

HAUDENOSAUNEE

MOHAWK • ONEIDA • ONONDAGA • CAYUGA • SENECA • TUSCARORA

TONAWANDA SENECA NATION

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November 18, 2022

Tom Roster
Manager, Iroquois National Wildlife Refuge
United States Fish and Wildlife Service

Re: Request to Withdraw Approval of Pipeline Right of Way Through Iroquois National Wildlife Refuge Pending Consultation, Full Environmental Review, and Compliance with NEPA

Nya:wëh sgë:nö', Mr. Roster,

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. We write to respectfully request that U.S. Fish and Wildlife Service (USFWS) withdraw approval of a pipeline right of way through the Iroquois National Wildlife Refuge, granted on August 25, 2021, and reopen the National Environmental Policy Act review for the pipeline. Please see the Nation's comments, attached.

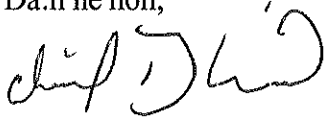
The Tonawanda Seneca Nation is a federally recognized Indian Nation. The Nation is a member nation of the Haudenosaunee, also known as the Six Nations or Iroquois Confederacy, and governs its Territory and citizens according to the Great Law of Peace. The Nation is recognized by the Federal Government, Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 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 Nations free use and enjoyment of our lands. 7 Stat. 44, Art. 3-4.

As detailed more fully in the attached, the industrial wastewater pipeline and the project to which it is connected will have significant negative impacts on the Nation and the Haudenosaunee. USFWS failed to involve the Nation in the limited environmental review conducted prior to approving the pipeline, and failed to comply with NEPA in its approval.

To remedy these wrongs, we request that U.S. Fish and Wildlife Service withdraw the Right of Way, which was based on an insufficient environmental analysis, and reopen the NEPA

process to complete a full environmental review process that complies with the law. We also ask that you immediately initiate formal consultation with the Nation regarding this Project.

Da:h ne'hoh,

A handwritten signature in black ink, appearing to read 'Chief Roger Hill', written over a white background.

Chief Roger Hill
Council of Chiefs
Tonawanda Seneca Nation

cc: Deb Haaland, Secretary of Interior
Martha Williams, Director, United States Fish and Wildlife Service
Bryan Newland, Assistant Secretary – Indian Affairs
Heidi Todacheene, Senior Advisor to the Secretary of Interior
Lisa Garcia, Regional Administrator, United States Environmental Protection Agency
Region 2



To: Tonawanda Seneca Nation
From: Jill Witkowski Heaps, Susan Kraham, Gussie Lord, and Michael Youhana
Date: November 21, 2022
Re: Analysis of U.S. Fish and Wildlife Service's compliance with the National Environmental Policy Act when making a compatibility determination and issuing a right-of-way permit for the STAMP Wastewater Outfall Pipeline.

As part of the planned buildout of the STAMP site and to entice additional industrial development there, the Genesee County Economic Development Center (GCEDC) is planning to build a wastewater discharge pipeline from the STAMP site 9 miles north to Oak Orchard Creek. GCEDC does not have any industrial users lined up to discharge through the pipeline but is building the pipeline with the hopes that it will draw industrial facilities to STAMP. The planned route for the pipeline runs directly through the Iroquois National Wildlife Refuge. In order to build the pipeline through the refuge, GCEDC needs permission from the U.S. Fish and Wildlife Service.

Before U.S. Fish and Wildlife Service was able to sign off on the project, the National Environmental Policy Act required it to review the potential impacts of the STAMP force main project, which will carry industrial wastewater and sewage from the STAMP industrial development site, through the Iroquois National Wildlife Refuge, to discharge into Oak Orchard Creek. GCEDC completed a draft environmental assessment of the pipeline's impacts on the refuge, and that draft environmental assessment was available for comment from January 16, 2020 to February 21, 2020. The notification list for the environmental assessment public review includes the following address:

The Tonawanda Seneca Nation
385 Bloomingdale Road
Akron, NY 14001
Attn: Christine Abrams

On July 16, 2020, the Refuge Manager at the Iroquois National Wildlife Refuge concluded that the STAMP pipeline through the refuge is a compatible use with the wildlife refuge. U.S. Fish and Wildlife Service made a Finding of No Significant Impact related to the pipeline on July 27, 2020. U.S. Fish and Wildlife Service granted STAMP Sewer Works a Right-of-Way Permit for the STAMP outfall pipe on August 19, 2021.

This memo lays out legal requirements that the U.S. Fish and Wildlife Service must meet under the National Environmental Policy Act (NEPA) prior to approving a federal action that may have significant impacts on the environment. This memo lays out the shortcomings of the U.S. Fish and Wildlife Service's analysis and what must be done for the agency to comply with NEPA.

I. NEPA Requires Federal Agencies to Examine the Impacts of a Project on the Environment and Tribal Nations Before Making a Compatibility Determination or Approving a Right of Way Permit.

The National Environmental Policy Act (“NEPA”) has a powerful mandate—to ensure that federal agencies take a “hard look” at the environmental impacts of significant federal action before committing to a course of action. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). NEPA institutes a “look before you leap” requirement forcing federal agencies to weigh several options—and their environmental consequences—before approving a major federal action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S. Ct. 1835, 1845, 104 L. Ed. 2d 351 (1989) (“by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”).

A. The Agency Must Look at All Direct, Indirect, and Reasonably Foreseeable Effects of the Project.

NEPA requires that agencies examine the reasonably foreseeable direct, indirect, and cumulative impacts of the proposed action. 40 C.F.R 1508.1 . Specifically, NEPA requires an agency to examine “changes to the human environment from the proposed action or alternatives” In addition to examining a project’s direct effects, which are” caused by the action and occur at the same time and place,” the agency must examine indirect effects, which are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* Indirect effects may include growth caused by building out infrastructure and other effects related to induced changes in the pattern of land use and related effects on air and water and other natural systems, including ecosystems. *Id.* The agency must also consider a project’s cumulative effects, which are “effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* The agency looks at a wide range of effects, including “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial. *Id.*

B. The Agency Must Consider the Impacts of the Project on Environmental Justice Communities and Tribal Nations.

Agencies must also consider the impact of projects on environmental justice communities. Executive Order 12,898 directs federal agencies to “identify and address[] . . . disproportionately high and adverse human health or environmental effects of its programs” on minority and low-income populations. Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994). Courts will invalidate a NEPA analysis where the agency failed to

examine the impact of a pipeline on a nearby tribal nation. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp.3d 1 (D.D.C. 2020).

The Department of the Interior has adopted the policy to “identify and address... environmental impacts that may result in disproportionately high and adverse human health or environmental effects on low-income or minority, including tribal populations.” Department of Interior Policy 525 §1.5(A) (2017). It is also the Department of the Interior’s policy to “[e]nsure meaningful involvement of... tribal populations in Department... activities through proper public participation...” and to “[c]onsider, where applicable, environmental justice principles throughout planning and decision-making processes outline in NEPA, Title VI of the Civil Rights Act of 1964... and other... regulations and guidance related to environmental justice.” *Id.* at § 1.5(C), (D).

To implement these policies, the Department of the Interior will evaluate projects to determine if it will adversely impact tribal populations, considering whether “tribal populations have suffered or are at risk from suffering adverse health or environmental effects of risks or exposure to environmental hazards, from DOI actions.” Department of Interior Policy 525 §1.6(B)(1). The DOI will also consider whether “tribal populations have been denied an equal opportunity for meaningful involvement in governmental decision making relating to the distribution of environmental benefits or burdens.” *Id.* § 1.6(B)(2).

C. NEPA Requires an Agency to Scrutinize the Stated Purpose and Need for the Proposed Project.

The “purpose and need requirement is critical because it determines the universe of alternatives an agency must consider.” Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 Wash. U. J.L. & Pol’y 293, 305 (2010). When identifying alternatives, “[t]he range of alternatives that an agency must consider under NEPA is based on the purpose and need of the proposed agency action.” *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 981 (9th Cir. 2022) (citation omitted). The agency must define the project’s purpose in a way that is not so “slender as to define competing ‘reasonable alternatives’ out of consideration.” *Nat’l Wildlife Refuge Ass’n v. Rural Utilities Serv.*, 580 F. Supp. 3d 588, 611 (W.D. Wis. 2022) citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997). Where an agency adopts an applicant’s unreasonably narrow purpose statement that “drastically narrowed the alternatives,” court have found that the purpose statement violates NEPA. *Nat’l Wildlife Refuge Ass’n v. Rural Utilities Serv.*, 580 F. Supp. 3d 588, 613 (W.D. Wis. 2022)

D. NEPA Requires an Agency to Consider Meaningful Alternatives to the Proposed Action.

The agency’s determination of the purpose and need for a project drives consideration of alternatives. NEPA’s requirement that agencies “study, develop, and describe appropriate alternatives ... applies whether an agency is preparing an [EIS] or an [EA].” *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir.2008) (per curiam) (citations omitted). The existence of a viable but unexamined alternative renders an [EA]

inadequate.” *Westlands Water Dist.*, 376 F.3d at 868 (quoting *Morongo*, 161 F.3d at 575). An alternatives analysis is evaluated to determine whether the environmental document’s “selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 982 (9th Cir. 2022) (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).

II. The U.S. Fish and Wildlife Service Failed to Comply with NEPA when Determining the Industrial Wastewater Pipeline is Compatible with the Goals of the Iroquois National Wildlife Refuge and Granting STAMP Sewer a Right of Way Permit.

In order to grant permission for STAMP Sewer to build an outfall pipeline for industrial wastewater and treated sewage through the Iroquois National Wildlife Refuge, U.S. Fish and Wildlife Service should have looked at not only the direct impacts of the pipeline through the refuge, but also the reasonably foreseeable indirect impacts from building the pipeline. Since the purpose of the pipeline is to enable a massive buildout of an industrial “mega-site” directly adjacent to the Tonawanda Seneca Nation’s reservation, U.S. Fish and Wildlife Service should have looked at the impacts of this reasonably foreseeable development on the environment and the Tonawanda Seneca Nation. In addition to examining the mega-site’s impacts on the Nation, U.S. Fish and Wildlife Service should have looked at the impact of the potential 6 million gallon a day discharge into Oak Orchard Creek, a creek with a low flow of only half a million gallons a day.

A. U.S. Fish and Wildlife Service Inappropriately Defined the Project Purpose.

The USFWS failed to scrutinize the validity of the project’s purpose and ultimately the need for the project. If it had, it would have discovered that there are currently no facilities operating or planned for the STAMP site that will need to discharge 6 million gallons of effluent into Oak Orchard Creek, so there is currently no need for the project.

For the purpose of the compatibility determination, U.S. Fish and Wildlife Service defined the purpose of the pipeline through the refuge as “The purpose of this is to eliminate the potential adverse effects from discharge of 6,000,000 gallons daily into creeks that flow onto Federal, State, or Tribal managed lands by providing access through the refuge and discharging downstream of these lands.” This statement of purpose is impermissibly narrow and supports only one outcome—approval of the compatibility determination and the right-of-way permit.

The Environmental Assessment prepared by GCEDC states that the purpose and need for the pipeline through the Iroquois National Wildlife Refuge is to “allow the transport of up to 6 million gallons per day (MGD) of combined sanitary and process wastewater effluent generated... at the [STAMP] Site to the proposed discharge location at Oak Orchard Creek.” Environmental Assessment at 1.

The Environmental Assessment prepared by GCEDC defines the project purpose as “The purpose of the proposed federal action (issuance of right-of-way within an existing road right-of-way from the INWR) is to allow for the transport of up to 6 million gallons per day (MGD) of combined sanitary and process wastewater effluent generated, recycled, and treated at the Site to

the proposed discharge location at Oak Orchard Creek.” This project purpose is impermissibly narrow, and U.S. Fish and Wildlife Service should not have adopted it. By specifying that the discharge had to convey 6 million gallons a day of wastewater from the STAMP site, even though there are no discharges at that site that need to discharge *any* wastewater at this point, impermissibly narrows the range of alternatives. Second, by specifying that the wastewater has to be discharged into Oak Orchard Creek, the statement of purpose further narrows wastewater discharge options for the STAMP site. Further, GCEDC’s plan to provide the capacity for up to 6 million gallons a day of wastewater is arbitrary. GCEDC could entice facilities that are not water-intensive or could reuse all wastewater onsite instead of seeking to bring water-intensive utilities to a plot of land with no existing water or wastewater services and no waterways nearby that could safely accept that much discharge on a daily basis.

B. U.S. Fish and Wildlife Service Failed to Identify and Evaluate Meaningful Alternatives to the Proposed Project.

GCEDC’s draft environmental assessment only evaluated two virtually indistinguishable options to meet future potential wastewater needs at the STAMP Site—build a 6 million gallon a day pipeline through the Iroquois National Wildlife Refuge to Oak Orchard Creek, or build a 6 million gallon a day pipeline through the Tonawanda Wildlife Management Area to Oak Orchard Creek. The environmental assessment mentions, but does not consider or evaluate the possibility of “manag[ing] wastewater through reuse alternatives” because GCEDC eliminated that alternative in 2013. Draft Environmental Assessment at 5. Failure to consider this alternative without further explanation was arbitrary and capricious. Additionally, failure to consider any alternatives that would require less wastewater discharge was arbitrary and capricious and violates NEPA.

Additionally, GCEDC’s “no action” alternative—a 6 million gallon a day wastewater pipeline to Oak Orchard Creek through the Tonawanda Wildlife Management Area—is not a true no action alternative. U.S. Fish and Wildlife Service should have examined other alternatives that do not require an industrial wastewater pipeline through sensitive wetlands—like seeking tenants that are not water-intensive or finding a different location to build out a water-dependent “mega industrial site.” GCEDC’s poor planning in selecting this plot of land for a mega-industrial site should not be rewarded with federal permission to build an industrial wastewater pipeline through a wildlife refuge, where that pipeline is incompatible with the uses of the refuge. In its response to comments, GCEDC readily admits that desire to provide capacity for 6 million gallons a day of industrial wastewater is just a guess and that “the amount could fluctuate depending on the businesses...” Environmental Assessment, Appx. G at 2. The STAMP site currently has only one tenant, Plug Power Inc., and this tenant does not need 6 million gallons of water a day. In fact, according to the Environmental Assessment Form submitted by that tenant to GCEDC in 2020, the tenant requires just 280,000 gallons of water per day, to be supplied by Genesee County. *See* Gateway Project Full Environmental Assessment Form Part 1 at 5 (December 30, 2020).

GCEDC could market the STAMP site to companies that are not water intensive, which would obviate the need to discharge a massive amount of water from the site. If 6 million gallons a day are not needed, then a number of options for bringing a smaller amount of water to the

STAMP site that do not include the construction of the pipeline could be available. For example, the STAMP might be able to rely on the Town of Alabama's existing water distribution system if improvements were made to that water distribution system. The U.S. Fish and Wildlife could also consider whether constructing a water main designed to transport less water from the STAMP site than 6 million gallons per day. Such an alternative must be explored because, presumably, such a pipeline could have a smaller diameter, discharge water into a different water body, and be constructed along a different route.

Moreover, U.S. Fish and Wildlife Service's failure to evaluate meaningful alternatives and compare those alternatives to determine if there exists a practicable alternative that avoids wetlands impacts violates the Clean Water Act and Executive Order 11,990. Executive Order 11,990 prohibits destruction of wetlands where a practicable alternative that does not destroy wetlands exists. The Clean Water Act's 404(b)(1) guidelines establish requirements for avoiding wetlands destruction for activities that are not water-dependent, like a wastewater pipeline. The binding guidelines state: "Where the activity associated with a discharge which is proposed for a special aquatic site, [such as a wetland,] does not require access or proximity to or sighting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 2301.10(a)(3).

C. U.S. Fish and Wildlife Service Failed to Engage the Tonawanda Seneca Nation Prior to Issuing a Compatibility Determination on the Pipeline or Issuing the Right of Way Permit.

U.S. Fish and Wildlife Service did not engage with the Tonawanda Seneca Nation at all during the NEPA process or before it issued a compatibility determination and right of way permit for the STAMP outfall pipeline. The notification list for the Environmental Assessment included an invalid mailing address for the Tonawanda Seneca Nation—385 Bloomingdale Road in Akron, NY. The mailing address for the Nation is 7027 Meadville Road in Basom, NY. U.S. Fish and Wildlife Service also failed to otherwise engage the Tonawanda Seneca Nation, despite the fact that the pipeline is designed to induce development at the STAMP site, directly adjacent to the Tonawanda Seneca reservation. By completely ignoring the Tonawanda Seneca Nation and the impacts the STAMP wastewater pipeline will have on the Nation, U.S. Fish and Wildlife have violated NEPA, Executive Order 12,898, and the Department of Interior's policies on environmental justice and tribal engagement.

U.S. Fish and Wildlife Service is required to offer tribes a meaningful and timely opportunity to consult in federal decisionmaking processes that have implications for tribes or their resources. E.O. 13175, 65 Fed. Reg. 67249-67252, Nov. 6, 2000. U.S. Fish and Wildlife Service implements the Department of Interior Policy on Consultation with Indian Tribes, which requires consultation for an activity that may have a substantial direct effect on an Indian Tribe, including tribal cultural practices, lands, and resources or access to traditional areas of cultural or religious importance on federally managed lands. See *U.S. Fish and Wildlife Service Tribal Consultation Handbook*, Updated October 2018, § 4.3, available at <https://www.fws.gov/sites/default/files/documents/Tribal%20Consultation%20Handbook.PDF>. As more fully discussed below, government-to-government consultation between U.S. Fish and

Wildlife Service and the Tonawanda Seneca Nation was required prior to making a final determination on the right-of-way from a project adjacent to the Tonawanda Seneca Nation's reservation territory. U.S. Fish and Wildlife Service's failure to offer an opportunity for meaningful consultation is a violation of its trust responsibility and U.S. Fish and Wildlife Service's and Department of Interior's own tribal consultation policies.

Perhaps most blatant violation in the analysis is the lack of environmental justice analysis. GCEDC's Environmental Assessment concludes that "environmental justice is not relevant to the proposed action and will not be evaluated further." Draft Environmental Assessment at 33. GCEDC knows that the Tonawanda Seneca Nation has been strongly opposed to industrial development at the STAMP Site adjacent to their reservation and have opposed all plans to build out water and wastewater infrastructure at the site. In fact, the Environmental Assessment even mentions the Tonawanda Seneca Nation at one point, stating "the Tonawanda Seneca Nation had concerns with discharging to Whitney Creek..." Draft Environmental Assessment at 3. GCEDC's blatant disregard of the Tonawanda Seneca Nation, their opposition to the project, and the effects the project will have on them is insulting, and U.S. Fish and Wildlife's failure to independently evaluate the environmental justice issues at play with this project violates NEPA.

D. The Analysis Entirely Failed to Consider the Outfall Pipe's Impacts to the Nation's Cultural Resources.

The Tonawanda Seneca are part of the Haudenosaunee Confederacy. The Haudenosaunee Confederacy is made up of Seneca, Tuscarora, Mohawk, Oneida, Cayuga, and Onondaga Nations. The Tonawanda Seneca have lived on the Territory and surrounding areas well before written documents chronicled its history. The importance of the Territory is documented by ancient trail maps that show major routes the Haudenosaunee used. These trails connected villages across New York and served as major communication routes for runners, as well as roadways for travel. These trails include an ancient trail that led from modern day Basom, New York, connecting various Tonawanda communities, to present day Route 77/63. This trail then connected Tonawanda to the Seneca Nation of Indians' Allegany Territory. Tonawanda Creek and its several tributaries run through Tonawanda Territory. Both in ancient times and today, this waterway serves as important sources of traditional foods and important medicine plants that grow within the watershed.

In many cases, Tonawanda Seneca Nation families reside on the lands of their direct ancestors going back several generations. Samuel Kirkland's census of 1789 documented the Tonawanda families living on the Territory at that time and the same names and clans can be seen today on the Territory.

1. The NEPA Analysis Fails to Examine the Impacts of Foreseeable Industrial Development at the STAMP Site on Areas of Cultural and Historic Importance to the Tonawanda Seneca Nation.

The Tonawanda Seneca Territory is a site of rich cultural and historic significance, and 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, and 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-Completenessweb.pdf>.

The Tonawanda Senecas have lived on the Territory for centuries. Many Tonawanda Seneca families live on the lands of their direct ancestors, going back generations. Tonawanda oral history indicates that the longhouse currently used by the Nation was built using timber salvaged from earlier longhouses constructed on the territory incorporating timber from at least four longhouses built by Tonawanda citizens over many decades.

The portion of the Nation's Territory adjacent to the STAMP Site is referred to as the Big Woods and is of special importance to the Nation and the Haudenosaunee. The Big Woods are regularly used by Tonawanda Seneca Nation citizens and citizens of other Haudenosaunee Nations for a wide variety of cultural and traditional purposes, including hunting, fishing, traditional medicine gathering, and trapping. The buildout of the STAMP site will have reasonably foreseeable impacts on the Big Woods, which the Environmental Assessment ignores.

The Big Woods is pristine and unique among the Haudenosaunee Territories. It is a more mature forest and, as a result, the vast majority of Tonawanda Seneca Nation hunters choose to hunt in the Big Woods. The Big Woods contain an unusually high quality and diversity of plants and animals, including many species of concern at both the State and Federal levels. The Big Woods also contain trees with old growth or mature forest characteristics, along with vertebrae species dependent on this uncommon forest type. Unlike so many wooded areas, it has an unusually low incidence of invasive plant species.

The Big Woods are considered excellent hunting grounds and are used regularly by over one hundred Haudenosaunee hunters pursuant to a principle referred to as "one dish, one spoon," which provides for Haudenosaunee citizens from Nations other than Tonawanda to hunt, fish, and gather on Tonawanda Territory. The concept of "one dish, one spoon" means that the land provides for all, and if some have an abundance of something, they share with others. Since the Big Woods is such a good area for hunting, fishing, and gathering, the Nation shares this wealth with other Haudenosaunee Nations.

Many hunters on the Territory are subsistence hunters and rarely purchase meat from a supermarket or other commercial purveyors. Animals hunted in the Big Woods by Haudenosaunee citizens include deer, turkey, squirrel, rabbits, coyote, partridge, pheasants, raccoon, and frog. Some trapping also occurs in the Big Woods. Nation citizens trap fox, raccoon, beaver, mink, coyote, and muskrat. Nation and Haudenosaunee citizens also fish for bass, pike, walleye, and panfish in the areas near the Big Woods.

The Big Woods also contains numerous important traditional medicines that are not known to thrive anywhere else. The Creator has provided these medicines for Haudenosaunee and Haudenosaunee elders have shown younger generations how to harvest and make use of them.

Nation citizens also make traditional items from resources in the Big Woods. Nation citizens make lacrosse sticks, slippery elm baskets, rattles, and shoes. Traditional games are also played near the Big Woods, which are not open to the public.

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.

Despite the rich cultural and historic significance of the Big Woods, the NEPA analysis fails to describe or even acknowledge it.

2. The Tonawanda Seneca Nation Holds Sacred the Water and Animals of Western New York.

The Tonawanda Seneca Nation's environmental philosophies reveal how citizens' special and sacred relationship with the water and animals of Western New York, including those that live or nest in the Iroquois National Wildlife Refuge and the Big Woods. These environmental philosophies have been included in "Words That Come Before All Else: Environmental Philosophies of the Haudenosaunee," authored by the Haudenosaunee Environmental Task Force and Native North American Traveling College in 1992. These philosophies include:

"And altogether, those rivers of Mother Earth and lakes will be the blood veins of our Mother, our beautiful Mother. We must make sure those are always clean so that there will not be a heart attack some day to our Mother. The Creator told the river spirit he will move as a sign of life and so the Niagara Falls moved very strongly, the St. Lawrence as well..." (p. 25)

"In the coming of the Peacemaker and the creation of the Haudenosaunee Confederacy, Water plays an important role as well. The story begins on the northern shore of Lake Ontario." (27)

"Within the Haudenosaunee, there is a clan system with birds on one side and animals on the opposite side of the fire. We have been taught that each bird had a lesson to teach us and that by observing we will learn from them valuable lessons for our survival as human beings." (113)

"The fourth bird on the bird's side of our Haudenosaunee Clan system is the Hawk... We are awed by the bird's beauty and grace as it glides through the sky. The Hawk's name in the Seneca language is ka ji das." (115)

"The Eagle, a sacred bird to the Haudenosaunee, provides a good example of cooperative rearing. The male and female both build the nest, incubate the eggs, provide food, and defend the nest. Haudenosaunee people believe, in times of danger, the Eagle will provide a warning to us. A recent severe storm at the Iroquois preserve near the Tonawanda Band of Seneca community snapped off a tree containing a nest with two Eaglets. Both were killed in the fall. The unusually

high winds, including tornados in recent days, speak to the change in weather patterns we're witnessing in the northeast and across the country." (115-116)

3. The U.S. Fish and Wildlife Service Failed to Consider Impacts on the Wildlife at the STAMP Site.

Researchers at SUNY-ESF have collected evidence of tri-colored bats on the Nation's territory directly adjacent to the STAMP site and within hundreds of feet of proposed high voltage power lines. However, GCEDC has not conducted any analysis of the potential impacts of development at the STAMP Site on the tri-colored bat. GCEDC only performed raptor surveys one hour prior to sunset to 0.5 hours after sunset. Failing to conduct morning and nocturnal surveys provides incomplete information about raptor presence at the STAMP site. Because the surveys did not include frequency of use or density of sightings, it is impossible to evaluate the raptor use of the Site, including the proposed sewage treatment plant connected to the outfall pipeline.

E. U.S. Fish and Wildlife Service Failed to Consider the Impacts of the Industrial Wastewater Discharge on Oak Orchard Creek.

1. STAMP Sewer Seeks to Discharge Phosphorus-Containing Sewage into Phosphorus-Impaired Oak Orchard Creek.

The environmental impacts analysis of the STAMP wastewater pipeline, which is being proposed to convey treated sewage and industrial wastewater to Oak Orchard Creek, failed to examine the impact of the discharges on Oak Orchard Creek. Specifically, upper Oak Orchard Creek is listed on New York's 303(d) listing of impaired waters as "impaired" for excess Phosphorus pollution. The environmental impact review of the pipeline ignored the water quality impact of adding more Phosphorus pollution to a Phosphorus-impaired creek. Had the environmental review looked at this critical water quality issue and weighed the water quality impacts between this pipeline and other water discharge options for the STAMP site, it would have become clear that Oak Orchard Creek is a poor (and illegal) site for a new Phosphorus discharge.

Authorizing a discharge pipeline intended to discharge more Phosphorus into Oak Orchard Creek is incompatible with the goals of the Iroquois National Wildlife Refuge and its Comprehensive Conservation Plan. Goal 2 of the Comprehensive Conservation Plan is "Maintain the environmental health and integrity of Oak Orchard Creek and associated bottomland floodplain forests and wetlands as a free-flowing habitat with a diverse assemblage of native plants and animals." The plan acknowledges that Oak Orchard Creek is an impaired water body that causes a "plume of sediments and nutrients that can extend up to 10 km out into [Lake Ontario] from the mouth of Oak Orchard Creek." Iroquois National Wildlife Refuge Comprehensive Conservation Plan at 3-12 (2011). For this reason, the pipeline is not a compatible use of the Iroquois National Wildlife Refuge.

2. STAMP Sewer Seeks to Discharge 6 million gallons of wastewater daily into a creek with a low flow of 0.46 million gallons per day.

GCEDC sought permission to build an outfall pipeline designed for a future capacity of 6 million gallons a day discharge into Oak Orchard Creek. The creek is at risk of becoming effluent dominated, meaning that the water body's flow could become predominately made up of treated wastewater, because Oak Orchard Creek has a 7Q10 flow 0.46 MGD.

Transforming Oak Orchard Creek into an effluent dominated stream is incompatible with the goals of the Iroquois National Wildlife Refuge and its Comprehensive Conservation Plan. Objective 2.1 of the Comprehensive Conservation Plan is "Maintain, and restore as necessary, the water quality, natural flow regimes, and biological integrity of Oak Orchard Creek in the eastern portion of the refuge, relying on natural processes when possible." In order to accommodate facilities that may discharge up to 6 million gallons a day of wastewater, GCEDC is planning to build a water pipeline to bring water from the Niagara River more than 30 miles to the STAMP Site. Hauling water from the Niagara River to the STAMP Site, using it in who-knows-what kind of industrial facility, and then discharging 6 million gallons a day of industrial wastewater into Oak Orchard Creek does not maintain the natural flow regime in Oak Orchard Creek. For this reason, the pipeline is not a compatible use of the Iroquois National Wildlife Refuge.

F. U.S. Fish and Wildlife Service Failed to Consider the Impacts of Spills on the Refuge and its Wildlife.

Spills are reasonably foreseeable during the construction and operation of a pipeline. U.S. Fish and Wildlife Service failed to examine any impact of any type of spills in the Environmental Assessment, in violation of NEPA.

1. The Analysis Failed to Examine the Impacts of Spills of Fracking Fluid During the Pipeline Construction Process.

GCEDC plans to use horizontal directional drilling to construct the pipeline through the wildlife refuge. The Environmental Assessment acknowledges that horizontal directional drilling "require[s] the use of drilling fluid" during construction and that "drilling fluid is made from mixing bentonite and other additives with water." Draft Environmental Assessment at 12. The actual makeup of drilling fluid is not included in the Environmental Assessment, and companies that produce the drilling fluid claim that the actual chemical makeup is proprietary. The Draft Environmental Assessment also recognizes that spills happen. *Id.* The Environmental Assessment claims that the contractor would control the fluid injection rate and then contain the fluid. But there is no assessment of the harm that such spills could cause to the fragile ecosystem within the refuge.

Public comments raised during the public comment period highlighted the lack of analysis and raised significant concerns about the damage a spill of drilling fluid could cause. Specifically, commenters stated, "We are concerned about going under the creek and the use of HDD fluid injection. We feel it is dangerous to chance contaminating the wildlife refuge."

Environmental Assessment, Appx. G at 4. GCEDC's wholly inadequate response to that concern was: "Trenchless directional drilling construction methods will be used to install the force main below the creek as required. These methods are used throughout the region in order to reduce or avoid impacts on the surrounding environment." *Id.* The failure to evaluate the potential negative impacts of a spill of drilling fluid in the refuge violates NEPA.

2. The Analysis Failed to Examine the Impacts of Spills of Industrial Wastewater During Pipeline Operation.

While GCEDC at least admitted to the possibility of a spill of drilling fluid, they denied the possibility of a spill during the pipeline's operation having any impacts. GCEDC claims that "the effluent would not pose a threat to the environment because of the contents of the Force Main meets regulatory agency permit limits for a direct discharge." Draft Environmental Assessment at 13. This analysis is laughable. GCEDC has no idea what the makeup of the industrial effluent will be, since there are no planned industrial facilities yet. However, even if the NY Department of Environmental Conservation issued a permit for the discharge of effluent into Oak Orchard Creek, it does not follow that such effluent would not be harmful to the refuge. Further, there is the possibility that an industrial facility violates its permitted effluent limitations, in which case it is reasonably foreseeable that such discharges could cause significant harm to the refuge. The failure to acknowledge these potential harms, evaluate them, and mitigate them, violates NEPA.

CONCLUSION

U.S. Fish and Wildlife Service has failed to comply with NEPA in making the compatibility determination and issuing the right-of-way permit, in violation of the law.