



Phillips Lytle LLP

Via E-Mail

May 9, 2022

Kimberly Merchant
Deputy Regional Permit Administrator
New York State Department of
Environmental Conservation
6724 East Avon-Lima Road
Avon, NY 14414-9516

Re: Western New York Science and Technology Advanced Manufacturing Park
NYSDEC Jurisdiction Under 6 NYCRR Part 182 - Plug Power Associated
Projects

Dear Ms. Merchant:

As you know, we represent the Genesee County Economic Development Center (“**GCEDC**”) with respect to the Western New York Science & Technology Advanced Manufacturing Park (“**STAMP**”) Plug Power Associated Electrical Project (“**Project**”). The Project has three components: 1) the construction of a new substation on the north side of STAMP in close proximity to the New York Power Authority (“**NYPA**”) 345kv lines (“**Substation**”); 2) the relocation and enhancement of the existing 115kv powerlines that currently traverse STAMP (“**Powerline Reroute**”); and, 3) the construction of a laydown area for staging materials and equipment needed for the Project on the site of the proposed wastewater treatment facility will be constructed immediately adjacent to and north of Plug Power’s current site (“**Laydown Area**”).

We are writing in response to the New York State Department of Environmental Conservation’s (“**NYSDEC**” or “**Department**”) letter dated May 2, 2022 (“**Project Determination**”), in which the Department determined that certain portions of the Project require an incidental take permit (“**Take Permit**”) pursuant to section 11-0535 of the Environmental Conservation Law (“**ECL**”) and the Department’s regulations under Part 182 (collectively with ECL, “**Part 182**”). Specifically, we seek to clarify the GCEDC’s understanding of those aspects of the Project that do not require a Take



Permit and to request that the Department reconsider its determination that certain aspects of the Project require a Take Permit as we respectfully submit that this determination is: (i) inconsistent with the requirements of Part 182; (ii) will have a significant adverse impact upon Plug Power's proposed green hydrogen production facility; and, (iii) threatens other tenant prospects at STAMP that represent billions of dollars of investment and thousands of jobs.

Summary of Request

GCEDC, through its consultants, conducted winter raptor surveys at the request of the Department which documented up to four (4) short-eared owls and up to five (5) northern harriers foraging at various locations on the STAMP Site. At the direction of the Department, GCEDC submitted requests to the Department for confirmation that a Take Permit would not be required for any of the various infrastructure improvements to the STAMP Site, including the Project.

After meeting with the Department, GCEDC was informed that it was unlikely that a Take Permit would be required for any portion of the Project. The Department concurred that various other infrastructure projects would not require a Take Permit. However, the Department has since provided the Project Determination in which the Department asserts Part 182 jurisdiction over portions of the Project

After careful review and analysis of the Project Determination, GCEDC respectfully requests:

- That the Department confirm that the Powerline Reroute and Laydown Area portions of the Project are cleared with respect to Part 182 provided that no construction activities take place during the months of November to April.
- That the Department reconsider its determination that future development of the Laydown Area would require a Take Permit, since:
 - 1) during the entire multi-month winter survey season, neither short-eared owls nor northern harriers were ever observed utilizing any of the Laydown Area or the lands immediately adjacent to the Laydown Area, and thus the Laydown Area should not be considered to be "occupied habitat";



- 2) even if preliminary considered to be “occupied habitat,” the Laydown Area has been cleared because an entire season of monitoring under the winter raptor survey protocols approved by the Department have yielded no observation of either species; and
 - 3) there are thousands of acres of suitable habitat available in the surrounding areas, including state and federally protected habitat on the nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge, Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area, which include the preferred habitat for these two species.
- That the Department reconsider its determination that the development of the Substation will require a Take Permit since:
 - 1) the Project Determination appears to overstate the impact of the Substation on occupied habitat on the STAMP Site;
 - 2) the Project Determination mistakenly asserts that possible roosting was observed; and
 - 3) there are thousands of acres of suitable habitat available in the surrounding areas, including state and federally protected habitat on the nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge, Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area, which include the preferred habitat for these two species.

Project Overview

As you know, STAMP is New York’s largest advanced manufacturing campus, located on approximately 1,262 acres of land located in the Town of Alabama, New York (“**STAMP Site**”). At full buildout, STAMP will be a high-tech campus with over 6 million square feet of advanced technology manufacturing and related uses and creating over 9,000 jobs. GCEDC, partnering with numerous New York State agencies (including NYSDEC), has invested over fifteen years and tens of millions of dollars to prepare the STAMP Site for development and to attract companies to the STAMP campus. The GCEDC currently has 13 projects in various stages of the site selection



process looking at the STAMP Site. It is acknowledged that not all of these projects would fit at STAMP due to their size, however, they would all have a large economic impact in the region. The proposed capital investment for each project ranges from the hundreds of millions to billions of dollars. The jobs creation pledges for these projects range from 100 jobs to over 4,000. The one project that is the furthest along, and that has designated STAMP as its top site in the world, is a \$9 billion investment with over 1,300 jobs.

Construction on the first tenant facility on the STAMP Site, Plug Power, began in September 2021, following an extensive environmental review to ensure the project meets what was analyzed in the Generic Environmental Impact Statement (“**GEIS**”) that was completed in 2012, including the issuance of NYSDEC permits associated with the Plug Power project.

As the Department is aware, Plug Power is in the midst of constructing an approximately \$290,000,000 green hydrogen production facility that will create a local renewable energy source and assist in meeting New York’s ambitious goals as set forth in the Climate Leadership and Community Protection Act (“**CLCPA**”). To power the hydrogen facility, Plug Power will need additional electrical capacity that can only be accessed off of NYPA’s 345 kV transmission lines that are immediately adjacent to the North end of the STAMP Site. Plug Power will need 225 mW of power to operate their facility. This will require the construction of the Substation, and enhancement of the current National Grid owned Line 112 that bisects the STAMP Site and which has a top capacity of 35 mW. In conjunction with the Powerline Reroute to free up more of the north campus for development, this line will be converted to a double circuit line and the second circuit will connect Plug Power’s facility to the new substation.

To facilitate the Powerline Reroute, the Laydown Area will have to be constructed for staging materials and equipment needed for the Project. The Laydown Area will be located where the proposed STAMP wastewater treatment facility (“**WWTF**”) will be constructed in order to reduce the footprint of ground disturbance. The Laydown Area is located immediately adjacent to and north of Plug Power’s current site.



Part 182 Discussions with the Department

In Fall, 2021, NYSDEC informed GCEDC that updated winter raptor surveys would need be performed during the 2021/2022 winter season. At first, the Department indicated that such studies might be necessary before permitting for Plug Power took place, but after discussion, the Department agreed that the completion of such studies should not hold up Plug Power's planned construction schedule. The GCEDC's consultant, CC Environment & Planning ("CC") undertook preparations to begin a winter raptor survey from December 2021 to mid-May 2022 to assess whether any threatened or endangered winter raptors were present on the STAMP Site. CC consulted with NYSDEC and received NYSDEC approval of the survey plan including methods and timing.

CC's winter raptor survey documented up to four (4) short-eared owls and up to five (5) northern harriers foraging at various locations on the STAMP Site. These observations are within a close distance to the nearby 5,600-acre Tonawanda Wildlife Management Area, which begins at the STAMP Site's north western edge, and the 10,800 acre Iroquois National Wildlife Refuge located a short distance to the north of STAMP. The survey also observed both species in and around the John White Wildlife Management Area, a 329-acre conservation area that provides habitat primarily for grassland birds located immediately adjacent to the south eastern corner of STAMP.

On Friday February 4, 2022, while CC's survey work was underway, NYSDEC provided GCEDC with an acknowledgement of the notice of intent for GCEDC's construction of the Laydown Area. The next day, on Saturday February 5, 2021, NYSDEC issued a stop work order to GCEDC, prohibiting any work on the Laydown Area. In the stop work order, NYSDEC asserted that before construction could begin on the Laydown Area, Powerline Reroute, and other projects, GCEDC would need to file additional information with the Department to allow the Department to issue a determination as to whether the Department had Part 182 jurisdiction with respect to some or all parts of the Project.

On February 17, 2022, NYSDEC provided GCEDC with a series of maps purporting to depict the boundaries of northern harrier and short-eared owl occupied habitat on the STAMP Site. As depicted therein, while the Department had not yet made a formal



determination, preliminary indications from the Department were that a half-mile radius around each sighting, nearly the entirety of the STAMP Site, would be considered “occupied habitat.”

On March 18, 2022, GCEDC commenced the first round of Part 182 requests for determination by submitting a formal request to the Department with respect to the Plug Power hold and haul, on-site water main, and Crosby Road reconstruction projects. By letter dated March 28, 2022, the Department concurred that the above projects “are all likely to have no or minor impacts to wintering raptors provided the work is completed outside the wintering period” and that “no Part 182 permit is required” for those projects. Shortly thereafter, however, the Department notified GCEDC that none of these projects could move forward until each was evaluated for potential impacts to the adjacent Tonawanda Seneca Nation territory as a potential traditional cultural property. GCEDC has since provided to the Department with documentation demonstrating that all SHPO clearances for these projects have been issued and awaits the Department’s confirmation that the GCEDC is clear to proceed.

On April 13, 2022, CC on behalf of GCEDC, continued with a second round of requests for determination with respect to the Powerline Reroute, Laydown Area, and Substation. On May 2, 2022, the Department provided the Project Determination in which the Department asserted Part 182 jurisdiction over portions of the Project.

Powerline Reroute

We thank the Department for its confirmation that it does not have Part 182 jurisdiction over the Powerline Reroute and that, notwithstanding limited permanent and temporary impacts to what the Department considers to be occupied habitat, if there are no construction activities during the months of November to April, then there is no take of any threatened or endangered species and no Take Permit is required. National Grid has confirmed that it will not engage in construction activities for the Powerline Reroute



between November 1st and April 30th.¹ Thus, we understand that the Department has cleared the Powerline Reroute as detailed herein with respect to Part 182.

Please let us know immediately if we are mistaken.

The Laydown Area

In the Project Determination, the Department found that if GCEDC would commit to completion of construction of the Laydown Area before November 1, a Take Permit would be required but only for portions of the Laydown Area that would not be converted back to habitat in the future (in conjunction with the WWTF construction) and such permitting could “be addressed in a future Part 182 permit for the STAMP site.”

GCEDC can commit to completion of construction of the Laydown Area prior to November 1st. Thus, based on the Project Determination, GCEDC understands that this aspect of the Project can commence and that any Take Permit would “be addressed in a future Part 182 permit for the STAMP site.”

Nonetheless, GCEDC requests that the Department reconsider its determination that a Take Permit would be required in the future. The Laydown Area and gravel access road will cause a total disturbance to 10.43 acres, of which 5.13 acres will be temporary and 5.3 acres will be permanent. We respectfully submit that the Department has erroneously determined that the laydown area is occupied habitat, and that development of the same may result in a “take” of either short-eared owls or northern harriers. During the entire multi-month winter survey season, neither short-eared owls nor northern harriers were ever observed utilizing any of the Laydown Area or the lands immediately adjacent to the Laydown Area.

Instead, the Department’s determination appears to be based exclusively on a ½ mile radius drawn around observed foraging activities. “Occupied habitat” is defined as “a geographic area in New York within which a species listed as endangered or threatened

¹ This commitment is contingent upon being able to start the Powerline Reroute by July. This, it is critical that the Department issue clearance for the Powerline Reroute pursuant to the Letter of Resolution as soon as possible.



in [Part 182] has been determined by the [D]epartment *to exhibit* one or more essential behaviors.” 6 NYCRR § 182.2(p) (emphasis added). An essential behavior means “any of the behaviors exhibited by a species listed as endangered or threatened in this Part that are a part of its normal or traditional life cycle and that are essential to its survival and perpetuation” and “includes behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering.” Id. § 182.2(f). To be clear, neither the short-eared owl or the northern harrier have exhibited one or more essential behaviors at or around the Laydown Area. Thus, the Laydown Area cannot properly be defined as “occupied habitat.” Instead, it appears that the Department is basing its jurisdictional determination for the Laydown Area on the presence of “*potentially* occupied habitat.” Indeed, the Project Determination makes reference to habitat that is “suitable for use” rather than habitat that is actually being used. Thus, the Department’s determination that the development of the Laydown Area is “likely to result in the take of a threatened or endangered species” does not appear to have a rational basis.

Separate and apart from this lack of actual occupied habitat, even if the Department could rely on “*potentially* occupied habitat” as a basis of Part 182 jurisdiction (nothing in the statute or regulations suggest that this is the case), observations of the Laydown Area during the entire 2021/2022 wintering season demonstrate that this area should be cleared of jurisdiction. CC conducted an entire season of monitoring under the winter raptor survey protocols approved by the Department to determine whether the two species engage in any essential behaviors in the area where the Laydown Area will be constructed, with no observation of either species.²

Furthermore, as detailed above, there are thousands of acres of suitable habitat available in the surrounding areas, including state and federally protected habitat on the nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge,

² We understand that the Department has informed CC that, in order to clear an area identified as occupied habitat, three years’ worth of survey data must be provided. However, a three-year monitoring requirement is not supported by anything in either Part 182, the ECL more generally, or any of the Department’s regulations. The only three-year requirement in the Department’s regulations is found in 6 NYCRR section 182.9(d), which provides that all determinations must be kept on file at the appropriate regional office for three years.



Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area, which include the preferred habitat for these two species. Moreover, it is important to keep in mind that the two species are not geo-specific meaning that they do not return to the same location year after year and will instead find suitable habitat across a broad geographic range without adverse impact. Indeed, as the Department is aware, the species in question are entirely new to the STAMP Site. Accordingly, any observation of these species does not guarantee that they will return in the future to engage in an essential behavior.

Accordingly, so long as the Laydown Area is constructed during warm weather months when the species have migrated north, there is no evidence that the development of the Laydown Area is likely to result in a take of a threatened or endangered species. In fact, the available information strongly suggests that the opposite is true. Specifically: 1) none of the species were observed undertaking essential behaviors on or around the Laydown Area throughout the 2021/2022 winter season; 2) the short-eared owl and the northern harrier are not geo-specific and may or may not return to the STAMP Site in future winters; and 3) there are thousands of acres of permanently protected potential habitat located in close proximity to the STAMP Site in nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge, Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area. Thus, the development of the Laydown Area is not likely to result in the take of either the short-eared owl or the northern harrier and no Take Permit should be required for its construction.

The Substation

The GCEDC acknowledges that in the winter raptor survey, there was some foraging behavior observed by both species during winter months in the area of the Substation. Nonetheless, the Project Determination appears to have been based, at least in part, upon two misconceptions about the impact that development of the substation could have on the short-eared owl and the northern harrier.

The Department states in the Project Determination that “there will be approximately 54 acres of ground disturbance during the proposed [Project]. This amounts to direct



impacts to about 15% of the open field habitat present in the northwestern portion of the STAMP property.” This 15% figure appears to be inaccurate, and we respectfully request that the Department re-evaluate this calculation.

First, the 54 acres includes almost 10 acres of forested lands which are not properly considered suitable habitat for either species. Additionally, the Department’s calculations used in part to justify Part 182 jurisdiction over the Substation include impacts resulting from the Powerline Reroute (totaling 1.9 acres of permanent impact and cleared by the Department for Part 182 jurisdiction) as well as the Laydown Area (totaling 5.3 acres of permanent impact and conditionally cleared by the Department for Part 182 jurisdiction). An analysis of the Substation should not include impacts from portions of the Project cleared (or conditionally cleared) by the Department. In fact, permanent impacts to potentially occupied habitat for the Substation and associated access road totals only 7.7 acres.

Second, it is unclear why the Department limits its comparison of the scope of this impact to only the northwest section of the STAMP campus. Based on NYSDEC’s preliminary map of occupied habitat, the Department currently considers approximately 1,074 acres of the STAMP Site to consist of occupied habitat for the short-eared owl, and 1,024 acres for the northern harrier.³ As such, the 7.7 acres of permanent impacts represents impacts to only **0.72%** of the Department’s view of occupied habitat for the short-eared owl at STAMP and only **0.71%** of the Department’s view of occupied habitat for the northern harrier at STAMP (again, the GCEDC strongly disagrees with the Department’s approach to classifying occupied habitat). The Department’s calculations also do not include the thousands of acres of surrounding habitat including permanently protected potential habitat located in close proximity to the STAMP site in nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge, Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area.

³ We note that the Department’s preliminary mapping of occupied habitat on the STAMP Site represents a dramatic shift in the Department’s jurisdiction over the STAMP Site with respect to Part 182. No such jurisdiction was identified when the STAMP Site was reviewed pursuant to the State Environmental Quality Review Act, whereas now only a small fraction of the STAMP Site is “clear” from NYSDEC’s perspective.



In the Project Determination, the Department states that “possible roosting was documented during the surveys” because an owl calling near a hedgerow was heard, without the owl being observed. This assertion is simply incorrect.

Contrary to the Department’s assertion regarding roosting, the short-eared owl documented calling from a hedgerow on December 20, 2021, was not observed to be roosting in this location. In fact, the hedgerow in question was observed by CC prior to the start of the survey, including walking past the vicinity of the hedgerow, with no owl detected. Instead, a red-tailed hawk was perched within the hedgerow. This owl may have been one of the two documented foraging in the area that evening, as only two owls could be confirmed by sight/sound at any one time during the survey. Accordingly, no roosts have been documented on the Site, and it is unclear why roosting activity would be inferred when all of the data available to the Department suggests that no roosting activity occurred.

In summary, while foraging activities were observed in the area to be developed for the Substation, the acreage to be permanently impacted is extremely small and not significant compared to the remainder of the Department’s view of occupied habitat at STAMP (0.72% for the short-eared owl and 0.71% for the northern harrier). In addition, as noted above, the short-eared owl and the northern harrier are not geo-specific and may or may not return to the STAMP Site in future winters. Additionally, there remain thousands of acres of suitable habitat in close proximity to the STAMP Site including permanently protected habitat in nearby John White Wildlife Management Area, Iroquois National Wildlife Refuge, Tonawanda Wildlife Management Area, and Oak Orchard Wildlife Management Area. Thus, the development of the Substation is not likely to result in the take of either the short-eared owl or the northern harrier and no Take Permit should be required for its construction.

Conclusion

The GCEDC seeks to continue to develop STAMP, including furthering the development of Plug Power, an important piece in advancing New York State’s clean energy goals pursuant to the CLCPA. The development of STAMP will create over 9,000 jobs and has been a priority of both GCEDC and New York State for over a



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decade. GCEDC is committed to working with the Department to resolve the Department's concerns with respect to Part 182. With that in mind, we respectfully submit that the Department should reconsider its determination that a Take Permit is required for portions of the Project.

Very truly yours,

Phillips Lytle LLP

By /s/ *Adam S. Walters*

Adam S. Walters

ASW

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