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TONAWANDA SENECA NATION

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July 21, 2022

Thomas Haley
NYSDEC
6274 East Avon-Lima Road
Avon, NY 14414-9519

Nya:wëh Sgë:nö', Mr. Haley,

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

The Tonawanda Seneca Nation submits these preliminary comments on application #8-9908-00210/00011 for an incidental take permit under Part 182 for temporary and permanent impacts to Northern Harrier and Short-Eared Owl from construction on the STAMP site. The Nation is awaiting additional information from DEC (see below) as well as a second meeting to consult on this and previously provided information, and reserves the right to submit additional comments at a later date.

The Nation objects to the issuance of the permit because it will adversely impact the Northern Harrier and the Short-Eared Owl and because the required mitigation is inadequate to provide a net conservation benefit. The permit fails to consider the full scope of species impacts from the full range of projects at STAMP, and the permit process as undertaken violates Part 182's "otherwise lawful activity" requirement and DEC's Uniform Procedures Act. Harm to the species is also harm to the Nation specifically and the Haudenosaunee generally, and interferes with our ability to discharge our obligation, under the Great Law of Peace, to protect all species. Hawks like the Northern Harrier have a particular role in the Nation's culture and history, recognized by our governmental and familial clan structure. We urge you to deny this permit.

The Tonawanda Seneca Nation is a federally recognized Indian Nation whose Reservation Territory is adjacent to the Project site. The Nation is a member of the Haudenosaunee, also known as the Six Nations or Iroquois Confederacy, and governs its Territory and citizens according to the Great Law of Peace. The Nation is recognized by the Federal Government. 86 Fed. Reg. 7,554, 7,557 [Jan. 29, 2021], and is a successor in interest to the Seneca signatories to the 1794 Treaty with the Six Nations, which guarantees the Nation free use and enjoyment of our lands. 7 Stat. 44, Art. 3-4. The territory originally reserved to the Nation by the Treaty includes the STAMP site.

The Tonawanda Seneca Territory is a site of rich cultural and historic significance. The Nation is in the process of having the Territory designated as eligible for listing on the National Register of Historic Places as a Traditional Cultural Property (“TCP”). Traditional Cultural Properties include aesthetics, plants and wildlife, as well as traditional and cultural activities associated with a place. *See, e.g., U.S. Dep’t of the Interior, National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* [1992] (“National Register Bulletin 38”), <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completeness.pdf>. The natural and cultural resources of the Nation’s Territory are inseparable, such that impacts to any of the natural resources of the Territory are also impacts to the cultural resources of the Nation and of all Haudenosaunee people. Among citizens of the Nation and the Haudenosaunee, there is an ongoing and deep cultural connection to the places that benefit all Haudenosaunee, so that if the Tonawanda Territory is impacted, it will have an impact on all Haudenosaunee.

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

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 followup 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.

DEC SHOULD REQUIRE A SITEWIDE MITIGATION PLAN

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.

DEC SHOULD DENY THE PART 182 INCIDENTAL TAKE PERMIT BECAUSE THE UNDERLYING PROJECT IS NOT AN “OTHERWISE LAWFUL ACTIVITY.”

DEC cannot issue an incidental take permit unless it determines that the proposed activity is an otherwise lawful activity. 6 NYCRR 182.12. DEC cannot make that determination here because the SPDES draft permit for the Wastewater Treatment Facility (“WWTF”) has significant legal flaws and because key determinations on the SPDES and other permits have not been made. As the Nation identified in its multiple comment letters regarding the application for the SPDES permit for the WWTF, in the absence of a TMDL and determination of Waste Load Allocations, DEC cannot issue a permit to discharge phosphorous into a waterway listed on the 303(d) list as impaired for phosphorous. Thus, the WWTF is not a lawful activity and cannot be a legitimate basis for a Part 182 Incidental Take Permit. In addition, the Nation has raised concerns regarding the substation and the relocation of the transmission lines to which it will connect. In advance of a determination on these permits, the Department cannot conclude that the Incidental Take Permit is for an otherwise lawful project.

DEC HAS NOT SATISFIED THE REQUIREMENTS IN THE UNIFORM PROCEDURES FOR PERMIT APPLICATIONS

The Uniform Procedures require:

- (a) Immediately upon determining that an application is complete and is for a major project:
 - (1) The department must provide notice to the chief executive officer of the municipality in which the proposed project is to be located, and to any person who has previously expressed in writing an interest in receiving such notification.

(2) The department must also publish a notice of complete application in the Environmental Notice Bulletin no more than 10 calendar days after the date of notice to the applicant.

(b) The notice must contain the following information:

- (1) The applicant's name.
- (2) A brief description of the proposed project and its location.
- (3) A list of all department permits for the project for which application has been made, and identification numbers for those applications.

NYCRR 621.7. The Notices required by this section failed to correctly identify the project applicant and omitted the identification numbers for relevant department permit applications. According to the application documents, GCEDC is the applicant for the Incidental Take Permit and, as the proposed permittee, is responsible for the proposed mitigation. Nevertheless, DEC's Notice of Complete Application identifies the applicant as Stamp Sewer Works, Inc. Likewise, the Draft Permit identifies Stamp Sewer Works, Inc. as the Permittee. This is a clear violation of the public notice requirement which dictates that the public be afforded notice of the applicant.

In addition, the Notice simply referenced the SPDES and wetlands permit applications for the Wastewater Treatment Facility and indicated that they had been previously noticed. The notice also mentioned the substation project that would tap into the transmission line but failed to provide any information about any pending applications for the substation. Despite the clear requirements of the Uniform Procedures, the Notice failed to include the identification numbers for the permit applications.

These plain errors invalidate the Notice and preclude DEC from approving the permit. In order to move forward, DEC must first reissue notice in the ENB; require a corrected notice be published in the local newspaper of record; and allow for a new public comment period as required by the U.P.A.

CONCLUSION

DEC should deny the incidental take permit under Part 182 for the take of Northern Harrier and Short-Eared Owl on the STAMP project site. The application fails to include adequate survey data; it fails to offer sitewide mitigation; the project cannot be determined to be otherwise lawful and the application itself fails to comply with the uniform procedures. The Nation looks forward to receipt of the additional survey information DEC has agreed to provide, and to a meeting with DEC on the full range of information relevant to this draft permit, prior to DEC's decision.

Da:h ne'hoh,



Christine G. Abrams
On behalf of the Council of Chiefs

TSN Office Administrator
Tonawanda Seneca Nation

cc Kimberly Merchant, Deputy Regional Permit Administrator, NY DEC Division of Permits
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