

MEMORANDUM

TO: Mark A. Masse, CPA | Senior Vice President of Operations, GCEDC

FROM: STAMP Tech Team: Nick Bayer, P.E. | Environmental Engineer, CPL; Katlyn Hojnacki, Senior Ecologist, CC Environment

DATE: July 28, 2022

RE: STAMP Part 182 Permit and SEQRA Comments from Tonawanda Seneca Nation

CPL and CC Environment & Planning (“CC”, together with CPL, the “Tech Team”) have reviewed correspondence received from the Tonawanda Seneca Nation (“Nation” and “Nation Letters”) dated June 24, 2022, July 6, 2022, July 15, 2022, and July 21, 2022 regarding the STAMP Part 182 Permit application deemed complete and published by the New York State Department of Environmental Conservation (“NYSDEC”) on June 21, 2022, as well as the State Environmental Quality Review Act (“SEQRA”) resolution adopted by the GCEDC Board on July 21, 2022 (“Resolution”), relating to the STAMP Wastewater Treatment Facility (“WWTF”), Force Main, Substation, and Powerline Reroute (“STAMP Infrastructure”). This memo summarizes the Tech Team’s review of the Nation’s information and concerns relevant to the Resolution.

SEQRA Resolution Comments

Nation Comment: To the best of the Nation's knowledge, GCEDC has never analyzed the impact of a sewage discharge containing Phosphorus on the Phosphorus-impaired Oak Orchard Creek. GCEDC's claim that the "WWTF does not include any new potentially significant adverse impacts to land resources or land use that were not analyzed in the STAMP GEIS, as amended" is simply false. Neither the original nor the amended GEIS acknowledged that Oak Orchard Creek is impaired for Phosphorus. Neither DEC nor GCEDC has completed a waste load allocation for Oak Orchard Creek to determine the current Phosphorus loading, nor has any Phosphorus reduction from other Phosphorus sources been identified. GCEDC's assertion the WWTF discharge will have no significant impact on Oak Orchard Creek is unsupported in the record.

Tech Team Response: *The Nation may not be aware, but as a direct result of the Nation’s prior comments on this issue to NYSDEC, an extensive analysis of the potential impacts of the WWTF discharge containing phosphorous to Oak Orchard Creek has been completed as part of the NYSDEC permitting process for the WWTF. The WWTF draft SPDES permit limit for phosphorus was originally set at 0.5 mg/L. As noted by the Nation in prior comments to NYSDEC on the WWTF draft SPDES permit, the Clean Water Act prohibits the discharge of any effluent which would lead to a violation of water quality standards. The New York State water quality narrative standard for phosphorus provides that it shall not be discharged “in amounts that result in the growths of algae, weeds and slimes that will impair the waters for their best usages.” Oak Orchard Creek is a Class C stream. This means that the best usage of Oak Orchard Creek is for waters supporting fisheries and suitable for non-contact activities.*

Accordingly, following extensive consultation with CPL, GCEDC and USEPA, NYSDEC adjusted the discharge limit in the WWTF SPDES permit for phosphorus from 0.5 mg/L down to 0.2 mg/L, the strictest available water quality-based limit. This new limit was chosen based on an analysis of existing phosphorus levels in Oak Orchard Creek in order

to ensure that the discharge from the WWTF could only result in a dilution of phosphorus levels going forward (in other words, the WWTF discharge limit for phosphorous is lower than documented concentrations of phosphorous in Oak Orchard Creek). As such, as a direct result of the Nation's prior comments on this issue, an extensive analysis of the potential impacts of the WWTF discharge containing phosphorous to Oak Orchard Creek has been completed and the phosphorous discharge limit for the WWTF has been adjusted accordingly.

Nation Comment: Compounding its failure to adequately assess impacts on Oak Orchard Creek, GCEDC has also failed to analyze the impact of the proposed six million gallons per day discharge during low flow. That volume of discharge will render the creek an industrial-effluent dominated waterway — clearly an adverse impact. And, despite its recitation in the proposed Resolution that permit effluent limitations "have been specifically drafted, with feedback from the Nation and USEPA, to ensure that a discharge does not adversely impact surface waters," the Nation has seen no such limitations nor any response to its comments and communications. Because these effluent limits have not been provided to the Nation or otherwise made public, they cannot serve as the basis for a negative declaration

Tech Team Response: *Similar to the Nation's prior comments to NYSDEC on phosphorous, the Nation's prior comment to NYSDEC has been carefully analyzed by both NYSDEC and CPL in conjunction with the permit application review process for the WWTF. As noted above, Class C streams in New York are suitable for non-contact activities, and as such swimming is not a primary use for Oak Orchard Creek. Generally, the discharge from the force main at 6 MGD represents a fraction of the average annual flow of Oak Orchard Creek. Most of the year, Oak Orchard Creek's flow is at or above the proposed discharge rate of the force main.*

The low flow condition is based on the 7Q10 flows which represent the lowest 7-day average flow that occurs (on average) once every 10 years. While the low flow condition of Oak Orchard Creek could result in an "effluent dominated" classification of Oak Orchard Creek during such low flow condition, the SPDES permit limits are calibrated to ensure no decrease in the water quality standards. As set forth above, phosphorus levels will be diluted from the WWTF discharge rather than increased. In addition, while temperature discharge limits will be 90 degrees in the final WWTF SPDES permit, the WWTF will discharge only treated sanitary water, which will not result in discharges exceeding 5 degrees above Oak Orchard Creek, even during low flow conditions. This is because sanitary wastewater does not create temperature concerns (particularly in situations where the effluent will travel many miles via the Force Main before it is discharged), whereas, for example, cooling water from industrial processes could be expected to have higher temperatures when initially entering the Force Main (if and when such discharges are permitted). The temperature limit in the WWTF SPDES permit is set at the New York State standard from which we understand NYSDEC would only deviate if it determined that there was a reasonable potential for a discharge which would exceed 5 degrees above the receiving waterbody's temperature. Similarly, sanitary wastewater does not implicate other contaminants of concern such as PFOA, PFOS, PCB, or dioxin. Accordingly, the Force Main discharge during low flow periods will not result in any adverse impact to fish or swimmers in compliance with the requirements of the Clean Water Act. Further, we understand that NYSDEC will release its formal responses to the Nation's comments on this and other issues when it issues the final WWTF SPDES permit.

Nation Comment: The so-called "Force Main" offers another example of the failure to adequately assess environmental impacts. The force main is proposed to be an outfall for as-yet-unidentified and unpermitted industrial discharges. GCEDC concedes this in other documents yet baldly concludes in the proposed Resolution that the force main will have no impact on the environment.

Tech Team Response: *As discussed extensively with the Nation during the WWTF Enhanced Public Participation meetings conducted with both Nation Leadership and Nation Members, the total discharge capacity of the Force Main is 6 million gallons per day (MGD). However, the pending SPDES permit application will only authorize the discharge of up to 1 MGD from the proposed WWTF. As also discussed extensively with the Nation, while it is anticipated that future currently unknown tenants of STAMP will propose discharges from their operations and the Force Main has been designed to accommodate up to 5 MGD of discharges from such future tenants, no future tenants will be authorized to discharge any wastewater through the Force Main until they have applied for and obtained a SPDES permit from NYSDEC. In addition, it is noted that any such future permitted discharge can be no less protective of the environment than the permitting requirements imposed on the WWTF due to NYSDEC's anti-backsliding policy. In addition, any such permitting would require extensive consultation and outreach to the Nation similar to the consultation and outreach conducted with the Nation on the WWTF SPDES permit.*

Nation Comment: GCEDC also refers to the application for an incidental take permit to support its proposed negative declaration. However, the public comment period for that permit remains open and the Nation has not yet submitted its comments, the timeline for which is distinct from that of "the public." The Nation has a number of concerns with respect to species on the site, including the extent of surveying, potential roosting, segmentation, the adequacy of mitigation and the reliability of seasonal restrictions.

Tech Team Response: *See below discussion of Part 182 comments from the Nation. The regulations governing the issuance of a Part 182 Permit require GCEDC to implement a net conservation benefit plan. Thus, the very nature of being granted the Part 182 Permit ensures that no significant environmental impacts with respect to threatened or endangered species will result from the STAMP Infrastructure. Further, we note that endangered species were identified on the STAMP Site in the GEIS, and the Land Management Plan (currently undergoing a required once every five-year update and which will be provided to the Nation in draft form for a 60-day review and comment period per request of NYSDEC) is designed to mitigate adverse impacts to the same. To the extent that the Nation has specific other concerns relating to potential roosting or the reliability of seasonal restrictions, the Tech Team would be happy to address such concerns.*

Nation Comment: Likewise, the Nation has raised the need for a robust visual impact assessment of all elements of the STAMP development, an assessment that cannot be completed without consultation and collaboration with the Nation. For example, the power line project GCEDC is pursuing at STAMP would result in huge steel towers being constructed directly adjacent to the Nation's Territory, and as the Nation has informed GCEDC, the National Park Services deem visual impact assessment of such towers a "complex, multistep process" that includes "gathering information about [viewshed] users" and analyzing "sensitivity of the viewers to changes in the landscape." (Nation letter of April 22 quoting NPS and BLM guidance). The Nation has called upon GCEDC to initiate

the consultations required for an adequate visual impacts assessment; instead, GCEDC continues to employ a consultant who has never set foot on the Nation's Territory, much less communicated with the Nation about viewshed users or sensitivity to landscape changes or any other aspect of visual impact assessment.

Tech Team Response: *This comment is substantially similar to the Nation's April 22, 2022, letter commenting on the Initial Assessment prepared for the powerline reroute pursuant to the STAMP Letter of Resolution ("LOR") by kta. Reference is made to the letter from Phillips Lytle LLP dated May 12, 2022, to NYSDEC for the response that was provided at that time. The LOR provides, in relevant part, that when projects (such as the STAMP Infrastructure) require permits from NYSDEC (but not the United States Army Corps of Engineers), the GCEDC shall prepare an "Initial Assessment" to analyze potential impacts of such projects on the Nation's Territory with respect to the National Register criteria for eligibility as a Traditional Cultural Property ("TCP"). The Tech Team further understands that the Settlement Agreement between GCEDC, the Nation, and Plug Power included the relocation of the National Grid power line into the "Restricted Protected Property" of the STAMP Site. The parties agreed to the relocation of the power lines, as well as the location of the 100' wide area in which the power lines would be placed. The Settlement Agreement was negotiated between the parties and executed following Justice Zambito's dismissal of the Nation's Article 78 proceeding against the Plug Power project.*

In addition, it is noted that when GCEDC was preparing its first visual impact assessment pursuant to the LOR, GCEDC informed the Nation that GCEDC had retained Saratoga Associates to conduct field work to gather background visual data to be utilized in future impact assessments for the benefit of the Nation. The Tech Team understands that GCEDC requested permission from the Nation to allow Saratoga Associates to enter the Nation's Territory to gather visual data, however, the Nation declined to respond to this offer. As detailed in the visual impact assessments, Saratoga Associates utilized similarly wooded property on the STAMP Site at the edge of the Nation's Territory, to simulate various viewpoints from the Nation's Territory.

The visual impact assessments prepared for both the powerline reroute and substation clearly and accurately demonstrate that the STAMP Infrastructure will be well-screened from the Nation's Territory, with such screening likely to become improved by the provision of the Settlement Agreement which designates the area between the powerline reroute and the Nation's Territory to become a permanently protected buffer area.

Nation Comment: Finally, GCEDC has chosen to pursue a "cultural resource screening" strategy that literally erases the Nation and its citizens from analysis of cultural resource impacts. Each and every cultural resource impact report GCEDC has commissioned expressly "privilege[s] non-Indian perspectives and perceptions" and intentionally omits "culturally specific information." This methodology is very familiar to the Nation, as we have faced centuries of efforts to ignore our people and erase our culture.

Tech Team Response: *The screening protocols referenced by the Nation are set forth in the LOR that was negotiated between NYSDEC, GCEDC, SHPO, and the Nation. We also note that this comment is substantially similar to the Nation's April 22, 2022 letter commenting on the Initial Assessment prepared for the powerline reroute pursuant to the LOR by kta. Accordingly, the response included in the May 12, 2022, letter from Phillips Lytle LLP to NYSDEC is incorporated by reference. To the extent the Nation believes that information or perspective is missing from the Initial Assessments, the LOR process*

provides the Nation the opportunity to comment substantively on each Initial Assessment, and the Nation's input is a valued part of the review process for GCEDC.

Part 182 Permit Comments

The Nation Letters include both procedural and substantive comments on the Part 182 Permit application. The Tech Team understands that NYSDEC is preparing responses to the Nation's procedural objections, which fall outside of the scope of this memorandum.¹ The Nation's substantive comments, together with the Tech Team's response to each comment, is below.

Nation Comment: Northern harrier and Short-eared owl both are target species for DEC's Strategy for Grassland Bird Habitat Management and Conservation. Yet, despite early indications in the STAMP GEIS that Northern harrier and Short-eared owl are and have long been present on the project site, and despite recorded consistent and regular siting of the species, DEC has failed to require adequate surveys for the species. DEC indicated in a July 11, 2022 meeting with the Nation that it has three years of survey data for the site, but it has failed to provide that information to the Nation even after several specific follow-up requests. Moreover, in the application for the Incidental Take Permit, the Applicant's consultant stated that surveys were conducted during the 2010-2011 wintering season and an updated investigation began on December 20, 2021. That investigation was limited to biweekly surveys through the end of April 2022 at four survey points. Application at 3. There is no indication that any other survey data exists, despite DEC's representation at the July 11th meeting. Importantly, there have been no surveys beyond April in any year.

While the Applicant insists that there is no activity beyond the end of the wintering season for either species, the absence of reliable, year-round survey information requires that more work be done before a determination can be made on this permit application. New York's Breeding Bird Atlas lists nesting by Northern harrier in or near the project area as "Probable." The Cornell ebirds database includes multiple records of Northern harrier in the area during breeding months. Likewise, Short-eared owls have been seen in the area as late as April and may take advantage of agricultural land for breeding. DEC should require adequate surveys to confirm the species' use of the site throughout the year.

Tech Team Response: CC completed surveys relevant to the Part 182 Permit application from December 21, 2021, until April 28, 2022 pursuant to a NYSDEC-approved survey plan consistent with NYSDEC's Survey Protocol for State-listed Wintering Grassland Raptor Species (August 2021). Following the completion of those surveys, at the request of NYSDEC and in connection with the update to the STAMP Land Management Plan, CC undertook additional surveys from May 18, 2022, through July 19, 2022 in accordance with a NYSDEC-approved survey plan consistent with the NYSDEC Survey Protocol for State-listed Breeding Grassland Bird Species (August 2021). Breeding season for both Northern harrier and Short-eared owl s is May – July. The breeding season surveys did not identify any portion of the STAMP Site as occupied for any threatened or endangered species during that time frame. While various databases include records of winter raptors in the area during breeding months, this is unsurprising considering the thousands of acres of adjacent grassland that serves as habitat for those species. No breeding behavior by these species has ever been documented on the STAMP Site.

¹ The Tech Team understands that NYSDEC, by email dated July 26, 2022, informed the Nation that NYSDEC did not intend to re-issue the notice of complete application or otherwise extend the public comment period for the Part 182 Permit application.

Nation Comment: According to DEC, "Protection of suitable habitat is the most vital need of Northern harriers. They require vast expanses of relatively intact open habitat." <https://www.dec.ny.gov/animals/7090.html>. Likewise, "large blocks of habitat are essential for short-eared owls, and habitat preservation/restoration programs should aim to conserve large blocks of habitat." (Wiggins et al. 2006). DEC has acknowledged that the Project will likely have adverse impacts and that it will lead to additional development that will, in turn, have additional adverse impacts. Moreover, DEC has acknowledged that the better course is to plan for mitigation of the whole site instead of fragments. For example, in its May 2, 2022 letter to GCEDC, DEC wrote, "it would make sense to develop a plan for addressing this issue for the entire STAMP site rather than piece meal for each individual development project."

Nevertheless, DEC appears ready to authorize just such piecemealing. It has allowed the Applicant to divide the proposed development into small enough parts to avoid a holistic approach to impact assessment and mitigation, one that would take into account the applicant's longstanding and well-known plan to transform the entire STAMP site from its current form —grasslands, wetlands, agricultural lands and some forest -- into an industrial park. Instead, DEC has drafted a permit to allow one project in exchange for limited mitigation and appears positioned to do the same for each and every segment of the massive industrial development the applicant plans.

Tech Team Response: *The Tech Team respectfully notes that NYSDEC's May 2, 2022, letter recommended that GCEDC consider developing a plan for addressing Part 182 mitigation for the entirety of the STAMP Site for logistical reasons rather than substantive environmental reasons - because mitigation for the full STAMP Site would likely need to be accomplished off-Site, eventually, handling projects individually will likely run into on-Site limitations due to lack of suitable mitigation space. NYSDEC's May 2, 2022, letter goes on to state that mitigation "could possibly be accomplished on-site, by setting aside and managing acreage of buffer ag land, in grassland habitat." The Part 182 Permit Application proposes superior mitigation, setting aside a 30-acre parcel previously slated for development. The proposed mitigation is not "limited" in any way - the winter raptor species prefer open fields of 25 or more acres, and the mitigation plan includes provisions for creating the appropriate conditions for the species on the mitigation parcel and maintaining the mitigation parcel as suitable habitat.*

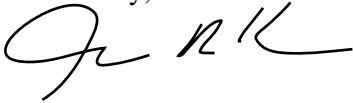
GCEDC is in the process of evaluating pursuing a Part 182 Permit application for the remainder of the STAMP Site. Nevertheless, the Tech Team notes that there is no environmental harm caused by the approach rejected by the Nation - establishing appropriate mitigation on a project-by-project basis may be less efficient from a permit processing perspective (meaning the DEC has to process more than one permit), however, any future Part 182 Permit applications that involve the development of occupied habitat will be subject to the same stringent "Net Conservation Benefit" standard as the current application..

Conclusion

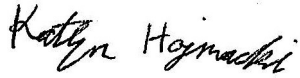
All of the substantive comments raised in the Nation Letters relevant to the Resolution have been respectfully considered and carefully evaluated by the Tech Team. The extensive environmental investigations completed over the course of several years analyzing the Project Infrastructure clearly demonstrates that the Project Infrastructure will not result in significant adverse environmental impacts, and that the Part 182 Permit will

achieve a net conservation benefit for the winter raptor species.

Sincerely,

A handwritten signature in black ink, appearing to read "A. R. Kosa". The signature is fluid and cursive, with the first letter of each name being capitalized and prominent.

Andrew R. Kosa, P.E.
CPL
Principal Associate

A handwritten signature in black ink, appearing to read "Katyln Hojnacki". The signature is cursive and somewhat stylized, with the first letter of each name being capitalized.

Katyln Hojnacki
Senior Ecologist
CC Environment