

Responsiveness Summary
Endangered Species/Threatened Species (Incidental Take) – Part 182
DEC # 8-1820-00032/00001 (formerly 8-9908-00210/00011)
STAMP Sewer Works, Inc. and Genesee County IDA d/b/a Genesee County
Economic Development Center (GCEDC)
STAMP WWTF, Laydown Area, and Substation
September 2022

Background

The New York State Department of Environmental Conservation (DEC or the Department) is issuing a Part 182 Permit to STAMP Sewer Works, Inc. and Genesee County IDA d/b/a Genesee County Economic Development Center (GCEDC) for the wastewater treatment facility (WWTF), laydown yard, and substation to be located at the Western New York Science and Technology Advanced Manufacturing Park (STAMP) sponsored by GCEDC in the Town of Alabama, Genesee County. The public comment period closed on July 26, 2022.

STAMP Sewer Works, Inc. and GCEDC applied for a Part 182 permit to take habitat used by the State-Listed Endangered Short Eared Owl and the State-Listed threatened Northern Harrier for overwintering at the STAMP site being developed by GCEDC, an industrial development agency, in Genesee County, located west of State Route 77/63, south of State Route 77, and north of Judge Road in the Town of Alabama.

The project includes construction and operation of a WWTF for sanitary waste associated with existing and future tenants of the STAMP site and will be located in the central portion of the STAMP site, west of Crosby Road. The project also includes disturbance associated with the construction of an access road from the WWTF to Crosby Road. The SPDES and wetlands permit applications for the proposed WWTF and associated effluent pipe were publicly noticed already. The impacts to occupied habitat from WWTF construction would be 3.9 acres of permanent impacts and 4.9 acres of temporary impacts.

In addition, the project includes the construction and operation of a substation which will tap into the NYPA 345 kV electric transmission line just north of the STAMP site. The substation will be located within the northwestern portion of the STAMP site, west of Crosby Road. Substation construction will disturb a total of 21.5 acres; however, some of this acreage is wooded and is not considered occupied habitat. Of these 21.5 acres, 7.7 acres of permanent impact to occupied habitat/or buffer conversion and 7.2 acres of temporary impact in occupied habitat will occur.

The total habitat impacts from the WWTF and substation construction would be 23.7 acres: 11.6 acres of permanent impacts and 12.1 acres of temporary impacts. To

address these impacts, a Net Conservation Benefit Plan with a 25-acre mitigation site has been reviewed and accepted. To achieve net conservation benefit for wintering grassland bird habitat, a 1:1 ratio of replacement to impacted habitat is typically recommended, and the mitigation for this project does involve a 1:1 ratio of temporarily and permanently impacted open habitat being replaced with enhanced habitat and maintained as such for seven years.

DEC prepared this Responsiveness Summary (RS) to address the comments received regarding the Part 182 permit process. The correspondences are identified below and are included as an Appendix to this RS.

Part	Affiliation	Name	Dated
1	Tonawanda Seneca Nation (TSN)	Christine G. Abrahams	June 24, 2022
2	Tonawanda Seneca Nation (TSN)	Christine G. Abrams, Office Administrator, on behalf of the Council of Chiefs	July 21, 2022
3	Attorney for TSN	Alex Page	July 12, 2022

Comment: The species surveys are inadequate to determine whether the northern harrier and short-eared owl occupy the site for breeding or other activities beyond the wintering season.

Response: The surveys that have been conducted and are being conducted at the STAMP site follow the Statewide guidance for surveying for these species. Wintering raptor surveys are typically done until March 31; however, if Short-eared Owl and/or Northern Harrier are present at the project site during the last two weeks of March, additional surveys in April would be required. If either species is documented during these early April surveys, the protocol would then switch to breeding season surveys from April through July 20 if there is a need to determine if the species are present in breeding season. In the case of the STAMP site, breeding season surveys were already planned regardless of the outcome of the wintering surveys.

The STAMP site is primarily active cropland or active hayfields and, although nesting in denser areas in and around hayfields is possible, these species are more likely to nest in established grasslands or other open habitats with thick low vegetation such as marshes or old fields. Even on the much higher quality habitat of the nearby John White Wildlife Management Area (WMA), breeding season observations of northern harriers are uncommon and short-eared owls have been completely absent from the surrounding area by May each year.

STAMP's consultants conducted breeding grassland bird surveys on the STAMP site within suitable habitats during the 2022 breeding season (targeting the suite of grassland breeding bird species including both grassland raptors and songbirds), but the complete results have not yet been received by DEC as the season recently ended. There is currently no record of either northern harrier or short-eared owls breeding here in recent times, and the early results of the surveys in 2022 did not show potential breeding activity by either species. Although a sedge wren was detected, no probable or confirmed breeding behavior was observed. If there is evidence that short-eared owl, northern harrier, or any other State-listed species has a history of nesting at the STAMP site or in the immediate vicinity, sharing this information with the regulatory agencies will help in making sure that all necessary protections are enforced for the species.

Comment: DEC indicated that it has three years of survey data for the site.

Response: DEC only has partial information for one year of recent survey data (i.e., 2021/22) for wintering raptors for the STAMP site, which documented that much of the STAMP site is occupied habitat. Additional survey data on wintering raptors from the end of the 2021/2022 survey season is expected from GCEDC. GCEDC has also provided some early breeding season survey data regarding a sedge wren detection and will be providing some additional survey data from breeding season surveys which were recently completed.

Impacts which convert open field areas to any habitat other than open field would require Part 182 permits. For the areas that are mapped occupied habitat, three years of survey data showing that they do not support the northern harrier and short-eared owls would be necessary before their occupied habitat status could be removed.

Comment: DEC should require a sitewide mitigation plan.

Response: DEC has recommended a sitewide plan to address Part 182 concerns and has informed GCEDC that a Part 182 permit will be required for further development. The Part 182 permit for the substation and WWTF/laydown area is addressing a project to serve the existing legal and permitted development at the site and is relatively minor in comparison to constructing large buildings on the site. Plug Power was approved prior to any documentation that the northern portion of STAMP was being used by wintering northern harriers or short-eared owls.

Comment: DEC should deny the Part 182 incidental take permit because the underlying project is not an "otherwise lawful activity" because the SPDES draft permit for the WWTF has significant legal flaws and because key determinations on the SPDES and other permits have not been made.

Response: The SPDES and Freshwater Wetland permits will be issued at the same time as the Part 182 permit. Specific comments on the WWTF will be covered in the Responsiveness Summary for the SPDES Permit.

Comment: DEC has not satisfied the requirements in the Uniform Procedures Act. The notice must contain the correct applicant's name. The notice failed to provide any information about any pending applications for the substation. The notice failed to include the DEC ID numbers for the SPDES and Article 24 Freshwater Wetlands Permits applications.

Response: The Part 182 permit will be issued to STAMP Sewer Works, Inc. and GCEDC. Both permittees were named in the June 22, 2022 Notice of Complete Application (NOCA) and Environmental Notice Bulletin (ENB) notice. Although the initial Part 182 application identified GCEDC as the sole applicant, STAMP Sewer Works, Inc. was properly added as a co-applicant by a revised application dated July 22, 2022.

The DEC ID numbers for the SPDES permit or the freshwater wetland permits were not required to be included in the aforementioned notices as they are distinct projects. Although there is overlap between these permits with respect to the WWTF, they cover different areas. The Part 182 permit also covers the substation which is not part of the SPDES or freshwater wetland permit. Please note that the SPDES and freshwater wetland permits were publicly noticed already. The only Uniform Procedures Act permit required by DEC for the substation is the Part 182 permit which was public noticed under 8-9908-00210/00011 (note: the DEC ID number was changed to 8-1820-00032/00001 to reflect the locations of the project components based on the Department's numbering system). There is also a SPDES stormwater general permit (GP-0-20-001), under which coverage will be authorized for the substation, pending issuance of the Part 182 permit.

Comment: Changing the ID by substituting a new applicant name for STAMP Sewer Works would require that DEC issue a new NOCA, which would trigger a new public comment period, since 6 CRR-NY 621.7(b)(1) requires each NOCA to include "the applicant's name" and the public comment period runs only from a valid NOCA.

Response: The NOCA was not required to be reissued and the comment period did not need to be extended. STAMP Sewer Works, Inc. was added as a co-applicant, not as a substitute for GCEDC. See above response.

Comment: The NOCA incorrectly states that "the proposed action is not subject to CP-29." And "The LOR states that "NYSDEC acknowledges that the Nation's Territory has been identified as a Potential Environmental Justice area and that, due to the STAMP Site's location adjacent to Nation Territory, [NYSDEC] will apply NYSDEC Commissioner Policy 29, Environmental Justice and Permitting ("CP-20") and CP-42, as provided herein, to all applicable elements of the Project undergoing environmental review and permitting."

Response: CP-29 only applies to certain permit application types such as: Title V and Air State Facility, State Pollutant Discharge Elimination System (SPDES), solid waste management, and hazardous waste management. Part 182 is not included and,

therefore, is not subject to CP-29. To clarify, “applicable” as is it used above refers to the permit types specifically identified in CP-29. The LOR does not and was not meant to expand the scope of CP-29. Please note that DEC did apply CP-29 to the SPDES permit application for the WWTF at the STAMP Site.

Comment: The Nation requests a public hearing.

Response: DEC determined that the applications and associated comments did not meet the requirements for a hearing as set forth in 6 NYCRR Part 621.8.

Comment: The Nation objects to GCEDC’s intent to take Lead Agency Status.

Response: GCEDC sent out a Lead Agency request in June of 2022, which DEC did not object to because GCEDC has been the Lead Agency on this project since 2010 and prepared the Generic Draft and Final EIS. GCEDC is also the project sponsor.

Comment: The proposed mitigation is wholly inadequate as it fails to offer adequate habitat and does not comply with DEC’s own standards for grassland bird habitat.”

Response: The mitigation is adequate and complies with applicable standards. As stated above, to achieve net conservation benefit for wintering grassland bird habitat, a 1:1 ratio of replacement to impacted habitat is typically recommended. Here, a Net Conservation Benefit Plan with a 25-acre mitigation site has been reviewed and accepted. The mitigation for this project involves a 1:1 ratio of temporarily and permanently impacted open habitat being replaced with enhanced habitat and maintained as such for seven years. The permit also includes creation, monitoring, and maintenance conditions to assure the mitigation project remains appropriate habitat throughout the seven-year period.

