

HAUDENOSAUNEE

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TONAWANDA SENECA NATION

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March 31, 2023

Thomas P. Haley
NYSDEC Region 8 Headquarters
6274 E. Avon-Lima Road Avon, NY 14414
via email to thomas.haley@dec.ny.gov

Re: Preliminary Comments of Tonawanda Seneca Nation on STAMP Endangered/Threatened
Species Sitewide Incidental Take Permit Application
No. 8-1820-00032/00003

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 Nation provides herein preliminary comments on the Sitewide Incidental Take Permit submitted by GCEDC. DEC has not yet carried out its consultation obligation to the Nation as required by CP-42 – Contact, Cooperation and Consultation with Indian Nations. The Nation intends to submit additional comments once consultations are completed.

I. DEC MUST CONSULT WITH THE NATION AND RESPECT ITS RIGHTS

As stated to DEC via videoconference on March 24, the Nation requests that DEC complete consultations with the Nation prior to approving the permit application or any part of it. In addition, the Nation asks again that DEC apply Commissioners Policy 29 -- Environmental Justice and Permitting to this process to ensure that the Nation's rights as an Environmental Justice community are respected and that Nation leaders, citizens, and other members of the public are provided robust opportunities to participate in the permitting process. Application of the policy requires, among other things, preparation and implementation of an Enhanced Public Participation Plan and, in the case of permits sought at the STAMP site, compliance with the March 2021 Letter of Resolution ("LOR") signed by GCEDC and DEC.

The LOR states that DEC "agree[s] to implement the provisions of CP-29...in relation to any NYSDEC administered permit applications subject to the Uniform Procedures Act at the STAMP site." It is undisputed that Part 182 permit applications are subject to the Uniform Procedures Act. *See, e.g.*, 6 NYCRR 182.10 ("[D]epartmental actions on [Part 182] permit applications [including] public notice and comment procedures...shall utilize the procedures found in Part 621 (Uniform Procedures)"; Letter of DEC to GCEDC Requesting Additional Information on Part 182 Permit Application, March 3, 2023 ("[I]n accordance with 6 NYCRR 621.14(b), the Department requests that DEC submit the following information..."); Letter of GCEDC to DEC Responding to March 3 Part 182 Letter (noting ENB publication of the permit application "pursuant to the Uniform Procedures Act"). And by the terms of CP-29(V), DEC is legally mandated to apply the policy "to the extent permitted by law, including [as to] applicability." DEC has provided no legal reason prohibiting it from applying CP-29 and no justification for its refusal to do so.

In addition, the Nation reiterates its request of November 4, 2022 (to which DEC failed to respond for over twelve weeks) that ground-disturbing work at STAMP be paused pending a robust survey for bat species of special concern, a number of which have been identified on Nation territory. *See* Report of Jonathan Kresge, attached as Exh. A. As discussed below, this work is particularly urgent as the Northern Long Eared Bat, known to occupy the area, is now listed as Endangered by the United States Fish and Wildlife Service.

In addition, the Nation requests that, prior to issuance of any take permit related to industrial development at STAMP, DEC ensure that the requirements of the CLCPA are met, including baseline burden and air quality analyses, studies of micro- and meso-scale air quality impacts of any proposed industrial activity, vehicle traffic, etc., at STAMP, and analysis of whether the proposed development would "disproportionately burden disadvantaged communities," sometime CLCPA prohibits. CLCPA § 7(2), (3). This analysis must take account of the Nation's special relationship with the natural world; sovereignty over its treaty-confirmed reservation territory; and historical trauma linked to dispossession of its ancestral territories and the attempted eradication of the Nation and its reservation. *See, e.g., The Tonawanda Senecas' Heroic Battle Against Removal*, Laurence Hauptman (2011). GCEDC is required to provide evidence that CLCPA requirements have been met and prohibitions avoided; it has failed to do so.

Further, the Nation requests that prior to any destruction or development of the 665 acres of occupied habitat, a Supplemental EIS be completed in consultation with the Nation to assess impacts on Northern Harrier ("NOHA"), Short-Eared Owl ("SEOW"), and other species, as well as on the Tonawanda Seneca Nation and its cultural heritage, resources, and environment, including plant and animal species of special importance, from the proposed taking and related industrial development. GCEDC's destruction of NOHA and SEOW habitat is a "subsequent proposed action" under SEQRA, the effects of which have not been addressed or adequately addressed in the 2012 FEIS or subsequent GCEDC Findings or Resolutions. 6 NYCRR 617.10(d); *see also* 6 NYCRR 617.7(c)(1)(ii) ("substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species" is considered an "indicator of significant adverse impacts on the environment."). Because this subsequent

proposed action will have significant adverse impacts on the environment, the Nation, and the Nation's cultural resources, "a supplement to the final generic EIS must be prepared." 6 NYCRR 617.10(d).¹

II. THE PART 182 PERMIT APPLICATION SHOULD BE DENIED

The Nation requests that DEC reject the STAMP Sitewide Part 182 permit application and protect the 665 acres of occupied habitat adjacent to the Nation's territory from industrial destruction. The permit should be rejected for the following reasons.

A. The permit should be rejected on environmental justice grounds

The Nation is an Environmental Justice Community for purposes of DEC Commissioners Policy 29 and a Disadvantaged Community for purposes of the Climate Leadership and Community Protection Act (CLCPA). In addition to refusing to apply CP-29, DEC has failed to require GCEDC to conduct the Disadvantaged Community analysis mandated by the CLCPA. The Tonawanda Seneca Nation opposes this habitat destruction and would be directly impacted by it, as described below. The permit would allow for unmitigated incidental take on Nation lands when – inevitably – increased human presence, noise, excavation, light, and traffic "disturb" SEOW and NOHA and turn them away from adjacent Nation territory. Further, the direct, indirect, and cumulative impacts of the Part 182 permit, which would clear the way for large-scale industrialization of the STAMP site, would severely harm not only the Nation but the Haudenosaunee. The Nation's treaty-protected reservation Territory is a small fraction of the 70,000 acres reserved to the Nation by the 1797 Treaty of Big Tree, and the Nation and its citizens continue to suffer harm from the ongoing legacy of colonialism and dispossession. As discussed below, the Nation's territory, especially the Big Woods adjacent to the STAMP site, is unique among Haudenosaunee territories and is used regularly by hunters from across the Haudenosaunee, who fish, hunt and gather on Nation territory. The Big Woods also contains numerous important traditional medicines that are not known to thrive anywhere else. Industrialization of the STAMP site would destroy the ability of the Haudenosaunee to carry out cultural activities and uphold responsibilities to the natural world. This is a human rights issue for the Tonawanda Seneca Nation and the Haudenosaunee, who would bear a disproportionate burden from the industrialization of land at STAMP.

B. The application would not create a net conservation benefit as required by law

¹ The Nation reiterates its rejection of GCEDC's purported "Initial Assessments," documents styled as "Cultural Resource Screens" but lacking any analysis of impacts on the Nation's cultural resources. These purported assessments expressly "privilege[] non-Indian perspectives" and have been created without consultation with the Nation; they present the Nation's history as ending in 1857; and are intentionally devoid of information about impacts on the Nation's culture, resources or people. For the purposes of SEQRA's requirements related to subsequent proposed actions, no Initial Assessment has addressed impacts on NOHA or SEOW.

As discussed below and in the Statement of ornithologist Alison Kocek, Ph.D. (“Kocek Statement”), attached as Exh. B, the permit application fails to create a net conservation benefit to NOHA or SEOW. According to the Grassland Trust, fewer than 100 SEOWs remain in New York State. Kocek Statement at 1. The presence of this species at STAMP multiple times throughout the winter indicates that the occupied habitat at STAMP is an important and rare wintering location for these endangered birds. *Id.* Likewise, NOHA similarly benefit from large, open expanses of undisturbed grasslands and there is there is evidence of NOHA use of open fields at STAMP during both winter and breeding season. Kocek Statement at 2. Due to the ecology of both species, 58 acres would be inadequate for the wintering needs of NOHA and SEOW currently using the STAMP site, especially the SEOW, and especially during times of lower prey availability that can lead to interspecies aggression. *Id.* According to ornithologist Alison Kocek, Ph.D., “for this reason alone, the application has not demonstrated a net conservation benefit will occur from this mitigation and should not be approved.” *Id.* As discussed more fully below, GCEDC has failed to show, as required by 6 NYCRR 182.11(d)(2), that the taking sought to be authorized by incidental take permit will not reduce the likelihood of the survival or recovery of the species in New York.

1. Insufficient Mitigation Acreage

GCEDC’s permit application proposes to destroy 665 acres of NOHA and SEOW habitat forever and replace it with, at best, 58 acres of prospective habitat over 60 years. Even if GCEDC committed to protecting the 58 acres in perpetuity, which it does not, this would reduce NOHA and SEOW habitat by more than 90%. The proposed action and mitigation cannot provide a net conservation benefit as required by Part 182, especially when 25 of the 58 proposed mitigation acres have already been set aside as mitigation for an earlier taking, and the bulk of the remaining 33 acres is already protected from development, see discussion below.

2. Speculative Habitat Creation

GCEDC’s application fails to show that the proposed mitigation areas will ever be suitable habitat actively used by SEOW and NOHA. Speculative plans to create new potential habitat are not enough to ensure a net conservation benefit when known occupied habitat is destroyed.

3. Unsuitably Fragmented Habitat

These raptors need unfragmented habitat. The proposed mitigation fails to provide this. SEOWs in particular prefer tracts of at least 250 acres to survive. Small non-adjacent parcels cannot support SEOW, and such parcels therefore cannot comprise a “net conservation benefit” over destruction of large, intact parcels like those proposed to be developed, particularly the tract of 310 acres in the upper northwest corner of the STAMP site.

4. Failure to Account for Indirect Take on the Nation and Elsewhere

The permit application fails to account for indirect take that will occur outside the 665 acres planned for industrial development, including indirect take on the Tonawanda Seneca Nation territory and adjacent wildlife refuges. *See* Kocek Statement at 2 (the proposed take “is likely to cause take beyond the STAMP site itself.”). 6 NY-CRR 182.2 defines “take” to mean “the pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting of any species listed as endangered or threatened in this Part, *and all lesser acts such as disturbing, harrying or worrying.*” (emphasis added). GCEDC has failed to acknowledge or provide mitigation for the indirect take that will occur beyond the bounds of proposed (as yet unknown) industrial facilities.

As discussed below, the fact there is no project planned for the majority of the acreage sought to be taken means it is impossible for GCEDC to provide an accurate assessment of indirect take as required by Part 182. DEC recognizes as to the protection of environmental resources that “all the natural world is interconnected and interrelated” and that “environmental impacts transcend [geographic] boundaries.” Commissioners Policy 42 – Coordination and Consultation with Indian Tribes at III(C), IV(C)(1). As DEC has explained, “NOHA and SEOW essential behaviors, like foraging, are disturbed by the increased human presence, traffic, noise, and ground disturbance” and an applicant “must account for the indirect take of individual NOHA and SEOW by lesser acts such as disturbing, harrying or worrying.” (DEC Brief on Exceptions, *In the Matter of Application of Hecate Greene Energy I LLC*, Case No.: 17-F-0619, August 26, 2021 at pp. 2-3). Such disturbances are not limited to the geographic boundaries of the STAMP site. They constitute a take that must be avoided or mitigated, and because GCEDC has failed to assess the extent of these disturbances (and indeed cannot assess them in the absence of an actual project), much less mitigate them, the permit application should be denied.

C. GCEDC impermissibly manipulates a claimed “ag exemption” to intentionally degrade habitat and minimize mitigation requirements

Since at least June 2022, GCEDC has controlled the management of all leased farmlands comprising occupied habitat at STAMP, including directing what is planted there. *See* GCEDC Lease Agreement, attached as Exh. C. (specifying in para. 4 that “[t]he nature of the crops to be grown shall be approved in advance by Lessor [GCEDC], and no further planting may take place on the Premises”). GCEDC claims that the agricultural exemption allows GCEDC both to (1) exercise its authority over leased farmland to intentionally degrade habitat; and (2) use the purportedly degraded status of existing habitat to reduce GCEDC’s mitigation plan obligations. *See, e.g.*, Supplemental Submission of GCEDC to DEC, March 10, 2023 (“GCEDC Supplement”) at 4 (claiming DEC “mischaracterizes the take proposed mitigation” as taking 665 acres of habitat in exchange for 58 acres of mitigation, based on GCEDC’s active efforts to degrade existing habitat); *see also* GCEDC Supplement at Exh. A, p. 1 (“The proposed development will remove relatively marginal winter habitat, most of it row crops, that is not

managed or protected for grassland birds”); *see also* Application at 6 (noting, as if in the abstract, that “typical agricultural activities such as frequent disturbance and fertilizer/pesticide application are all generally undertaken without respect to grassland bird populations, and thus decrease the value of the habitat for these species.”)

DEC must not approve this strategy, which makes a mockery of the net conservation benefit standard. Doing so would eviscerate the standard and encourage applicants to intentionally degrade occupied habitat – to treat it “without respect to grassland bird populations” -- as a means of reducing the mitigation required to show a net conservation benefit to these threatened and endangered species.

D. GCEDC impermissibly uses adjacent habitat outside the take acreage to minimize mitigation requirements

As it has before, GCEDC attempts to use the vast swath of protected and semi-protected areas encircling the STAMP site as a justification for industrialization of the site. In response to DEC’s request for a showing of specific measures to enhance the NOHA and SEOW, GCEDC responds that “[t]he proposed development is located within a large complex of protected, managed, and unmanaged open lands (part of the Tonawanda-Iroquois-Oak Orchard Complex). Several areas within this complex are currently utilized by SEOW and NOHA... Both SEOW and NOHA are highly mobile during the winter and foraging habitat is available immediately adjacent to the agricultural lands proposed for development at STAMP.” GCEDC Supplement, Exh. A at 1. The fact that “several areas” nearby serve as habitat for SEOW and NOHA is irrelevant to the impacts of the proposed take and Part 182’s requirement that the species be left better off by the proposed action than it was prior to the action. DEC cannot credit the presence of nearby habitat in its analysis of the purported net conservation benefit to be created pursuant to the mitigation plan. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033 (N.D. Cal. 2015) (finding that USFWS violated the “net conservation benefit” requirements of the Endangered Species Act by factoring conservation efforts on neighboring lands into its analysis of company’s mitigation efforts proposed for incidental-take-permit application, and holding that applicants cannot piggyback off of the conservation efforts of non-applicant neighbors). The permit application should be denied.

E. GCEDC has failed to adequately consider modification of the proposed development activity.

Like the federal Endangered Species Act, Part 182 requires both the applicant and the agency to consider whether modification of the proposed activity could avoid or minimize taking of the species. *See, e.g. Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d 1274 (E.D. Cal. 2000) (setting aside as arbitrary and capricious an agency’s approval of a ESA-mandated habitat mitigation plan where the agency failed to consider alternatives). In response to DEC’s March 3 request for

“a description of any efforts to modify the proposed activity to minimize or avoid entirely any take or taking of the species” as required by 6 NYCRR 182.11(c)(4), GCEDC simply states that “GCEDC will be removing 58-acres from their planned development of STAMP.” See March 10 Supplement at Exh. A, p.4. This statement is false and should not be credited by DEC as responsive to its question or to the requirements imposed by Part 182.

First, GCEDC has already committed to managing 25 of the purported 58 acres as grassland habitat in order to mitigate a separate take for which DEC issued a permit in 2022. Second, the bulk of the 33-acre parcel lies within the 500 foot “buffer” that GCEDC has already agreed with DEC to protect from development. See, e.g., STAMP Master Utility Plan – Common Areas Map of December 2022, attached as Exh. D (showing “400’ Buffer” and “500’ Structure Setback” overlying proposed 33-acre mitigation parcel).

Nor should DEC credit GCEDC’s claim to have provided the description of modification alternatives required by 6 NYCRR 182.11(c)(4) in the 2011 GEIS or “alternatives analysis” submitted to the U.S. Army Corps of Engineers in 2015. These analyses were conducted years before DEC determined the STAMP site to be Occupied Habitat for NOHA and SEOW and thus do not (and cannot) assess whether some modification of GCEDC’s as-yet-speculative development plans – such as avoidance of the most intensively used habitat – might minimize or avoid taking NOHA or SEOW. In fact, GCEDC has made no efforts to modify the proposed activity to minimize or avoid any take of the NOHA or SEOW, including modifying the project by protecting from development the occupied habitat for which no projects currently exist, as discussed below. Under these circumstances the permit application should be rejected.

F. GCEDC has failed to provide an acceptable proposed conservation easement

DEC has advised GCEDC that GCEDC must “submit an implementation agreement which meets the requirements of 6 NYCRR 182.11(e)” and has specified that implementation agreements submitted for approval pursuant to 6 NYCRR 182.11(e) must include “must...include an unexecuted draft of the Conservation Easement.” DEC Letter of March 3, 2023. GCEDC has failed to meet this requirement. Instead, GCEDC has submitted a draft conservation easement intended to relate to buffer areas between the Nation and STAMP and along wetlands and waterways. This draft buffer conservation easement has never been finalized or accepted by the Nation. More importantly, it contains no provisions to provide protective habitat or ecological conditions conducive to the health, survival and recovery of NOHA or SEOW as required by 6 NYCRR 182.11(e).

In fact, the conservation easement does not even mention SEOW, NOHA, or the creation of grassland habitat suitable for these species. More generally, the draft supplied by GCEDC contains deficiencies so severe as to require wholesale redrafting to meet conservation goals. The draft lacks discernable, specific conservation purposes and values to be protected and fails to clearly distinguish between permitted and prohibited uses on the protected property. Certain uses are prohibited “except where otherwise permitted,” but the easement does not explain how that determination is to be made. In fact, it cannot be determined with certainty which uses are

prohibited, because there may be conflict between the generic prohibited activities and the specifically prohibited activities.

Measures to be taken in the 25- and 33-acre parcels to create and maintain grassland habitat suitable for NOHA and SEOW comprise the core of GCEDC's proposed mitigation plan, and DEC has clearly stated that a draft conservation easement outlining these measures is required by 6 NYCRR 182.11(e). Such an easement would need, at the very least, to define relevant conservation values and the steps to be taken to ensure those specific values are protected. Because GCEDC has failed utterly to provide such a document, the permit application should be rejected.

G. There is no project for which the sitewide permit is needed, particularly for the 300+ acres comprising the largest parcel of occupied habitat on the STAMP site.

There is no planned activity in the majority of the developable acres for which GCEDC seeks this sitewide permit, particularly in the 300+ acre parcel on the site's northwest corner, the area most intensively used and occupied by NOHA and SEOW. *See* Application at 6. Instead, GCEDC seeks to destroy the habitat of endangered species in the hopes of someday attracting revenue-generating tenants to STAMP. Speculative plans to destroy habitat for no known benefit should not justify issuance of a Part 182 permit.

H. DEC should require a supplemental EIS prior to issuance of any further permits at STAMP.

As discussed above, SEQRA mandates a supplemental EIS under the circumstances presented here. Since 2016, the Nation has requested a supplemental EIS be performed to address critical shortcomings in GCEDC's 2012 EIS, which referred to the Nation by an incorrect name and failed utterly to consider impacts of industrialization at STAMP on the Nation, its people and its cultural resources. In addition to these failures, the 2012 EIS is over a decade out of date and lacks analysis required by intervening state and federal law, including the CLCPA. The impacts of industrialization in this ecologically rich and unique area have never been properly studied. A supplemental EIS should examine among other things: impacts on SEOW, NOHA, and other threatened/endangered species such as the Northern Long-Eared Bat and Tri-Colored Bat (see discussion below); how industrialization and the loss of these species and others affect the Nation and the Haudenosaunee, its people and its cultural resources; industrializations' impacts on the hydrology of the area; and impacts of traffic, noise, and light on and around the Nation; including direct, indirect, and cumulative impacts. The supplemental EIS should be completed prior to issuance of further Part 182 permits; for this reason the permit should be denied at this time.

I. The presence of threatened and endangered bats militates against granting the permit.

Tri-Colored bat was documented on the Nation in 2022. Other documented bats include Big Brown Bat, Little Brown Myotis, Hoary Bat, Silver-Haired Bat, and Eastern Red Bat. *See* Statement of Jonathan Kresge, attached. Tri-Colored Bat is expected to be listed as Endangered by the U.S. Fish and Wildlife Service this year, following a proposed rule to list the species published in 2022. Northern Long-Eared Bat is known to use the area that includes the STAMP site and the Nation, and is listed as Endangered by the U.S. Fish and Wildlife Service and DEC. *See* <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis>; <https://www.dec.ny.gov/animals/106713.html>. Federal guidelines for assessing the presence of NLE Bat and protecting it from extirpation are forthcoming, and there is no question industrialization at STAMP could result in damage to this critically endangered bats, whose presence in New York State has declined by 98% since 2006. *See* <https://www.dec.ny.gov/animals/106713.html>. The presence of these bats should be studied under guidelines being developed by USFWS prior to allowing industrial development at STAMP.

J. The sitewide incidental take permit relates to species of cultural importance to the Tonawanda Seneca Nation and the Haudenosaunee

CP-42 requires DEC to “avoid any irreplaceable loss” of Nation cultural resources, including Traditional Cultural Properties, stemming from DEC actions. CP-42 III(D). Granting a sitewide Part 182 permit to destroy over 600 acres of occupied habitat adjacent to the Nation would cause such an irreplaceable loss. The proposed habitat to be destroyed lies within the Nation’s ancestral lands and adjacent to the Nation’s treaty-protected Reservation Territory. The Nation’s Territory is a site of rich cultural and historic significance deemed a Traditional Cultural Property², and the Nation is in the process of having its Territory designated as eligible for listing in the National and State Registers of Historic Places.

Part of the Nation’s territory located adjacent to STAMP is referred to as the Big Woods and has special importance to the Nation and the Haudenosaunee. In addition, Nation citizens maintain farmland, including cover crops, just west and south of the STAMP boundary. The areas of the Nation adjacent to STAMP contain an unusually high quality and diversity of plants and animals, including many species of concern at both State and Federal levels. The Big Woods are considered excellent hunting grounds and are used regularly by hunters from across the Haudenosaunee, who fish, hunt and gather on Nation territory. The Big Woods also contains

² Traditional cultural properties include aesthetics, plans and wildlife, and traditional and cultural activities associated with a specific place. *See, e.g.* U.S. Dep’t of the Interior, National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties [1992], <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completenessweb.pdf>.

numerous important traditional medicines that are not known to thrive anywhere else. To the Nation and the Haudenosaunee, cultural and natural resources are inseparable, such that impacts to any of the natural resources of the Nation's Territory are also impacts to the cultural resources of all Haudenosaunee. There is an ongoing and deep cultural connection to the places that benefit all Haudenosaunee. Industrialization and harm to endangered species on the Nation will harm all Haudenosaunee.

Every part of the natural world is important and interrelated, and the Nation and the Haudenosaunee carry out duties and responsibilities to all of creation equally. At the same time, certain species occupy particular places in Haudenosaunee culture, and the hawks and owls are among them. Harm to these species is also harm to the Nation specifically and the Haudenosaunee generally, and interferes with the Nation's ability to discharge its obligation, under the Great Law of Peace, to protect these species. Hawks like the Northern Harrier have a particular role in the Nation's culture and history, recognized by the Nation's governmental and familial clan structure. *See, e.g.,* <https://snpolytechnic.com/sites/default/files/docs/resource/birds.pdf> (providing a version of the story of the beginning of the Hawk Clan; listing Northern Harriers as among the hawks found on Haudenosaunee territory).

Owls like the Short-Eared Owl also play a particular role in Tonawanda Seneca culture and history. Lacrosse has been played by the Haudenosaunee people for countless centuries. On his deathbed, Handsome Lake, the Seneca prophet and religious leader who brought the Great Law to the people, requested a game of lacrosse be played to assist his journey. *See, e.g.,* <https://redhawkslax.com/history/>. While it is well known that the game of lacrosse originated with the Haudenosaunee, the story of the very first game of lacrosse is told to include hawk and owl as captains for the bird side, based on owl's wisdom and keen sight, and hawk's ability to move quickly. *See, e.g.,* <https://www.oneidaindiannation.com/a-lacrosse-legend/>.

NOHA and SEOW have cultural importance to the Nation, and the impacts on the Nation's culture to destruction of these species' habitat adjacent to the Nation, including incidental take on the Nation, have never been properly assessed. The permit application should be denied.

III. Conclusion

For all the reasons above, the Tonawanda Seneca Nation calls upon DEC to reject the STAMP Endangered/Threatened Species Sitewide Incidental Take Permit Application No. 8-1820-00032/00003. Further, the Nation asks DEC to comply with the requests made herein, and to continue consultations with the Nation on the proposed industrial facility.

Da:h ne'hoh,



Christine G. Abrams
On behalf of the Council of Chiefs
TSN Office Administrator
Tonawanda Seneca Nation

Cc: Kimberly Merchant, DEC
Adriana Espinoza, DEC
Beynan Ransom, DEC
Joselyn Ferguson, DEC
Sean Mahar, DEC
Basil Seggos, DEC
Lisa Garcia, EPA
Grant Jonathan, EPA
Samantha Nyer, EPA
Timothy Binzen, USFWS

11-3-2022

My name is Jonathan Kresge. I currently work as a science teacher in the Baldwinsville Central School District and have worked in the past as a naturalist and at several national parks doing various wildlife research and biotech work. I have a strong passion for wildlife and conservation efforts which led me to complete a Certificate of Training in the "Bat Acoustics Training Course, with Introduction to Mist Netting". This was a three-day intensive workshop presented by Environmental Resources Management in 2019. I am not a bat biologist but this course trained me to manually analyze bat calls to determine the species. At the invitation of the Nation, I have visited various parts of TSN territory, including portions in the Big Woods near STAMP. On June 18, 2022 I installed two Wildlife Acoustics "Song Meter Mini Bat Ultrasonic Recorders" at about 43.08166 N 78.41740 W and 43.08718 N 78.42068 W along the Tonawanda and STAMP property boundaries. These two recorders and the Kaleidoscope Pro software used to analyze/auto-ID the bat calls are manufactured by Wildlife Acoustics, an industry leading company in the development of professional wildlife acoustic monitoring tools used by scientists around the world. After changing out the batteries and SD cards of the recorders at various times throughout the summer to get multiple sets of recordings, I retrieved the recorders on 10-24-2022 and ran the sound files through Kaleidoscope Pro Version 5.4.8 set to Bat Analysis Mode → Classifier Settings: Bats of North America 5.4.0 (+1 More Accurate (Conservative)) filter. The software Auto-ID'd six different species of bats which I confirmed to the best of my ability via manual inspection of the spectrograms. The Bats species ID'd include the following:

Big Brown Bat (*Eptesicus fuscus*)

Little Brown Myotis (*Myotis lucifugus*)

Hoary Bat (*Lasiurus cinereus*)

Silver-Haired Bat (*Lasionycteris noctivagans*)

Eastern Red Bat (*Lasiurus borealis*)

Tri-Colored Bat (*Perimyotis subflavus*)


From the few Tri-Colored Bat recordings I recorded, I believe there is enough evidence to suggest that this bat species may be present in the area. Tricolored bats are proposed for listing by USFWS as endangered. According to USFWS, Tri-Colored bats face extinction due to white-nose syndrome, which has led to 90-100% declines in tri-colored bat winter colony abundance at sites impacted by the disease. (<https://www.fws.gov/species/tricolored-bat-perimyotis-subflavus>).

Given the evidence that tri-colored bats may be present in the Big Woods, it is likely tri-colored bats are also in adjacent forested areas on the STAMP site

The dire threat of extinction to this bat species highlights the need to survey the STAMP site for tri-colored and other bats

Sincerely,


Jonathan M. Kresge



DANIEL M TIVNAN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01T16350505
Qualified in Onondaga County
My Commission Expires 11-07-2023

STATEMENT OF ALISON R. KOCEK, Ph.D.

March 30, 2023

My name is Alison R. Kocek. I am an ornithologist and wildlife biologist with 23 years of experience studying birds.

I received my B.S. from the University of Arizona in 2004, my M.S. from the State University of New York's College of Environmental Science and Forestry (SUNY-ESF) in 2016, and my Ph.D. from SUNY-ESF in 2022. Both my thesis and dissertation focused on the study of and management implications for imperiled bird species. I am currently a postdoctoral researcher at SUNY-ESF studying imperiled Saltmarsh Sparrows and Federal- and State-Listed Endangered Great Lakes Piping Plover. I am also the Vice President of Onondaga Audubon, an organization dedicated to the conservation of birds and their native habitats in Central and Northern New York.

I write in regards to the Article 11, Part 182 permit to take overwintering habitat used by the State-Listed Endangered Short-eared Owl (SEOW) and the State-Listed Threatened Northern Harrier (NOHA) on the STAMP site (Western New York Science & Technology Advanced Manufacturing Park).

I have reviewed the permit application, request from NYSDEC for more information, and the supplemental information from 03 March 2023. It is my understanding that the application must demonstrate a net conservation benefit to the two species of concern (SEOW and NOHA) in order for the permit to be approved, and it is my conclusion that the proposed mitigation plan outlined in the permit would not only fail to provide a net conservation benefit, but would cause overall net harm, as outlined below.

SEOW require large, open expanses of undisturbed grasslands due to their need for an abundant supply of small rodents. It is suggested that wintering SEOW are provided at least 125 acres (Tate 1992, Herkert et al. 1993, New York Natural Heritage Program 2023) or preferable 250 acres or larger patches (Herkert et al. 1993, New York Natural Heritage Program 2023) of low open grasslands with abundant small mammals for their persistence in the Northeastern United States. However, few studies have assessed the exact habitat size requirements for these birds. Village (1987) found that SEOW territory size in winter in Scotland ranged from 42-72 ha (104 – 178 acres) which is in agreement with expansive habitat areas being important for this species.

It is also well known that small mammal abundance on the landscape can be unpredictable and that SEOW movements can be nomadic as they search for abundant prey locations (Booms et al. 2014). This makes the species difficult to detect and perhaps increases the habitat range needs for this species to account for times when rodent abundance is low. Booms et al. (2014) also suggested that the number one conservation priority for the species should be to, “better define and protect important habitats.” This is likely especially important in New York state as SEOW abundance has dropped to as few as 100 wintering individuals remaining statewide (Grassland Bird Trust 2023). The presence of this species at the STAMP site multiple times throughout the winter is an indication of an important and rare wintering sanctuary location.

NOHA similarly benefit from large, open expanses of undisturbed grasslands due to their dependence upon rodent prey populations during both the wintering and breeding season. Breeding pairs have been found to cover as many as 100 miles per day in search of food during the breeding season (Grassland Bird Trust 2023). There is evidence of this species using the STAMP site during both winter and breeding season although active breeding has not been confirmed.

The proposed permit would allow for removal of 665 acres of habitat in exchange for maintaining a total of 58 acres of replacement habitat, reducing the suitable habitat for these state-listed species by nearly 90%. Due to the ecology of both species, it is unlikely that 58 acres of habitat would be adequate for the wintering needs of all the individuals currently using the STAMP site, especially the SEOW, and especially during times of lower prey availability that can lead to interspecies aggression. For this reason alone, the application has not demonstrated a net conservation benefit will occur from this mitigation and should not be approved.

Additionally, removal of such a large chunk of active habitat at one time is likely to cause take beyond the STAMP site itself. Surveyors noted, “a pair of harriers was observed foraging along the edge of a cut corn field on their way to John White Wildlife Management Area” (WNY STAMP Incidental Take Permit Application 2023). This pair may not be able to find adequate food supplies to successfully nest without the current STAMP site even if they are not actively nesting within it because it may be an important part of their territory.

An alternate plan that may lead to a net conservation benefit to these species would involve protecting the most important larger patches within the STAMP site where both species were observed (in the NW corner and S end) and mitigating a large contiguous patch of habitat nearby that would create more habitat than would be lost by this project. This plan should also be implemented in a stepwise fashion to ensure that suitable habitat remains at all times while newly mitigated habitat has time to grow and mature (5+ years).

In summary, the current proposed removal of 665 acres of SEOW and NOHA habitat in exchange for 58 acres of replacement does not constitute a net conservation gain for these State-Listed species and may lead to a take outside of the STAMP boundary. I ask the NYSDEC to deny the Article 11, Part 182 permit without significant increases in mitigated habitat size and quality as described above.

I hereby certify that, to the best of my knowledge, the information herein is true and accurate.



30 March 2023

Alison R. Kocek

Date

Literature Cited

- Booms, T. L., G. L. Holroyd, M. A. Gahbauer, H. E. Trefry, D. A. Wiggins, D. W. Holt, J. A. Johnson, S. B. Lewis, M. D. Larson, K. L. Keyes, and S. Swegel. 2014. Assessing the Status and Conservation Priorities of the Short-Eared Owl in North America. *Journal of Wildlife Management* 78:772-78.
- Grassland Bird Trust. 2023. Conservation: Birds at Risk. [Accessed: 30 March 2023], <https://www.grasslandbirdtrust.org/conservation/grassland-birds-at-risk/>
- Herkert, J.R., R.E. Szafoni, V.M. Kleen, and J.E. Schwegman. 1993. Habitat establishment, enhancement and management for forest and grassland birds in Illinois. Illinois Department of Conservation, Division of Natural Heritage, Natural Heritage Technical Publication 1, Springfield, IL. 20 pp.
- New York Natural Heritage Program. 2023. Online Conservation Guide for *Asio flammeus*. [Accessed: 30 March 2023], <https://guides.nynhp.org/short-eared-owl/>.
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- Village, A. 1987. Numbers, Territory-Size and Turnover of Short-Eared Owls (*Asio flammeus*) in Relation to Vole Abundance. *Scandinavian Journal of Ornithology* 18 198-204.

GLEAD
6-2-22

M. Clattenburg - Yes
C. Kemp - Yes

M. Gray - Yes

The item was approved as presented.

6.2 Revised Land Lease Agreement for STAMP Farming- The GCEDC has previously approved a standard lease agreement for any farming activities on any of our corporate parks. While discussing some options with a farmer at STAMP to assist with our land management plans as well as the potential for a tenant to commit to STAMP and potentially impact the land prior to the crop being harvested, the farmer has made a request for the STAMP Committee to consider a revision in the lease agreement for 2022. Farming the land at the STAMP site helps with overall maintenance of the property as well as preventing any wetlands from expanding or other things which could cause issues for potential development. The farmer at STAMP is concerned that if he is only reimbursed for the cost of the crop, and not the fair market value, if the lease is cancelled early for a project to start construction, being reimbursed of cost for his crop would have a severe negative impact on his farming operations. His request is to change the reimbursement to be based on the fair market value of the crop that is impacted.

Fund commitment: None.

This was recommended for approval by the Committee.

C. Yunker made a motion to approve the Revised Land Lease Agreement with Norm Giess for STAMP Farming as presented; the motion was seconded by M. Clattenburg. Roll call resulted as follows:

P. Battaglia -	Yes	C. Yunker -	Yes
T. Bender -	Absent	P. Zeliff -	Absent
M. Clattenburg -	Yes	M. Gray -	Yes
C. Kemp -	Yes		

The item was approved as presented.

6.3 NYPA Facilities Study - Upon completion of the SIS study, NYPA required that a Facilities Study (FS) be completed on the proposed substation. NYPA completed the study and requested a deposit of \$100,000 for this work at the signing of the Facilities Study in 2020. This payment and agreement were approved in February of 2020. The original agreement had a scheduled FS completion date of May of 2020. The final Q580 FS Report Rev. 6 was issued on April 7, 2022. It took almost 2 years to finalize the FS due to the major change in the configuration of the Q580 STAMP Station and the associated additional studies needed to justify/confirm the reliability and operability of the revised configuration.

Fund commitment: An increase of \$53,000 covered under the existing \$8 million NYESD grant.

This was recommended for approval by the Committee.

C. Yunker made a motion to approve the payment of an additional \$53,000 for the Facilities Study Agreement as presented; the motion was seconded by M. Clattenburg. Roll call resulted as follows:

P. Battaglia -	Yes	C. Yunker -	Yes
T. Bender -	Absent	P. Zeliff -	Absent

FARM LEASE AGREEMENT

THIS FARM LEASE AGREEMENT ("Lease") is made as of this ___ day of May, 2022 by and between Genesee County Industrial Development Agency d/b/a Genesee County Economic Development Center, a New York public benefit corporation, having an office at 99 Med'cch Drive, Batavia, New York 14020-3141 ("Lessor"), and Norm Geiss whose address is 739 Ackerson Road, Basom, New York 14013 ("Lessee").

WITNESSETH:

WHEREAS, Lessor is the fee simple owner of a certain parcel of real property commonly known as STAMP Parcels 3, 9 and 11, consisting of approximately 183 acres of land, as more particularly described as S.B.L. No. 10-1-4.112, 10-1-13.1 and 10-1-42 in the Town of Alabama, County of Genesee, and State of New York (the "Property"); and

WHEREAS, Lessor desires to lease to Lessee a portion of the Property being approximately 169 acres of vacant land as shown on Exhibit A attached hereto (the "Premises"), and Lessee desires to lease the Premises from Lessor for the purpose of farming the Premises.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties intending to be legally bound hereby covenant and agree as follows:

1. **Demise.** In consideration of the rents reserved hereunder and the terms and conditions of this Lease, Lessor does hereby demise and let unto Lessee, and Lessee does hereby take and lease from Lessor, the Premises. Lessee agrees to accept the Premises in their "as is" condition and "with all faults" existing as of the date hereof. Lessee agrees that this Lease has been entered into after full investigation of the Premises and without any reliance upon any statement or representation by Lessor or any other person. Nothing in this Lease shall confer upon Lessee any rights to minerals or timber on the Premises.

2. **Term.** The term of this Lease shall be one (1) year, commencing on May 1, 2022 and ending on December 31, 2022 (the "Term"), provided, however, that either party may cancel this Lease effective as of the last day of a Lease Year provided that written notice of termination is given by such party to the other not later than thirty (30) days prior to such effective date of termination. For purposes of this Lease a "Lease Year" shall be defined as the twelve month period between January of a given year and December of the following year. Notwithstanding the foregoing, Lessor may, at any time during the Term, terminate this Lease as to the entire Premises or as to any portion thereof upon two (2) weeks written notice to Lessee. In such event, Lessor shall reimburse Lessee for ~~all documented, out-of-pocket expenses~~ the fair market value of the loss of crop the Lessee has incurred during the Term in connection with ~~with the planting~~ of any crop on the Premises, or on the portion of the Premises with regard to which this Lease is so terminated.

3. **Rent.** As consideration for this Lease, Lessee agrees to pay to Lessor annual rent in the amount of \$70 per acre (or \$10,140 for the entire Premises) for each Lease Year of the Term ("Rent"). Rent shall be due and payable to Lessor in two installments, as follows: Fifty (50%)

percent of the Rent shall be due and payable by June 1 of each Lease Year and the remaining fifty (50%) percent shall be due and payable by December 1 of each Lease Year. The Rent shall be a net rent and Lessor shall not be responsible for all expenses related to the farming of the Premises. Lessee shall be responsible for, and shall pay in a timely manner, any and all costs and expenses related to Lessee's farming of the Premises, including, without limitation, the costs and expenses for any equipment and machinery required to plow, plant, tend to and harvest the Premises, fertilizers, pesticides, and herbicides, water for irrigation, labor, taxes and insurance.

4. **Permitted Use.** Lessee shall use the Premises only for planting and harvesting of crops, and for no other purpose. The nature of the crops to be grown shall be approved in advance by Lessor, and no further planting may take place on the Premises. Lessee agrees to conduct such farming activities in accordance with good agricultural practices and in accordance with such standards as are generally accepted in the farming industry in Genesee County, New York. Lessee shall not (a) erect any permanent structures or improvements on the Premises, (b) store any equipment, machinery or supplies on the Premises, (c) drill, install or modify any wells, irrigation systems or drainage systems on the Premises, (d) materially alter the grades of the Premises so as to affect the storm water drainage on and off of the Premises, or (e) burn or permit the burning of any items on the Premises. Lessee shall monitor and maintain the Premises so as to prevent the development of any new wetlands. Lessee agrees to preserve established water courses, tile drains, tile outlets, diversion ditches, terraces and grass waterways and to refrain from any operation that will injure them. Lessee shall neither cut live trees nor market timber, fence posts or firewood on the Premises, nor will Lessee have any above or below ground mineral or gas or oil rights on the Premises.

5. **Hazardous or Offensive Uses.** Lessee may not conduct any dangerous, hazardous, noxious or offensive uses on the Premises and shall obtain, at its sole cost and expense, all governmental permits, licenses and approvals required for Lessee's use and occupancy of the Premises. Lessee shall comply with all environmental laws which include all federal, state, local and municipal laws, statutes, ordinances, rules, regulations, orders, decrees or requirements relating to or imposing liability or standards of conduct concerning the use, storage, treatment, transportation, manufacture, refinement, handling, production and/or disposal of hazardous materials, or otherwise pertaining to environmental protection, as now or at any time hereafter in effect, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act, 41 U.S.C. Section 9601; the Super Fund Amendment and Reauthorization Act of 1986; the Emergency Planning and Community Right-to-Know Act, Public Law 99-499, 100 Stat.1613; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901; the Occupational Safety and Health Act, 29, U.S.C. Section 655 and Section 657; the Clean Air Act, 42 U.S.C. Section 7401; the Clean Water Act, 33 U.S.C. Section 1251; and the New York Environmental Conservation Law; together with all amendments thereto, substitutions therefore, rules and regulations promulgated thereunder and all amendments to and substitutions for the rules and regulations.

Lessee shall not store, dump or dispose on the Premises any gasoline, motor oils or other hazardous substances. Lessee shall not at any time cause or permit any contamination of the Premises, including any ponds, stormwater or groundwater. Lessee shall not use any fertilizers (other than as specified on Exhibit B attached hereto), pesticides (other than as specified on Exhibit B attached hereto) or herbicides, and shall use such permitted fertilizers and

