration ¶ 14.

¹⁵ 40 CFR § 122.45(a).

¹⁶ Sulkin Declaration ¶¶ 14, 15.

In order to comply with the law, the Permit must require water temperature monitoring in “both the receiving water, upstream of the outfall and the water discharging from the outfall.”¹⁷ It is important that the discharge comply with the state’s temperature water quality standards because effluent that fails to comply can “fundamentally change the ecology of the creek and exacerbate problems related to dissolved oxygen and algae blooms.”¹⁸

B. The Permit’s dissolved oxygen monitoring requirements are insufficient.

The Permit must require dissolved oxygen monitoring in the water at the outfall site that will allow the agency “to determine compliance with effluent limitations and water quality standards that are or may be effected by the discharge.”¹⁹ The Permit’s current monitoring requirements fail to comply with the regulations because the monitoring location is “approximately 9 miles from the receiving water.”²⁰ The monitoring requirements are also unreasonable because they are too infrequent, occur at too few locations, and conclude prematurely.²¹

C. The Permit’s Fecal Coliform and Chlorine limits do not protect recreation uses in Oak Orchard Creek.

The Permit must ensure its Fecal Coliform and Chlorine limits protect water quality and recreational uses. For Fecal Coliform, the Permit’s limits must be set below the state criteria in order to ensure that the waters of Oak Orchard Creek are not contaminated with pathogens.²² The Permit sets Fecal Coliform levels at the criteria level without a margin of safety.²³ This absence of a margin of safety is especially concerning because Oak Orchard Creek is a Class C stream,²⁴ meaning that its best use is fishing and that it must “be suitable for primary and secondary contact recreation.”²⁵ Indeed, there is evidence of contact recreation at or near the discharge site.²⁶

In addition, the Permit’s limit for chlorine risks violating water quality standards because it is “too high for protection of the receiving waters, and above the level recommended by

¹⁷ *Id.*; see also 6 CRR-NY 750-1.13.

¹⁸ *Id.*; see also 6 CRR-NY 704.1(a) (“All thermal discharges to the waters of the State shall assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water”).

¹⁹ 40 CFR § 122.45(a); 6 CRR-NY 750-1.13.

²⁰ Fact Sheet at 6.

²¹ Sulkin Declaration ¶ 16.

²² *Id.* ¶ 17.

²³ *Id.*

²⁴ Notice of Complete Application at 1.

²⁵ 6 NYCRR 701.8.

²⁶ Sulkin Declaration ¶ 18.

EPA.”²⁷ Class C streams should be “suitable for fish, shellfish and wildlife propagation and survival,”²⁸ but high levels of chlorine are a threat to such aquatic life.²⁹ And high levels of the chemical can be hazardous to people engaged in contact recreation.³⁰

D. The Phosphorus limit does not reflect the lowest achievable limits through implementation of widely available technology.

The Phosphorus limit in the Permit does not reflect the lowest amount of Phosphorus that is technologically feasible at this proposed facility. At the December 20, 2021 tour of the Dansville Wastewater Treatment Facility provided to the Nation and Earthjustice by DEC, the operator of that facility shared that the Phosphorus discharges from the facility were 0.2 mg/L. Likewise, in New York City, the Phosphorus limit for wastewater facilities must reflect best treatment technology and facilities discharging over 500,000 gallons per day must be limited to 0.2 mg/L of Phosphorus.³¹ If this discharge level is feasible and required elsewhere in the state, there is no justification to have a higher discharge limit.

E. The proposed wet well is too small for the proposed discharges.

The wet well that will serve as a receptacle for effluent flowing from the wastewater treatment facility before moving into the 9-mile pipeline leading into Oak Orchard Creek only has a “relatively small volume of 60,000 gallons.”³² The Applicant’s plan to nevertheless pump 1 MGD of effluent into Oak Orchard Creek could very well lead to backed up sewage that would cause this small, overflowing wet well to leak.³³ DEC must not approve the Permit with such high volumes of effluent or with such a small wet well.

Leaks or overflows from the wet well are of particular concern to the Nation because of the well’s close proximity to the Nation’s reservation. Leaked or spilled effluent from the wet well could potentially travel into the territory of the reservation, for instance through nearby hydrologically linked wetlands, and thereby harm the health or environment of the Nation.

F. Compliance should be measured at the outfall.

The Permit provides for compliance monitoring at the end of the treatment works, not at the outfall. Given the length of the proposed discharge pipeline, the Permit must require compliance at the outfall in order to determine the impact the discharge has on the receiving

²⁷ *Id.* ¶ 17; 6 CRR-NY 703.2 (describing the narrative water quality standard as for this category of pollutants as “[n]one in amounts that will... impair the waters for their best usages”).

²⁸ 6 NYCRR 701.8.

²⁹ Sulkin Declaration ¶ 17.

³⁰ *Id.* ¶ 18.

³¹ 10 NYCRR 128-3.6(a)(8).

³² Sulkin Declaration ¶ 22.

³³ *Id.*

water and to comply with the requirement “to determine compliance with effluent limitations and water quality standards that are or may be effected by the discharge.”³⁴ Given that there is no public access from the nearest road to the location of the outfall, the applicant should explain to DEC how it plans to lawfully access the outfall in order to perform compliance monitoring. If the applicant cannot lawfully access the outfall, DEC should not issue the Permit.

G. The Permit should require monitoring for PFOA and PFOS.

DEC is in the process of finalizing guidance values for PFOA and PFOS in surface waters. The Permit should require monitoring for PFOA and PFOS, since these pollutants are regularly found in sewage.³⁵ Further, because we do not know what kind of industrial facilities will be built at STAMP, the Permit should incorporate monitoring requirements for PFOA and PFOS to ensure these harmful pollutants are not introduced into Oak Orchard Creek.

IV. DEC Cannot Issue the Permit Until the Applicant Provides Complete Information about the Proposed Operations and Discharges.

A. DEC cannot issue the Permit without clarifying the identity of the applicant, the operator, and the owner of the facility.

All SPDES permits must contain “the discharger’s name and legal status (corporate, individual, partnership or public).”³⁶ First, the Joint Application Form lists “Genesee Gateway Local Dev Corp/Genesee County EDC” as the applicant, and the property owner simply as “multiple.”³⁷ The permit application was transferred to “STAMP Sewer Works, Inc.” and the Notice of Complete Application identifies STAMP Sewer Works Inc. but the Permit states that the applicant is STAMP Sewage Work Corp.³⁸

DEC must ensure that the Permit is issued to the proper entity. In addition, the Nation seeks clarification on the relationship among STAMP Sewer Works, Inc., Genesee Gateway Local Dev Corp/Genesee County EDC, and the unnamed “multiple” property owners. The Secretary of State’s website does not reflect any information regarding the identity of the Chief Executive Officer or any of the board of directors of STAMP Sewer Works, Inc. and the articles of incorporation are written to limit the liability of any corporate officers. Who is actually the owner and the operator of the facility and who will be responsible for constructing, operating, and maintaining the facility?

³⁴ 40 CFR § 122.45(a); 6 CRR-NY 750-1.13.

³⁵ See Amila O. De Silva et al., *PFAS Exposure Pathways for Humans and Wildlife: A Synthesis of Current Knowledge and Key Gaps in Understanding*, 40 *Env’tl Toxicology & Chemistry* 631 (2020).

³⁶ 6 CRR-NY 750-1.7(a)(1).

³⁷ *Id.*

³⁸ Sulkin Declaration ¶ 29.

Resolving “the lack of clarity and consistency across these documents”³⁹ is important to the Nation for two reasons. First, it will help the Nation figure out whether or not the correct party applied for this permit.⁴⁰ Second, whether the facility is regulated as a Publicly Owned Treatment Works (POTW) turns on the identity of the owner.⁴¹ If the facility is in fact a POTW, then the Nation may need to submit additional comments on the application to ensure that the facility adheres to that regulatory framework.

B. DEC cannot issue the Permit without clarifying the identities of dischargers and the nature of their wastewater for any person or corporation that plans to send wastewater through the sewage treatment plant’s treatment works or outfall pipe.

The applicant has failed to comply with the law by neglecting to provide the necessary information about the dischargers that will be using the facility. Specifically, the law requires that, “[f]or facilities that are not POTWs, but receive wastewater or storm water from other persons, [the permit application] information shall include the identity of each user of the treatment works.”⁴² The Transportation Corporation law confirms that discharge pipes are considered a part of the sewage system.⁴³

The Permit claims that the “new plant would have an initial design capacity to accommodate an average flow of up to 1 million gallons per day of sanitary wastewater . . .”⁴⁴ However, it is not clear where this flow is actually coming from. The Permit claims the wastewater treatment plant would “serve the Science & Technology Advances Manufacturing Park (STAMP) and *potential* future domestic users in the Town of Alabama.”⁴⁵ There are currently no buildings or facilities constructed at the STAMP site that would be sending wastewater to the facility. The only facility currently approved and being constructed is the Plug Power facility, but that facility is not listed as a user of the treatment works, nor is there any indication whether Plug Power will be sending only sanitary wastewater to the facility or if it will be sending process wastewater either through the treatment facility or through the facility’s sewage pipes to Oak Orchard Creek. Thus, the applicant has not included the identity of any user of the treatment works, as required by regulation.

³⁹ *Id.*

⁴⁰ 6 CRR-NY 750-1.6(a) (“When a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit”).

⁴¹ EPA Memorandum: Permit Implications of Privatization at 3-4 (Apr. 16, 1987), https://www.epa.gov/system/files/documents/2021-07/owm0397_0.pdf.

⁴² 6 CRR-NY 750-1.7(b)(3).

⁴³ Transportation Corporation Law, Art. 10 § 115(2) (“‘Sewer system’ means all sewer pipes and other appurtenances which are used or useful in whole or in part in connection with the collection, treatment or disposal of sewage, and other waste, including sewage pumping stations and sewage treatment and disposal plants and sites”)

⁴⁴ Notice of Complete Application at 2.

⁴⁵ Notice of Complete Application at 2 (emphasis added).

This regulatory violation raises practical concerns. One prospective tenant proposes to manufacture polyethylene film on the STAMP site.⁴⁶ The Nation would like to know whether harmful waste or byproducts of the manufacturing process will be discharged through the outfall pipe into Oak Orchard Creek. Information of this kind will also allow DEC to determine which technology-based limits apply to the facility.⁴⁷

There has been no showing that the proposed sewage treatment plant would have enough consistent flow through the facility to properly maintain the functioning of the sewage works. The permit application fails to identify “each user of the treatment works” and should therefore be denied until the time that there are identified users of the treatment works.⁴⁸

C. Approving a 6 MGD pipeline for future undisclosed discharges as part of an application for a sewage treatment plant that has not identified users is illegal and contrary to the Clean Water Act and public policy.

1. Approving the Permit and its 9-mile pipeline is pre-approving future industrial discharges.

DEC’s approach of approving a pipeline with 6 MGD capacity with the intent of approving future undisclosed discharges to Oak Orchard Creek via a 9-mile pipeline undermines the Clean Water Act and its requirement to review and approve each proposed discharge individually and to allow public review and comment on proposed discharges.⁴⁹

If DEC approves this Permit—which explicitly admits it is building this facility in order to build the pipeline to accommodate future industrial discharges it has not yet identified—DEC is essentially pre-approving those future discharges into Oak Orchard Creek without disclosing the volume and nature of those discharges or explaining where the discharges are coming from.⁵⁰ These facilities could be proposing to discharge harmful levels of pollutants into Oak Orchard Creek, but if they route their wastewater through the wastewater treatment facility, the Nation could be effectively precluded from objecting to those discharges. Allowing a small wastewater treatment plant with no identified users to build a large, long pipeline, the primary purpose of which is to convey industrial wastewater for facilities before they are built or even identified, is essentially pre-approving those discharges. By authorizing this permit while fully aware that this

⁴⁶ 11/19/21 Mark Masse Email on Project Greenleaf.

⁴⁷ EPA Memorandum: Permit Implications of Privatization at 2 (Apr. 16, 1987), https://www.epa.gov/system/files/documents/2021-07/owm0397_0.pdf.

⁴⁸ See Sulkin Declaration ¶ 23, 26-27.

⁴⁹ See 33 U.S.C. § 1342; ECL § 17-0805.

⁵⁰ See Sulkin Declaration ¶ 23 (“a 1 million gallon a day discharge can serve up to 10,000 people... If the facility plans only to provide sewage treatment service for future industrial facilities to be built on the STAMP site... this facility appears to be much too large for the STAMP site’s sanitary sewage needs”).

application does not represent the anticipated discharges, DEC has made these future discharges all but inevitable.

For this reason, this Permit is premature and must be denied. The Permit cannot be issued until there are identified users of the sewage system—which includes both the treatment works and the pipeline. The Permit cannot pre-approve these future discharges and cannot condone building massive pipeline infrastructure to accommodate unknown future industrial discharges.

2. DEC’s plan to issue separate permits for future industrial facilities to discharge into the facility’s wet well would make enforcement impossible.

DEC’s stated intention to allow multiple STAMP tenants to discharge from Outfall 01 would make enforcement of water quality violations near impossible and the proposal is therefore unreasonable. DEC must clarify that all present and future discharges from a single outfall will be covered under a single permit. The Notice of Complete Application explains that “[i]f STAMP tenants desire to use this project outfall pipe for any future industrial discharge, they first would be required to submit a new SPDES permit application, subject to SEQRA and full public notice requirements, and to receive their own individual SPDES permit, specific to their industrial process, prior to authorization to discharge.”⁵¹ However, the Permit states, “[l]imits may be reassessed upon a request to add new dischargers, either to the STAMP WWTP, or for a separate individual permit but whose discharge combines with the discharge of this permit and is discharged to Outfall 01.”⁵² DEC’s inconsistent language here deprives the Nation of its ability to critically evaluate what exactly is being proposed for this Permit and for the STAMP site as a whole.

Furthermore, it would be unreasonable for DEC to issue multiple SPDES permits authorizing discharge through a single outfall. To do so would make it “extraordinarily difficult” for DEC, the Nation, or concerned individuals to enforce the terms of the several permits if there was an end-of-pipe violation.⁵³ DEC has an obligation to the Nation to provide examples of whether and how it has ensured compliance out of a similarly shared outfall elsewhere in New York.⁵⁴

What is clear is that if DEC’s plan is for future industrial facilities to discharge at Outfall 01 using the pipeline, those discharges must be incorporated into this Permit, which must be

⁵¹ Notice of Complete Application at 2; *see also* Sulkin Declaration ¶ 26.

⁵² Permit at 5.

⁵³ Sulkin Declaration ¶ 26; *see also* ECL § 17-0801, 0803 (“The department shall... require that every applicant for a permit to discharge pollutants into the waters of the state shall file such information at such times and in such form as the department may reasonably require to execute the provisions of this article”); TOGS 1.4.2 at 2 (“The Department *will* take appropriate action to ensure all regulated point source and non-point source dischargers comply with applicable laws and regulations to protect public health and the intended best use of the waters of the state”) (emphasis added).

⁵⁴ Sulkin Declaration ¶ 28.

reopened prior to authorizing any additional discharge.⁵⁵ The Permit Applicant must be the single entity liable for all discharges that flow through the outfall, and for monitoring reporting,⁵⁶ and remedying water quality violations at Oak Orchard Creek.⁵⁷ The Nation must be given notice of any proposed changes and at least 90 days to object or provide comment to any change in the discharge. The only reasonable alternative would be to hold all permit holders discharging through Outfall 01 jointly and severally liable for water quality violations in Oak Orchard Creek as well as monitoring for and remedying those violations.⁵⁸

V. STAMP Sewer Works Inc. is Ineligible to Receive Permits until it Complies with New York's Transportation Corporations Law.

A. The law requires a Sewage Works Corporation to supply the residents of the towns in which it is located with sewage service.

STAMP Sewer Works Inc. is a "Sewage Works Corporation" as that term is defined in the Transportation Corporations Law.⁵⁹ The law specifies that "[a] sewage-works corporation *shall* supply each city, town, village or other municipal area or district wherein such corporation operates, *and the inhabitants therein*, with facilities or make provision for the collection, treatment and disposal of sewage at fair, reasonable and adequate rates."⁶⁰

The certificate of incorporation for STAMP Sewer Works Inc. confirms that the "Corporation's sewer system will be situated in both the Towns of Alabama, New York and Towns of Shelby, New York."⁶¹ Yet, there is no information in the Permit or the Notice of Complete Application indicating that STAMP Sewer Works will supply these two towns or its residents with sewage services as required by law. To the contrary, the Notice of Complete Application states that the proposed facility will only *potentially* serve "future domestic users in the Town of Alabama" at some unspecified point in the future.⁶² Service for the Town of Shelby is not even mentioned in these documents.

⁵⁵ ECL § 17-0815(2).

⁵⁶ TOGS 1.4.2 at 3 ("Compliance with [pollutant specific effluent limits] via self-reporting is critical to the protection of water quality").

⁵⁷ Sulkin Declaration ¶¶ 26-27.

⁵⁸ *Id.*

⁵⁹ Transp. Corp. Law § 115(1) (Defining "Sewage Works Corporation" as "a corporation heretofore or hereafter organized to provide a sewer system as hereinafter defined for the disposal of sewage, through an established system of pipe lines, treatment plants and other means of disposal, and which erects, operates, maintains and performs other necessary acts incidental thereto, disposal systems for sewer areas formed within towns or villages and other municipal areas of the state");

⁶⁰ Transp. Corp. Law § 121; *see also* Certificate of Incorporation STAMP Sewer Works Inc. at 1 ("The Corporation shall be a sewage works corporation").

⁶¹ Certificate of Incorporation STAMP Sewer Works Inc. at 2.

⁶² Notice of Complete Application at 1.

B. STAMP Sewage Works' failure to post a bond guaranteeing it will build the system and provide sewage service to the municipalities for five years precludes DEC from issuing the Permit.

New York law requires that the local governing bodies for the cities, towns, and villages in which a sewage-works system is situated “shall require the posting of a performance bond” for the completion of construction of the facility.⁶³ The law also requires that the “local governing body shall require a reasonable guaranty from the corporation that said corporation will continue to maintain and operate the system for a period of at least five years.”⁶⁴ DEC should deny the Permit because STAMP Sewerage Works has not provided guarantees that it will provide sewage service to the residents of Alabama and Shelby for at least five years.

C. DEC should not issue the Permit if STAMP Sewage Works was formed to provide public benefits to private industrial dischargers.

New York law provides certain benefits and rights to sewage works corporations, including the right to condemn private property in order to lay its sewage lines.⁶⁵ The reason that sewage works corporations are given the right to condemn property to install sewage lines is because these sewage works corporations provide a public benefit by providing sewage services to the residents of the towns, municipalities, and villages where they operate. STAMP Sewage Works was not formed to serve the people of Alabama or Shelby. It was formed to serve the future industrial dischargers Genesee Economic Development Corporation is trying to entice to come and build on the STAMP site. DEC cannot approve STAMP Sewage Works' plan to build a 9-mile discharge pipeline through private property and a national wildlife refuge, condemning private and public property, in order to build a discharge pipeline for private industrial dischargers.

VI. The Permit Must be Put on the No Administrative Renewals List to be Technically Reviewed Every Five Years.

Under New York State's Environmental Benefit Permit Strategy, “[a]ny permit for facilities that discharge into a 303(d) listed water... if . . . the permittee discharges a pollutant that is the cause of the impairment and . . . the effluent limit for that pollutant is not water quality based” must be placed on a high priority No Administrative Renewals List and receive a full technical review by the DEC's Division of Water every five years.⁶⁶ Permits “which have the greatest potential for causing significant environmental harm” are also placed on the No

⁶³ Transp. Corp. Law § 119(1).

⁶⁴ Transp. Corp. Law § 119(2).

⁶⁵ Transp. Corp. Law § 124.

⁶⁶ Technical and Operational Guidance Series (TOGS) 1.2.2 – *Administrative Procedures and the Environmental Benefit Permit Strategy for Individual Permits* at 5, 22

https://www.dec.ny.gov/docs/water_pdf/togs122.pdf; see also Region 2 NPDES Program and Permit Quality Review at 11, https://www.epa.gov/sites/default/files/2019-07/documents/new_york_2019.pdf.

Administrative Renewals List. An additional reason to place this permit on the NARL is because it is a Class 05 permit,⁶⁷ which the Applicant intends to modify.⁶⁸ For these reasons, the Permit must receive a full technical review every five years.

Additionally, the potential impacts of this Permit on the Nation and the Nation's concerns regarding this Permit and future permitting at the STAMP facility are further justification for requiring a full technical review of the Permit every five years.

VII. DEC Should Not Issue the Permit Until Approvals are Received by Property Owners to Build Its Pipeline, Which Will Serve Private Industry, Across Private Property and Wetlands Concerns are Addressed.

Private property such as residences and farmland will be impacted by the proposed pipeline.⁶⁹ However, the Permit and accompanying documents supporting the application do not provide information on whether and how impacts to private property are being minimized or managed during the construction of the pipeline. DEC must explain how rights to lay the pipeline on or near private property along the proposed route and at the discharge point were or will be acquired.

Allowing the construction of the pipeline along the proposed route could also “result in loss of water and flow” from wetlands “by accidental sinking,” drying these water bodies up.⁷⁰ DEC must explain whether there is a plan in place to avoid such deleterious impacts to the environment.

In order to proceed, the sewage treatment plant and associated 9-mile pipeline will likely be subject to judicial and permitting processes, as well as other forms of federal and local administrative review. These processes and reviews could require the applicant to find a new discharge location or pipeline route, or necessitate alterations to the substance of the Permit such, as developing new effluent limits. The Applicant's own statements and other supporting documents indicate that § 404 and § 401 permits will be required for this project.⁷¹ The approval of a § 404 permit would likely initiate a National Environmental Policy Act process, which the Nation intends to participate in fully in accord with its rights under federal law.⁷² These legal processes will provide DEC with “a more complete picture of the project's impact on water

⁶⁷ Draft Permit at 1.

⁶⁸ See Letter to Kimberley Merchant from Mark Masse, December 23, 2020 (stating “[a]s usage at the wastewater treatment plant increases, permit modifications will be applied for”); see also TOGS 1.2.2 at 22 (Mandating that NARL include “Class 01, 03, 05, 07, 09 or 10 permits for which the permittee noted that a permit modification is needed”).

⁶⁹ Sulkin Declaration ¶ 24.

⁷⁰ *Id.* ¶ 25.

⁷¹ Sulkin Declaration ¶¶ 25, 30.

⁷² See 40 CFR 1508.1(q)(3)(iv).

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quality and provide the agency with information it needs to ensure compliance with the Clean Water Act” and to engage in reasonable decision-making as it considers the Permit.⁷³

VIII. The Facility May Emit Foul Odors and the Pipeline May Leak. DEC Should Explain Its Plan to Ensure That Foul Odors from the Plant Do Not Hinder the Quality of Life of Surrounding Residents, Including Those of the Nation. DEC Should Explain Its Plan for Monitoring Pipeline Leaks Preventing Such Leaks.

In addition to the many water quality impacts described above, this facility has “the potential to emit foul odors” and its 9-mile pipeline has “the potential to leak.”⁷⁴ DEC should not approve this project before these risks are dealt with. Because the WWTF is upstream from and directly adjacent to the Nation, it is particularly critical for the Nation that DEC ensure there are detailed plans with enforceable requirements to protect against leaks and foul odors.

For all these reasons, the Tonawanda Seneca Nation respectfully requests that DEC deny the SPDES permit for the STAMP Wastewater Treatment Facility. In the event the permit is not denied, the Nation asks that modifications consistent with the Nation’s comments be made to the Permit so as to ensure robust protections for the Nation and the environment. Please contact the Nation via email at tonseneca@aol.com or phone at 716-542-4244 at your earliest convenience to schedule a meeting at which DEC’s responses to the Nation’s comments can be discussed with the Nation and EPA.

Da:h ne’hoh,



Christine G. Abrams
On behalf of the Council of Chiefs
TSN Office Administrator
Tonawanda Seneca Nation

Attachment: Exhibit 1: Declaration of Barry Sulkin

CC: Grant Jonathan Jonathan.grant@epa.gov
Lance Caldwell Caldwell.lance@epa.gov
EPA Region 2

⁷³ Sulkin Declaration ¶ 30.

⁷⁴ *Id.* ¶ 31.

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Argie Cirillo
EPA Region 2
Danny Gogal
EPA OEJ

Cirillo.Argie@epa.gov

Gogal.Danny@epa.gov

Exhibit 1

DECLARATION OF BARRY SULKIN

Qualifications

1. My name is Barry W. Sulkin. I am an expert in the field of environmental science and water quality and in all aspects of discharge permits under the federal Clean Water Act's National Pollutant Discharge Elimination System and related state programs. My resume is attached below as Exhibit A.
2. I am an environmental consultant and also Director of the Tennessee office of PEER (Public Employees for Environmental Responsibility), and am working on behalf of the commenting parties in this matter.
3. I received my Bachelor of Arts in Environmental Science in 1975 from the University of Virginia where I received a du Pont Scholarship. During my undergraduate years, I worked as a Lab Technician and Research Assistant at the University of Virginia and Memphis State University conducting water and soil/sediment analyses and sampling.
4. Following graduation from college, in 1976 I joined the staff of what is now called the Tennessee Department of Environment and Conservation as a Water Quality Specialist. I worked in the Chattanooga, Knoxville, and Nashville field offices and the central office of the Division of Water Quality Control in positions that included field inspector, enforcement coordinator, assistant field office manager, and assistant manager of the Enforcement Section. My duties included compliance inspections of water systems and wastewater systems under the NPDES permit program, enforcement coordination for the water pollution and drinking water programs, as well as work with the drinking water, dam safety, underground storage tank, and solid/hazardous waste programs. I also conducted investigations regarding fish kills, spills, and general complaints, including problems of stream alteration and pollution, as well as scientific/research investigations regarding water quality.
5. In 1984 I was promoted to Special Projects Assistant to the Director, and in 1985 I became State-wide manager of the Enforcement and Compliance Section for the Division of Water Pollution Control. In this capacity I was responsible for investigating and preparing enforcement cases, supervising the inspection programs, participating in developing NPDES permits, monitoring permit compliance, and conducting field studies involving alterations and water quality of wetlands, rivers, streams, and lakes.
6. While in this position, I received a joint State of Tennessee and Vanderbilt scholarship and took an educational leave to obtain my Masters of Science in Environmental Engineering, which I received in 1987 from Vanderbilt University. My thesis was "Harpeth River Below Franklin, Dissolved Oxygen Study," which was a field and laboratory study and computer modeling of water quality and impacts of pollutants from an NPDES permitted facility. I returned to my position as manager of the Enforcement

and Compliance Section in 1987, where I remained until 1990.

7. Since 1990 I have engaged in a private consulting practice primarily specializing in water quality problems and solutions, regulatory assistance, permits, stream surveys, and various environmental investigations mainly related to water.
8. I have reviewed and assessed the draft State Pollutant Discharge Elimination System Discharge Permit for a proposed wastewater treatment plant to serve the Western New York Science & Technology Advanced Manufacturing Park and potential future domestic users in the Town of Alabama (“Draft Permit”) and various related documents.
9. This Declaration contains my expert opinions, which I hold to a reasonable degree of scientific certainty. My opinions are based on my application of professional judgment and expertise of sufficient facts or data, consisting specifically of a review of the regulations and documents related to the Draft Permit. These are facts and data typically and reasonably relied upon by experts in my field.
10. In my expert opinion, the Draft Permit fails to meet requirements of the Clean Water Act. The wastewater treatment facility proposal also raises a number of additional regulatory and environmental concerns that I comment upon in the subsequent section.

Summary of Opinions

A. The SPDES permit’s effluent limits are too high and its monitoring requirements are too lax.

11. The Draft Permit cannot be issued in its present form because it proposes to delay the implementation of final effluent limits for 6 months or longer, and to “monitor only” during the interceding period. Draft Permit at 5. Regulators are not permitted to issue SPDES permits without effluent limitations under the Clean Water Act. “Interim limits,” which only prescribe monitoring are no substitute. The Draft Permit must apply limits from the moment discharges into the Oak Orchard Creek segment begin.
12. The Draft Permit also cannot be issued in its present form because it contemplates adding a monthly average concentration of 0.50 mg/l and loading of 4.2 lb/d of Phosphorous into waters that are already impaired for that pollutant. *See* Draft Permit at 3, 6; *see also* 40 C.F.R. § 122.4. More specifically, the outfall pipe for the proposed wastewater treatment facility discharges into a segment of Upper Oak Orchard Creek, Hydro Unit Code 0413000104, that is listed as impaired for Phosphorous on New York’s Final 2018 Section 303(d) list. That means that this segment of Oak Orchard Creek already has Phosphorous levels above and beyond the quantities allowed for by water quality

standards, and no additional loading can be allowed. This limitation on Phosphorus has been known for at least 23 years, when it was first identified on the state's 1998 303(d) list. There has been ample time to determine the loading capacity of Phosphorus and assign allocations, which should happen before any new permitted load can be allowed. In addition, photos from a recent site inspection on November 24, 2021 show significant foam at the discharge site in Oak Orchard Creek, which may be indicative of existing worryingly elevated levels of Phosphorous. *See* Exhibit B.

13. The environmental damage resulting from additional Phosphorous discharges into a stream like this could be profound. More Phosphorus is likely to cause or exacerbate pollution due to low dissolved oxygen and algal growth, including harmful algal blooms. Such environmental damage is even more likely to occur when the flow of a body of water slows down, as is the case downstream of the proposed discharge site. The Clean Water Act helps to prevent these kinds of harmful consequences by prohibiting regulators from granting new permits for discharges of any pollutant, like Phosphorus, into waters impaired for that pollutant where available capacity does not exist, or has not even been determined—as is the case here.
14. The temperature limit on the discharge from the outfall pipe into Oak Orchard Creek also is too high and does not comply with the state temperature water quality criteria. The Draft Permit sets that temperature at 90F. Such a high temperature discharge would fundamentally change the ecology of the creek. Combined with nutrients contained in the effluent the rising temperature could exacerbate problems related to dissolved oxygen and algae blooms. The state criteria for temperature limits raising the stream temperature more than 5F over the temperature before the addition of effluent. *See* Fact Sheet at 9. By setting a temperature limit of 90F instead of 5F over the water temperature prior to the addition of the influent, the Draft Permit fails to comply with the law. In order to comply with the requirements of the Clean Water Act, DEC must incorporate New York's temperature increase limit into the draft permit.
15. Furthermore, there are no monitoring requirements to measure this temperature limit included in the permit, and this omission would make it difficult if not impossible to ensure compliance. To ensure compliance with New York's temperature criteria, compliance must be measured at the outfall, not at the end of the treatment works, as currently indicated on the page entitled "Monitoring Locations." The Draft Permit must clarify that both the receiving water, upstream of the outfall and the water discharging from the outfall must be tested. Twice a day grab testing, as listed in the Draft Permit, should be sufficient.
16. Like temperature, Dissolved Oxygen must be monitored at the Oak Orchard Creek outfall in order to protect water quality. The permit Fact Sheet states that "[t]here is a potential that oxygen could be depleted within the length of the outfall pipe and result in a [dissolved oxygen] less than 5 mg/L in the receiving water." Fact Sheet at 6. However,

the monitoring location for dissolved oxygen is “approximately 9 miles from the receiving water.” *Id.* The receiving water will only be monitored for a short period starting from the second summer after the operation of the wastewater treatment facility. During this second summer, dissolved oxygen monitoring at the discharge site will occur “once per week, on the same day of the week, from June 1st through August 14th, such that a minimum of 10 [dissolved oxygen] readings are taken.” Draft Permit at 6. The permit does not require that dissolved oxygen monitoring at different points above and below the discharge in the receiving stream. The permit also does not require that dissolved oxygen monitoring at different times throughout the day, or that it be carried out through the fall when lowest flows can occur at the end of the low flow season. This more comprehensive monitoring is necessary to determine if there is a dissolved oxygen impact in Oak Orchard Creek, and to see if there is a diurnal fluctuation related to algae. Overestimating the amount of dissolved oxygen as a result of infrequent monitoring could result in a failure to detect algal blooms and related dissolved oxygen diurnal depression, especially in an existing Phosphorus impacted stream. Infrequent monitoring at too few locations and ending monitoring too early in the low flow season might also lead to a failure to detect a reduction in dissolved oxygen from oxygen-demanding parameters in the effluent at a downstream sag point.

17. Both the Fecal Coliform and Chlorine limits allowed in the Draft Permit are too high. *See* Draft Permit at 4. High Fecal Coliform levels are an indication that water may be contaminated with disease-causing bacteria, viruses, and protozoa. For this reason, a permit should provide a margin of safety in setting Fecal Coliform limits. The limits set out in the Draft Permit are at the criteria with no margin of safety. Similarly, the Draft Permit’s limit for Chlorine, a chemical that is toxic to aquatic animals, is too high for protection of the receiving waters, and above the level recommended by EPA. A small stream with no mixing zone should have a Chlorine limit below the EPA criteria with a margin of safety. The decision to set a higher Chlorine limit is doubly perplexing because a footnote on the subsequent page of the permit states, “[i]f no chlorine is used in the treatment process, then no total residual chlorine monitoring is required.” *See* Draft Permit at 5. Additionally, other associated documents describe the use of UV light for disinfection instead of Chlorine. *See, e.g.,* Notice of Complete Application at 1. The Draft Permit should clarify whether or not Chlorine is going to be used in the treatment process, or as a back-up. If the chemical is going to be used more stringent limits should be set.
18. The Fecal Coliform and Chlorine limits are also too high in light of evidence of contact recreation at or near the discharge site. Specifically, I am concerned by the proximity of the discharge to a public park and by reports of possible recreational infrastructure from a November 24 site visit. Setting stricter limits on such pollutants is important for the safety of any person swimming, fishing, or otherwise engaging in recreation at or near the discharge site.

B. The sheer quantity of effluent to be discharged into the receiving stream raises concerns.

19. The Hydraulic Analysis by JM Davidson for this project only looked at the impact of the proposed discharge during periods of high-flow to examine the potential flooding impacts. *See* STAMP Discharge Analysis at Oak Orchard Creek (May 2020). The fact that the 7Q10 flow is 0.46 MGD also raises concerns that the proposed discharge will turn this segment of Oak Orchard Creek into an effluent dominated stream. *See* Draft Permit at 24. A “7Q10 flow” is the lowest 7-day average flow of a stream that is likely to occur once every 10 years. The 7Q10 flow of the receiving water in Oak Orchard Creek is a concern because the applicant proposes to discharge more than double this amount into the stream at this discharge site. *See* Notice of Complete Application at 1. The proposed initial average flows of 1 MGD a day would be more than enough to transform this segment of Oak Orchard Creek into an effluent dominated stream. But the applicant goes further and states that up to 6 MGD could eventually flow through the outfall pipe after additional tenants are secured for the Manufacturing Park—more than *12 times* the 7Q10 flow rate of the receiving water. *Id.* New York’s narrative water quality standard for flow prohibits alterations of a stream that will impair the waters “for their best usage.” Fact Sheet at 9.
20. An “effluent dominated stream” is one whose flow is predominately made up of treated wastewater. Transforming a natural stream, such as at the discharge site, into one that is effluent dominated can have adverse environmental consequences, especially when the assimilative capacity of that stream—that is, the water body’s capacity to handle discharges of pollutants through processes like natural decomposition—has not been determined. When a stream becomes effluent dominated the likelihood that water quality can degrade and become unsafe or less desirable for classified uses increases.
21. Effluent dominated streams are particularly likely to emit foul odors. I have worked in such waters where there is a prevailing musty “sewage” odor in the stream, even when the facility is meeting all permit limits; not all wastewater components that cause such odors are easily identified nor limited. In fact, the odors may be the result the of the combined effects of at least two substances that are more malodorous than either would have been individually. In such cases the stream becomes less desirable for recreational users, and once set in place the discharge cannot easily be stopped. This is particularly of concern in waters that are already impaired and water quality limited. *See* 40 C.F.R. 130.7 (containing the definition of “water quality limited”). The inundation of the stream with effluent could also have disastrous impacts on aquatic organisms.
22. The amount of effluent to be discharged from the wastewater treatment facility also raises concerns when considered along with the limited capacity of the project’s wet well. The Basis of Design Report states that this wet well can only handle a relatively small volume

of 60,000 gallons even though GCEDC plans to pump millions of gallons of effluent per day through this receptacle. *See* Basis of Design Report at 8. If something goes wrong along the nine mile outfall pipeline and wastewater begins to back up, then such a small wet well could begin to overflow or leak effluent into the surrounding area.

23. Further, the Draft Permit should clarify exactly where the sanitary sewage from this facility is coming from. According to EPA, a 1 million gallon a day discharge can serve up to 10,000 people. *See Learn about Small Wastewater Systems*, EPA, <https://www.epa.gov/small-and-rural-wastewater-systems/learn-about-small-wastewater-systems> (last updated Sept. 29, 2021) (“Small communities have 10,000 or fewer people and an average daily wastewater flow of less than 1 million gallons.”). If the facility plans only to provide sewage treatment service for future industrial facilities to be built on the STAMP site, each of which will implement its own industrial water treatment and be separately permitted, this facility appears to be much too large for the STAMP site’s sanitary sewage needs. The permit mentions “potential future domestic users in the town of Alabama” but does not clarify how many users that may include. Notice of Complete Application at 1. This information is critical to DEC ensuring it permits an appropriate maximum flow for the facility, particularly given the 7Q10 flow concerns regarding Oak Orchard Creek, as detailed above. Additionally, ensuring that the appropriate amount of influent flows through the facility is essential to maintaining the functioning of the facility.

C. The pipeline route could lead to adverse impacts to private property and wetlands.

24. Based on my review of documents in the February 2021 STAMP Offsite Wastewater Preconstruction Notification (“Preconstruction Notification”) depicting the outfall pipeline route, as well as information gathered from a site inspection, I believe that residential property may be impacted by this project. One drawing in the Preconstruction Notification appears to reveal that some sections of the pipeline will be routed through yards of private property owners along Allegany Road. *See* Preconstruction Notification at 132. A photo in the Preconstruction Notification suggests that the pipeline will need to veer away from the road and into private owners’ yards or past private residences in order to get around existing stream culverts. *See id.* at 136. There is also a map in the Preconstruction Notification which shows the pipeline crossing Lewiston Road in an unusual zig zag, and this type of routing raises red flags regarding impacts on residential property for me. *See id.* at 124. The Preconstruction Notification section labeled “Existing Conditions” also states that “[t]he project area” runs through “farmland” and “sing-family [sic] residences, and small hamlets.” *Id.* at 4. DEC should clarify whether or not the outfall pipeline will be routed through or near residential properties. If so, DEC should clarify whether or not additional administrative or legal processes, such as

eminent domain, will be required to route the pipeline through or near these properties.

25. My review of the outfall pipeline route also leads me to conclude that wetlands and streams might diminish or dry up as a result of this project. For example, a photo in the Preconstruction Notification indicates that the pipeline will run through wetlands and across or under streams. *See* Preconstruction Notification at 128. Routing the pipeline through these water bodies would require open cuts and directional drilling, which in turn could result in loss of water and flow by accidental sinking.

D. The Draft Permit's plan to allow multiple future discharges through a single outfall is a recipe for disaster and sets up a situation where no individual discharger will be held accountable for in-stream conditions below the outfall.

26. As a former state Water Quality Specialist with extensive experience monitoring compliance with NPDES permits, I have deep concerns regarding the proposal of the applicant to allow multiple STAMP tenants holding separate SPDES permits to discharge effluent and industrial wastewater through the proposed outfall pipe of the treatment facility. *See* Notice of Complete Application at 2; GCEDC Response to NOIA at 1–2. With only one outfall, ensuring compliance with and attributing responsibility for violations of these individual permit holders would be extraordinarily difficult after effluents are mixed, diluted, and possibly interact to cause synergistic effects. From the perspective of a regulator trying to ensure compliance with the Clean Water Act, it would be far more practical to hold STAMP Sewage Work Corp., the single entity requesting a permit to lay this outfall, liable for all discharges that flow through the proposed pipe. Each individual facility could then receive a permit for discharging into STAMP Sewage Work Corp, like a pretreatment permit, and STAMP Sewage Work Corp. would be liable for the discharge into Oak Orchard Creek.
27. If DEC plans to individually permit each future facility to discharge through a joint pipeline into the same outfall, every facility would need to be jointly and severally liable for any water quality violations in Oak Orchard Creek. Additionally, for parameters like temperature and Dissolved Oxygen, which must be measured at the discharge point in the receiving water, each permittee would be required to meet the temperature and Dissolved Oxygen limits within the creek, to complete monitoring, and to collectively remedy any violation.
28. Prior to issuing the Draft Permit, DEC must clarify for concerned stakeholders how exactly it plans to permit the discharge of multiple facilities through a single nine-mile long pipeline. DEC must provide an explanation of how it plans to enforce the permit limits to protect Oak Orchard Creek and what type of enforcement mechanisms it plans to use. DEC should also provide for stakeholders examples of whether and how this has been done elsewhere in New York.

E. In order to avoid regulatory quandaries, DEC should pause to collect additional information about the proposed wastewater treatment facility and outfall before issuing the permit.

29. DEC should require the applicant to provide clarification on the identity of the owner(s) and operator(s) of the project in question. Under NPDES rules the owner and operator must each be covered by the permit unless the owner and the operator are the same entity. However, the Joint Application form lists “Genesee Gateway Local Dev Corp/Genesee County EDC” as the applicant, and the property owner simply as “multiple.” Joint Application Form at 1. Meanwhile, the Notice of Complete Application describes the applicant for the Draft Permit as STAMP Sewer Works Inc., while the Draft Permit itself states that the applicant is STAMP Sewage Work Corp. *See* Notice of Complete Application at 1; Draft Permit at 1. DEC should resolve the lack of clarity and consistency across these documents. If STAMP Sewer Works Inc. is both the owner and the operator, the Draft Permit should clarify this. Any contract operator running the wastewater treatment facility would need to be jointly and severally liable for any water quality violations in Oak Orchard Creek.
30. The notice of Complete Application states that the applicant will be seeking Department of Environmental Conservation permits for impacts to wetlands. My review of the outfall pipeline route and related documentation on the wastewater treatment plant leads me to conclude that this project will also require a Clean Water Act § 404 permit and state 401 Certification. Indeed, Appendix A and C of the Preconstruction Notification seem to confirm as much. The fact that the pipeline runs through the Iroquois National Wildlife Refuge and may run through residential properties raises the possibility that more administrative review will be required before the project is fully approved. It would be best if DEC waited for additional permitting and environmental review processes to conclude before issuing a permit for this project. These additional administrative review processes will give DEC a more complete picture of the project’s impact on water quality and provide the agency with information it needs to ensure compliance with the Clean Water Act. In fact, as the 404 and any related processes (such as 401 Certification, NEPA, property acquisition, local approvals) play out, it might be determined that the pipeline as planned will not be allowed and a different discharge location will need to be found. This could change the Draft Permit limits and other requirements, and the permit now underway will turn out to have been premature.

F. Additional concerns.

31. Finally, I have additional concerns about the wastewater treatment facility and its potential impacts on the surrounding environment and community. Wastewater treatment facilities have the potential to emit foul odors that can be a nuisance to surrounding communities. Wastewater outfall pipes also have the potential to leak. DEC should require the applicant to explain the steps it is taking to ensure that foul odors do not

emanate from the plant and hinder the quality of life of the residents of the Tonawanda Seneca Nation or the town of Alabama. DEC should also require the applicant to provide information on how it will make certain that the wastewater pipeline will not leak, and provide its plans for leak monitoring along the nine miles of pipe.



Barry W. Sulkin

12-24-21

Date

Exhibit A

BARRY SULKIN
ENVIRONMENTAL CONSULTANT
4443 PECAN VALLEY ROAD
NASHVILLE, TN 37218
PHONE (615) 255-2079

CURRICULUM VITA

EDUCATION

1987 M.S., **Vanderbilt University** - Nashville, Tennessee
Major: Environmental Engineering

Master's Thesis: "HARPETH RIVER BELOW FRANKLIN DISSOLVED OXYGEN STUDY" - Field and lab study, QUAL2E computer modeling of river hydrology, water quality, and impacts of a sewage treatment plant.

1975 B.A., **University of Virginia** - Charlottesville, Virginia
Major: Environmental Science

Additional undergraduate courses: math and engineering at University of Tennessee - Knoxville 1982-1984

HONORS

Conservationist of the Year, 2011, Wild South's Roosevelt-Ash Society, Ashville, NC, March 23, 2012

River Hero Award, River Network 2006

Lifetime Achievement Award, Tennessee Environmental Council, 1990

Water Conservationist of the Year, Tennessee Conservation League, 1989

State of Tennessee/Vanderbilt University

Environmental Engineering Graduate School Scholarship, 1985 - 1987

duPont Scholarship, University of Virginia, 1971 - 1975

Eagle Scout, 1967

PROFESSIONAL EXPERIENCE - CURRENT

Sept. 1990 - **Environmental Consultant**

Present Self-employed

Investigator, consultant, and scientist serving clients such as attorneys, environmental/citizen organizations, cities, individuals, businesses, media, and sub-contractor for other consultants/engineers. Activities include research projects, field studies, sampling, testing, site evaluations, stream/wetland determinations, permit negotiations, information and file research, photography, and expert witness presentations concerning water quality, NPDES, CAFO, TMDL, erosion, landfills, NEPA, FERC, NRC, and other environmental issues; also TN Director of Public Employees for Environmental Responsibility (PEER). Employed by EPA as special expert for Federal Advisory Committee for Detection and Quantitation and Uses in the Clean Water Act (June 2005- Dec 2007).

PROFESSIONAL EXPERIENCE - PREVIOUS

1987-June 1990
and 1985 **Manager**
Enforcement and Compliance Section
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Nashville, Tennessee

Responsibilities: Statewide manager of enforcement investigations and legal referrals for water pollution programs under the federal Clean Water Act and the Tennessee Water Quality Act; witness for hearings before the Water Quality Control Board, and local and state courts; data processing and analysis for wastewater permit discharges; field research projects regarding water quality problems, as well as field work involving various stream, river, lake, and wetland issues.

1989 **Instructor**
Graduate School of Engineering
University of Tennessee, Knoxville (Nashville campus)

Responsibilities: Assistant instructor for graduate course in environmental engineering- wastewater treatment.

Sept.-Nov.1986
and 1981 **Assistant Manager**
Regional Field Office
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Nashville, Tennessee

Responsibilities: Coordinated inspections, complaint investigations, field studies, and enforcement for wastewater programs in 41 county region.

Sept. 1985
- Aug. 1986 Education leave to attend graduate school

1984-1985 **Special Projects Assistant**
Director's Office - Elmo Lunn, Director
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Nashville, Tennessee

Responsibilities: Provided statewide coordination and technical assistance on deep well waste injection regulations, clear-cutting forestry problem investigations, animal waste problems, public relations and media presentations, state planning and policy, enforcement and field office coordination.

1982-1984 **Enforcement Coordinator**
Regional Field Office
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Knoxville, Tennessee

Responsibilities: Coordinated enforcement action in municipal and industrial drinking water and wastewater programs in 24 county region, including fish kills, spills, complaint investigations, and stream studies.

1981-1982 **Assistant Manager**
Enforcement Section
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Nashville, Tennessee

Responsibilities: Coordinated statewide investigations and legal actions for drinking water, wastewater, and safe dam programs.

1977-1981 **Water Quality Specialist**
Regional Field Office
Division of Water Pollution Control
Tennessee Department of Health and Environment
Nashville, Tennessee

Responsibilities: Inspected drinking water, and municipal and industrial wastewater systems for 41 county area; investigated spills, underground storage tanks, fish kills, and citizen complaints; conducted stream studies; coordinated enforcement program.

1976-1977 **Water Quality Specialist**
Regional Field Office
Division of Water Pollution Control
Tennessee Dept. of Health and Environment
Chattanooga, Tennessee

Responsibilities: Inspected public drinking water systems for nine county area; investigated spills and citizen complaints.

1975 **Research Assistant/Lab Technician**
Department of Environmental Science
University of Virginia
Charlottesville, Virginia

Responsibilities: Analyzed soil and sediment from Chesapeake Bay and marsh/wetland sites for Corps of Engineers dredge spoils study.

1974 **Research Assistant**
Department of Environmental Science
University of Virginia
Charlottesville, Virginia

Responsibilities: Weather research project data processing.

1974 **Research Assistant/Lab Technician**
Department of Civil Engineering
Water Quality Lab
Memphis State University
Memphis, Tennessee

Responsibilities: Field sampling and lab analyses of water for study of urbanization impacts of watershed streams.

PROFESSIONAL/CIVIC ORGANIZATIONS & CERTIFICATIONS (Past & Present)

Community Engagement Committee, Nashville Planning Department, 2013 to 2015

Beaman Park to Bells Bend Conservation Corridor community organization,
Board of Directors, 2012 to present

Certified Erosion Prevention and Sedimentation Control Professional (TN), Aug. 2004

Davidson County Grand Jury, Oct. - Dec. 1998, Nashville, TN

Nashville and Davidson County - Floodplain Review Committee, Oct. - Dec. 1998

National Environmental Health Association
Registered Environmental Health Specialist, 1994

State of Tennessee - *Registered Professional Environmentalist, 1982*

American Society of Civil Engineers

Water Environment Federation

Tennessee Environmental Council, *Board of Directors & Advisory Board, 1994 to present*

International Erosion Control Association

Tennessee Scenic Rivers Association

American Water Resources Association

Alaska Clean Water Advocacy, *Advisory Board*

ADDITIONAL TRAINING

“Fundamentals of Erosion Prevention and Sediment Control” certification course by the University of Tennessee and the Tennessee Department of Environment and Conservation, August 26, 2004; Recertification October 9, 2007

ABASINS Training@ short course of EPA supported computer mapping and water quality modeling techniques, Utah State Univ., Logan UT, August 6 - 10, 2001

"Wetland Mitigation Techniques" Tennessee Tech. Univ., Cookeville, TN April 26, 1999

"Pulp and Paper Cluster Rule and Clean Water Act Permits", Clean Water Network with EPA, Seattle, Washington, February 18-19, 1998

"Bioengineering Techniques for Streambank and Lakeshore Erosion Control", by Wendy Goldsmith, International Erosion Control Association, April 27, 1995

"Fundamentals of Hydrogeology, Karst Hydrogeology, and the Monitoring, Containment, and Treatment of Contaminated Ground Water", by Albert Ogden and Gerald Cox, January 6-7, 1994

"Ground Water Hydrogeology and Dye Tracing in Karst Terrains", James Quinlan, April 2, 1992

"NPDES Permit Writers Course" by the Environmental Protection Agency (EPA), April 1988

"Sediment Oxygen Demand Workshop", by EPA, U.S. Environmental Research Laboratory, Gulf Breeze, Florida, September, 1987

"Compliance Monitoring for NPDES Permits", by EPA, October, 1978

"Hazardous Materials Tactical Workshop", by Tennessee Civil Defense, April 1978

"Troubleshooting O & M Problems at Municipal Wastewater Treatment Facilities", by EPA, March, 1978

PRESENTATIONS/PUBLICATIONS

November 2015

“Evidence For Leaking Of Two Coal Ash Storage Ponds To Local Surface Water And Groundwater In Tennessee”, Harkness, Jennifer S.¹, Sulkin, Barry² and Vengosh, Avner¹, (¹Division of Earth and Ocean Sciences, Nicholas School of the Environment, Duke University, Durham, NC; ²Environmental Consultant, Nashville, TN); Abstract & Presentation at 2015 Geological Society of America Annual Meeting in Baltimore, MD

October 2010 & January 2015

Water Quality Sampling & Testing for Litigation Uses, Western Carolina University, Environmental Chemistry Class, Cullowhee, NC

April 2014 & March 2015

Environmental Regulatory Programs in State and Federal Government, Middle Tennessee State University, Murfreesboro, TN

June 2013

NPDES Permits & Cases Presentation at International WaterKeeper Alliance annual meeting, Calloway Gardens, Pine Mountain, GA

October 2012

Appalachian Public Interest Environmental Law Conference, University of Tennessee College of Law, “*Transportation Planning for the 21st Century*” panel, Knoxville, TN

March 2012

Alabama Rivers Alliance – “*How Winning Is Possible*” Keynote address for annual conference awards, Fairhope, AL

May 2001 – May 2013

River Rally, annual national conference in: California, North Carolina, Washington, Virginia, Colorado, New Hampshire, Ohio, Maryland, Utah, South Carolina, Oregon; taught various seminars each year on: Clean Water Act, NPDES Permits, Anti-degradation, Stormwater, TMDLs, Enforcement, Wetlands & Mitigation; by River Network based in Portland, OR

July 2005

“*The Clean Water Act Owner’s Manual*”, second edition, contributing writer & editor, River Network, Portland, OR

December 2003

“*Stream Flow and the Clean Water Act*”, Atlanta, GA, with River Network, Portland, OR

February 2003 & December 2004

“*Clean Water Act - Train the Trainer*”, Denver, CO & Madison, WI, with River Network, Portland, OR

May 2002

“*Tracking TMDLs*”, contributing writer & editor, National Wildlife Federation, Montpelier, VT & River Network, Portland, OR

February 2002

“*A Protocol for Establishing Sediment TMDLs*”, contributing writer & editor, developed for the Georgia Conservancy & University of Georgia Institute of Ecology by the Sediment TMDL Technical Advisory Group, Athens, GA

March 2001

“*The Ripple Effect - How to Make Waves in the Turbulent World of Watershed Cleanup Plans*”, contributing writer & editor, Clean Water Network, Washington, D.C.

October 1999 - April 2001

“*Clean Water Act Workshop*”, presenter for three-day training conferences - Vermont, Georgia, Tennessee, Colorado, New Mexico, Ohio, and Alaska, with River Network, Portland, OR

October 2000

"*TMDL Workshop*", presenter for training in San Diego, CA, with River Network, Portland, OR

April 1999

"*U.S. Environmental Laws & Regulations Compliance - Understanding Your Obligations Under the Clean Water Act*", session on Clean Water Act for course sponsored by Government Institutes, Inc. of Rockville, MD, given in Nashville, TN

March 1999

"*NPDES and State Water Quality Permits*" and "*The TMDL Process*", presentations at the Tenn. Clean Water Network conference; March 27, 1999, Bethany Hills Camp, Kingston Springs, TN

March 1999

"*State of the Rivers: Tennessee*" presentation at World Wildlife Fund "*State of the Rivers Conference*", March 15, 1999, Chattanooga, TN, with co-author of Tenn. section of "*A Conservation Potential Assessment of the Mobile and Tennessee/Cumberland River Basins in Alabama, Georgia, and Tennessee*" by WWF

December 1998

"*America's Animal Factories*", contributing writer & editor, National Resources Defense Council, Washington, D.C.

December 1998

"*The TMDL Process*", presentation with NRDC attorney at national Sierra Club state leaders conference, Santa Fe, New Mexico, December 11, 1998

October 1998

"*Clean Water Act Permits, Modeling, and TMDLs*" presentation at national conference of clean water organizations & attorneys, by Clean Water Network/NRDC, Oct. 16, 1998, Washington, DC

May 1998

"*Impacts of State Route 840 Upon the Human and Biophysical Environment*" NEPA, ISTEA, and Public Participation in Transportation Projects, Dept. of Environmental Geography guest lecture, Austin Peay State University, May 1, 1998, Clarksville, TN

March 1998

"*The State, EPA, Citizens - How the System Works*" Tennessee Clean Water Conference, Opening Plenary Presentation, March 28, 1998, Nashville, TN

March 1998

"*Total Maximum Daily Loads (TMDL) The Science, Process, & Controversy*" American Water Resources Association 1988 Tennessee Conference; paper presentation as part of panel with EPA representatives on TMDLs, March 3, 1998, Nashville, TN.

February 1997

International Erosion Control Association, on panel of speakers for session on practical applications of erosion controls at annual IECA national conference, Nashville, TN

October 1994

"*Stream Ecology, BMPs, and Compliance*", environmental impacts of road building, Sierra Club Southern Appalachian Highlands Ecosystem Taskforce, Transportation Workshop, Banner Elk, NC

June 1994

"*Fundamentals of Tennessee Environmental Law*", presentation on Water Pollution Control and Compliance Strategies, for course sponsored by Government Institutes, Inc. of Rockville, MD, given in Knoxville, TN

June 1994

University of Tennessee Law School, guest lecture on water pollution and the related state and federal laws, Knoxville, TN

October 1992

"*Storm Water Regulations for Saw Mills*" - Seminar sponsored by the Tennessee Association of Forestry and the Univ. of TN, Nashville.

August 1992

"*Storm Water Regulations for Industry*" - Seminars sponsored by the Tennessee Association of Business and the Univ. of TN, Chattanooga, Knoxville, Jackson, and Nashville.

July 1992

Storm Water in Tennessee - A Training Manual for Manufacturers, University of Tennessee Center for Industrial Services

April 1992

"*Dissolved Oxygen Study - Sewage Treatment Impacts and Assessments*", VA Water Pollution Control Assoc. 46th Annual Conference, Roanoke, VA

October 1990

"*The Tainted Waters of the Cumberland*"; Cumberland Journal, v.1, no. 1, pp. 16-20; Nashville, Tennessee.

November 1988

"*A Rapid Bioassessment of Richland Creek, Davidson County*", by M. Browning, B. Sulkin, T. Merritt, TN Div. of Water Pollution Control

June 1988

"*Assimilative Capacity of the Obed River at Crossville, Tennessee*"; U.S. Geological Survey 1st Annual Hydrology Symposium, Nashville, TN

March 1987 - 1994

Vanderbilt University Graduate School of Engineering and Law School; guest lectures on water quality topics and computer modeling of river waste assimilative capacity.

July 1983

Testimony on the pollution at the Oak Ridge nuclear weapons facilities before Congressional hearing chaired by Congressman Albert Gore.

Exhibit B





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