

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GENESEE

In the Matter of the Application of
TONAWANDA SENECA NATION,
Plaintiff-Petitioner,
For a Judgment Under Article 78 of the Civil Practice
Law and Rules,
-against-
GENESEE COUNTY ECONOMIC DEVELOPMENT
CENTER,
Defendant-Respondent.

Index No. _____

VERIFIED PETITION

AND COMPLAINT

Oral Argument Requested

Petitioner/Plaintiff Tonawanda Seneca Nation (“Nation”), a federally recognized Indian Nation, for its verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and its complaint seeking a declaratory judgment pursuant to Section 3001 of the CPLR, by its attorneys, alleges as follows:

PRELIMINARY STATEMENT

1. This petition challenges the February 4, 2021 Resolution of the Genesee County Industrial Development Agency d/b/a Genesee County Economic Development Center Pursuant to the State Environmental Quality Review Act Concerning Project Gateway - Proposed Future Use of a Portion of the Western New York Science & Technology Advanced Manufacturing Park (“February 4, 2021 Resolution”) finding that all potential impacts associated with a proposed hydrogen production facility, Project Gateway, are adequately addressed and that no further compliance with the New York State Environmental Quality Review Act (“SEQRA”) is

required. The February 4, 2021 Resolution found that the Project will not result in any adverse impact upon the Nation's Territory as a property of religious and cultural significance. In reaching this conclusion, however, the Genesee County Economic Development Center ("GCEDC") failed to consult with the Nation, whose Reservation Territory lies adjacent to the Western New York Science & Technology Advanced Manufacturing Park ("STAMP Site") in which Project Gateway is located. At a meeting with the Nation the day after the Resolution's adoption, GCEDC provided information about Project Gateway but withheld the fact that the Resolution had already been adopted. GCEDC did not inform the Nation of the February 4, 2021 Resolution until February 23, 2021.

2. This petition also challenges GCEDC's March 25, 2021 Final Resolution No. 03/2021 - 04, approving Project Gateway, ratifying the February 4, 2021 Resolution finding that the SEQRA review process for the Project is complete, and granting Project Gateway's owner, Plug Power, Inc., an exemption from state and local taxes for purchases of goods and services up to \$13,921,000 for Project development. GCEDC also failed to inform the Nation of the March 22, 2021 public hearing at which these issues were to be discussed.

3. On March 23, 2021, the Nation requested that GCEDC rescind the February 4, 2021 Resolution on the basis that it made findings about the nature and extent of impacts of Project Gateway on the Nation without input from the Nation. The Nation noted that GCEDC did not provide the Nation with Plug Power's application or a map of the proposed project until February 8, and only after the Nation requested the information at the February 5 meeting.

4. The findings in the February 4, 2021 Resolution were based, in part, upon a series of Environmental Impact Statements ("EIS") for the STAMP site, including a Generic Environmental Impact Statement ("GEIS") in 2012, a Supplemental Environmental Impact

Statement (“SEIS”) in 2016, and an updated Findings Statement in 2020. Nothing in either EIS or in subsequent findings of the GCEDC provides a factual basis for GCEDC’s findings in the February 4, 2021 Resolution about Project Gateway’s potential impacts on the Nation.

5. On March 30, 2021, GCEDC denied the Nation’s request to rescind the February 4, 2021 Resolution, stating that there would be a process “separate and apart from the SEQR process” to evaluate impacts of Project Gateway on the Nation’s territory as a property of religious and cultural significance. Nevertheless, GCEDC told the Nation that it included an assessment of potential impacts on the Nation in the February 4, 2021 Resolution because SEQRA requires a hard look at all potential adverse impacts associated with an action and a reasoned explanation for the determination. Finally, GCEDC stated that it was required to proceed with the SEQRA determination of significance within 20 days of becoming a lead agency and/or receiving all necessary information.

6. In denying the Nation’s recission request, GCEDC also cited a March 24, 2021 Letter of Resolution (“LOR”) entered into between GCEDC, the New York State Department of Environmental Conservation (“NYSDEC”) and the New York State Office of Parks, Recreation and Historic Preservation (“SHPO”), that provides for a consultation process with the Nation and requires GCEDC to undertake an assessment of impacts to the Nation for each project at STAMP that requires a NYSDEC permit.

7. GCEDC’s assertion that an evaluation of Project Gateway will occur “separate and apart from the SEQR process” does not relieve GCEDC of its obligation to comply with SEQRA, nor does it explain how the SEQRA process can have been deemed complete without input from the Nation, which is directly adjacent to the STAMP Site. Potential post-approval consultation offered through the LOR processes—which are distinct from the SEQRA process—

provides the Nation no opportunity for meaningful input on the Project, and does not rectify GCEDC's violation of the SEQRA. The LOR also offers consultation to the Nation only if an NYSDEC permit is required. Neither the GCEDC's March 30 letter nor the LOR clarify whether the hydrogen production facility requires a NYSDEC permit and is thus subject to the LOR requirements. In addition, the February 4, 2021 Resolution was issued several weeks before GCEDC signed the LOR. Thus, the LOR could not have been a basis on which GCEDC determined that input from the Nation was unnecessary prior to issuing the February 4, 2021 Resolution stating that no further SEQRA compliance was required.

PETITIONER

8. Petitioner Tonawanda Seneca Nation is a sovereign Indian Nation with authority and jurisdiction over its citizens and its treaty-protected Reservation Territory, which lies in Genesee, Erie, and Niagara counties. The Nation's Territory is bounded to the North by the Tonawanda Wildlife Management Area, which abuts the Iroquois National Wildlife Refuge to the Nation's northeast. 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, 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 free use and enjoyment of its land. 7 Stat. 44, Art. 3-4.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to CPLR sections 3001, 7801, and 7803.

10. Petitioners timely initiated this special proceeding by properly filing their Notice of Petition, Verified Petition and Complaint, and all supporting affidavits, memorandum of law, and other exhibits on June 4, 2021.

11. Venue lies in the Supreme Court, Genesee County, pursuant to CPLR § 7804(b), because the principal office of GCEDC is located there, *id.* § 505(a), and it is where GCEDC made the determinations challenged in this proceeding, *id.* § 506(b).

LEGAL BACKGROUND

12. The New York State Environmental Quality Review Act was adopted with the intention that “all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.” 6 NYCRR 617.1. SEQRA’s purpose “is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of State, regional and local government agencies at the earliest possible time.” *Id.*

13. To fulfill that purpose, the “lead agency” for SEQRA purposes is required to determine, “at the earliest possible time,” “whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.” 6 NYCRR 617.1(c), 617.2(v).

14. SEQRA defines the environment as the “physical conditions which will be affected by a proposed action.” These conditions include land, air, water, flora, fauna, objects of historic or aesthetic significance, and existing community or neighborhood character, among others. ECL 8-0105(6).

15. An agency must make a written findings statement before making a final decision to undertake, fund, approve or disapprove an action. 6 NYCRR 617.11.

16. That findings statement must “consider[] the relevant environmental impacts presented in an [environmental impact statement], weigh[] and balance[] them with social, economic and other essential considerations, provide[] a rationale for the agency's decision and certif[y] that the SEQRA requirements have been met.” 6 NYCRR 617.2(p).

17. The findings statement must also “certify that consistent with social, economic and other essential consideration from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decisions those mitigative measures that were identified as practicable.” 6 NYCRR § 617.11(d).

FACTS

18. GCEDC has sought to develop STAMP as a manufacturing mega-site for over a decade. The Nation’s Reservation Territory (“Territory”) immediately abuts the STAMP site at the Project’s western edge. *See* Tonawanda Map, Attachment A-1 to Affidavit of Chief Kenith Jonathan, attached to the Affirmation of Suzanne Novak, sworn June 4, 2021, (“Novak Affirmation”) submitted herewith as Exhibit 1; Overview Map, Attachment A-2 to *Id.*

19. On January 26, 2010, GCEDC accepted Lead Agency status for the coordinated SEQRA review of the STAMP Project and issued a positive declaration, having determined the Project may have a potential significant adverse impact on the environment. DCEDC, Draft Generic Environmental Impact Statement for the Western New York Science & Technology

Advanced Manufacturing Park (STAMP) at 2-1 [Apr. 2011] (“DGEIS”), attached to the Novak Affirmation as Exhibit 2.

20. GCEDC then prepared and circulated to Interested and Involved Agencies a draft Scoping Document. DGEIS at 2-2, Exhibit 2.

21. On February 11, 2010, representatives from GCEDC met with the Tonawanda Seneca Nation’s Council of Chiefs to discuss the Scoping Document and plans for STAMP. Minutes of February 11, 2010 Meeting Between Tonawanda Council of Chiefs and GCEDC on STAMP Phase 2, attached to the Novak Affirmation as Exhibit 3. Council members raised concerns about the impact of STAMP on hunting generally and on specific game species such as deer and pheasants. *Id.* at ¶ 4.

22. On April 14, 2011, GCEDC accepted the DGEIS as complete pursuant to the requirements of SEQRA. GCEDC, Final Generic Environmental Impact Statement for the Western New York Science & Technology Advanced Manufacturing Park (STAMP) at 1-2 [Jan. 2012] (“FGEIS”), attached to the Novak Affirmation as Exhibit 4. The DGEIS noted incorrectly that “[t]he Seneca Nation of Indians Reservation also abuts the western edge of the Project Site,” DGEIS at 3-1, Exhibit 2, and that the “Seneca Nation of Indians” is “an immediate neighbor” to STAMP. *Id.* at 4-4. The Tonawanda Seneca Nation and the Seneca Nation of Indians are two separate federally recognized Indian Nations.¹

23. Aside from referencing “the Seneca Nation of Indians Reservation” as adjacent to the STAMP Project Site, the DGEIS contained no substantive references to the Tonawanda Seneca Nation or impacts of the STAMP site on the Nation’s Territory in its analysis of impacts from STAMP on: Geology and Topography; Water Resources; Air Resources; Terrestrial and

¹ 86 Fed. Reg. at 7,554.

Aquatic Ecology; Technology Industry Health and Safety; Traffic and Transportation; Land Use and Zoning; Utilities; Community Facilities; Community Character; Demography; Historic and Archeological Resources; or Agricultural Resources. DGEIS at 6-1-6-94, Exhibit 2.

24. In January 2012, GCEDC accepted and adopted the Final GEIS, and forwarded a notice of completion to the Environmental Notice Bulletin for publication. GCEDC, New York State Environmental Quality Review Act Lead Agency Findings Statement for the Western New York Science & Technology Advanced Manufacturing Park (STAMP) at 6 [Mar. 1, 2012] (“2012 Findings Statement”), attached to the Novak Affirmation as Exhibit 4.

25. On March 1, 2012, GCEDC adopted a Findings Statement for the STAMP Site indicating that the Findings Statement complied with SEQRA and that the project was the alternative that avoids or minimizes adverse environmental effects to the maximum extent practicable. 2012 Findings Statement, Exhibit 4. The 2012 Findings Statement listed the Tonawanda Seneca Nation as an Interested Agency. *Id.* at 6. The Findings Statement further provided, in reference to monitors from the Nation that would monitor archeological work in the STAMP Site for unexpected discoveries, that “[c]oordination with the Tonawanda Seneca Nation will also be required before the implementation of any measures taken prior to the development of a future use at the Project Site.” *Id.* at 37.

26. As to the visual character of the community, the 2012 Findings found that STAMP was “planned to visually integrate itself into the existing rural, agrarian setting in a comfortable and compatible manner” and would “mirror the aesthetics of the Hamlet of Alabama.” 2012 Findings Statement at 34, Exhibit 4.

27. The 2012 Findings contemplated a Phase IB archaeological investigation, which involves field work to determine whether archeological and cultural resources are present on the

actual site, and expresses GCEDC's intent to subject future uses of the site to "applicable criteria set forth" there, including "realignment of structures, impervious services [sic] and other development features to avoid or minimize such potential impacts to the maximum extent practicable." 2012 Findings Statement at 37, Exhibit 4. "With implementation of these measures," the 2012 Findings provided, "GCEDC has determined that potential impacts to historic and archeological resources will be avoided and/or minimized to the maximum extent practicable." *Id.*

28. Outside of the section on Historical and Archaeological Resources discussing STAMP site archeological work, the 2012 Findings contained no substantive reference to the Tonawanda Seneca Nation; analysis of impacts to the Reservation or use of resources thereon; impacts to health and safety of the Nation's citizens; or the Nation's community character. 2012 Findings Statement, Exhibit 4.

29. In late 2015, GCEDC met with the Nation to provide information on a proposed solar panel silicon wafer manufacturing facility at the STAMP site and attendant modifications to the EIS. Genesee County Industrial Development Agency & GCEDC, Analysis of Environmental Impacts Pursuant to New York State Environmental Quality Review Act, Project Name: Western New York Science & Technology Advanced Manufacturing Park (STAMP) 2016 Update at § II(B)(6) [June 2016], attached to the Novak Affirmation as Exhibit 5. Nation leaders expressed concerns about wastewater discharges to Whitney Creek upstream from Nation lands; potential archaeological impacts from construction and treatment of archaeological finds; determination of site boundaries along the reservation boundary; and intrusion into the Nation's Reservation by employees and visitors to the site. *Id.* at § II(B)(6).

30. In June 2016, GCEDC issued a Supplemental EIS to address the potential impacts of the silicon wafer manufacturing facility and adopted an Amended Findings Statement in July 2016. *See* Exhibit 5; GCEDC, New York State Environmental Quality Review Act Lead Agency Amended Findings Statement for the Western New York Science & Technology Advanced Manufacturing Park (STAMP) [July 2016], attached to the Novak Affirmation as Exhibit 6.

31. On June 8, 2016, the Nation received from GCEDC a draft Programmatic Agreement (“PA”) to address Clean Water Act Section 404 permitting required for the STAMP site. E-mail from Sheila Hess, CEO, CC Environment & Planning, to Tonawanda Seneca Nation [June 8, 2016], attached to the Novak Affirmation as Exhibit 7. In response, the Nation requested that counsel to the Nation be cc’d on future correspondence with the Nation regarding the STAMP site. E-mail from Christine Abrams, Tonawanda Seneca Nation, to Sheila Hess, CEO, CC Environment & Planning [June 8, 2016], Exhibit 7.

32. On September 9, 2016, the Nation sent a letter to the U.S. Army Corps of Engineers (“USACE”), GCEDC, NYSDEC, and SHPO declaring the Nation’s reservation to be a Traditional Cultural Property (“TCP”). Letter from Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation, to Molly Connerton, U.S. Army Corps of Engineers, et al. [Sept. 9, 2016], attached to the Novak Affirmation as Exhibit 8. The letter expressed the Nation’s concerns about the PA’s improper definition of the STAMP Area of Proposed Effect (“APE”), which was limited to the STAMP site itself, and about the potential impacts of development at STAMP on the Nation’s cultural resources and practices, plants, animals, and waters. *Id.*

33. Specifically, the Nation noted that:

The Nation’s sovereign right to its territory, including the natural resources of the territory, is protected by federal treaty. The Nation has federally reserved water rights attached to our territory and the STAMP project lies entirely in Seneca aboriginal land. Waters, including streams

and wetlands, span the boundary between the STAMP site and the Nation. From time immemorial, our people have used and occupied the forests, streams and wetlands of the Nation's territory, including those directly adjacent to the STAMP site. Fish, birds, deer and other wildlife pass freely through this area and many trees and plants, including medicinal plants, grow there. All of these are an integral part of the natural world that we give thanks and acknowledge every day as Haudenosaunee with the words given to us by the Peacemaker.

Exhibit 8 at 1.

34. The Nation requested that consultations be held with the U.S. Army Corps of Engineers on the proper definition of the APE and that a cultural resource impact survey be conducted to determine how development of the STAMP site might affect the Nation's cultural resources. Exhibit 8. The Nation raised these concerns again on a conference call with GCEDC, ACHP, USACE, DEC and SHPO on October 12, 2016, and by letter on October 21, 2016. Letter from Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation, to Molly Connerton, U.S. Army Corps of Engineers, et al. [Oct. 21, 2016], attached to the Novak Affirmation as Exhibit 9. In addition, the Nation laid out preliminary concerns specific to potential impacts from the proposed silicon wafer manufacturing facility. Overview of Preliminary Concerns of the Tonawanda Seneca Nation Regarding the Proposed 1366 Facility and the STAMP Project [Oct. 2016], attached to the Novak Affirmation as Exhibit 10.

35. The proposed silicon wafer manufacturing facility never came to fruition, and in the spring of 2017, GCEDC notified the Nation that it had started negotiations with another potential tenant at the STAMP site. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Tonawanda Seneca Nation et al. [Apr. 21, 2017], attached to the Novak Affirmation as Exhibit 11.

36. On November 7, 2017, USACE met with the Nation, GCEDC, DEC, and SHPO to discuss the new potential tenant at STAMP, another solar manufacturing facility, and to re-

initiate the consultation process. Minutes of Consultation Meeting with the Tonawanda Seneca Nation [Nov. 7, 2017], attached to the Novak Affirmation as Exhibit 12. The Nation expressed serious concerns regarding the impacts of the proposed project facility from traffic, hazardous waste spills, and other dangers, including impacts on Nation's territory as a TCP, and stated that "STAMP would change the whole of our Nation and who we are." *Id.* The SHPO pointed out that an evaluation of eligibility must be completed so the parties could understand impacts on the Nation's TCP. *Id.*

37. Early in 2018, GCEDC agreed with the Nation that the Nation Territory qualifies as a TCP and proposed that GCEDC conduct a TCP study on the Reservation. Proposal of GCEDC Doc. No. 01-3092920.1, Proposal to Evaluate and Address Traditional Cultural Property Issue Relative to the Tonawanda Creek Reservation [Jan. 11, 2018], attached to the Novak Affirmation as Exhibit 13. The Nation provided preliminary feedback, noting that "the Nation will need a framework that ensures it has ownership of the TCP process and product," and that "[t]he Nation is the foremost expert on its territory and culture and must play a leading role in this work." E-mail from Alex Page, Counsel, Tonawanda Seneca Nation, to GCEDC, USACE, DEC, and SHPO [Jan. 25, 2018], attached to the Novak Affirmation as Exhibit 14.

38. Over the course of 2018, the Nation worked with GCEDC, SHPO, USACE, and DEC to refine the TCP study concept and develop a PA that acknowledged the TCP study and its importance to the assessment of impacts of STAMP site development on the Nation.

Programmatic Agreement Between the United States Army Corps of Engineers Buffalo District and the New York State Office of Parks, Recreation and Historic Preservation State Historic Preservation Office Regarding the Western New York Science & Technology Advanced Manufacturing Park, SHPO No. 10PR01963 [July 2018], attached to the Novak Affirmation as

Exhibit 15. The PA provided that DEC and SHPO, in consultation with the Nation, would execute a LOR governing procedures and standards for development activities under NYSDEC jurisdiction. *Id.* Because the PA applies only to projects subject to federal permitting requirements, the LOR would apply to certain projects at the STAMP Development that required NYSDEC permits. E-mail from David E. Witt, Indian Nations Affairs Coordinator, N.Y. Dep’t Env’t Conservation, to Tonawanda Seneca Nation [June 22, 2018], attached to the Novak Affirmation as Exhibit 16.

39. In June 2019, the Nation launched the TCP study and hosted a team of scientists coordinated by the State University of New York College of Environmental Science and Forestry (“SUNY-ESF”) who conducted a two-day biological survey on the Nation’s territory.

Stakeholder Working Group Meeting Notes-TCP Study [June 6, 2019], attached to the Novak Affirmation as Exhibit 17. The team

found that the area, particularly the area that is adjacent to [the STAMP site], contains an unusually high quality of plants and animals, including many species of conservation concern at both State and Federal levels; a remarkably low incidence of invasive plant species, along with robust populations of forest floor herbs; and a significant complement of trees of with old-growth or mature forest characteristics, along with vertebrate species dependent on this uncommon forest type.

Affidavit of Neil Patterson, Jr. at ¶ 4, attached to the Novak Affirmation as Exhibit 18. In 2019 and 2020, the Nation focused TCP Study efforts on follow up to this biological survey work, archival research and literature, and the preparation of a groundbreaking oral history project. Stakeholder Working Group Meeting Notes-TCP Study [Nov. 25, 2019], attached to the Novak Affirmation as Exhibit 19.

40. In November 2018, GCEDC proposed rerouting the power lines across the site and replacing single power poles with “H” style towers, increasing the height of the lines, and

moving the towers and lines from the middle of the STAMP site to its western edge, adjacent to the Reservation. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Tonawanda Seneca Nation [Nov. 6, 2018], attached to the Novak Affirmation as Exhibit 20; Map Attached to GCEDC E-mail to Nation [Nov. 6, 2018], attached to the Novak Affirmation as Exhibit 21. GCEDC updated the proposal in early spring of 2019. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Alex Page, Counsel, Tonawanda Seneca Nation [Jan. 24, 2019], attached to the Novak Affirmation as Exhibit 22; E-mail from Alex Page, Counsel, Tonawanda Seneca Nation, to Mark Masse, Sr. V.P. Operations, GCEDC [Jan. 24, 2019], attached to the Novak Affirmation as Exhibit 23.

41. On June 5, 2019, the Nation wrote to GCEDC expressing concerns about the lines' proposed proximity to the Nation and potential impacts on wetlands shared with or draining into the Nation. Letter from Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation, to Mark Masse, Sr. V.P. Operations, GCEDC [June 5, 2019], attached to the Novak Affirmation as Exhibit 24. The Nation requested that planning for the power line rerouting be paused so that the impacts of the proposed power line reroute could be assessed in light of the TCP study, in accordance with Section 8 of the 2018 Programmatic Agreement. *Id.*

42. GCEDC summarily rejected the Nation's request, stating that the PA applied only to projects where the USACE had jurisdiction, and further opining that "we do not believe the Nation will be impacted in any way by the proposed route." Letter from Mark Masse, Sr. V.P. Operations, GCEDC, to Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation [June 20, 2019], attached to the Novak Affirmation as Exhibit 25.

43. The Nation continued its efforts toward the TCP study, and in October 2019, the Nation contacted DEC and SHPO for more information about the draft LOR to be executed by

DEC and SHPO, in consultation with the Nation. E-mail from Alex Page, Counsel, Tonawanda Seneca Nation, to Scott Sheeley, DEC & SHPO Representatives [Oct. 7, 2019], attached to the Novak Affirmation as Exhibit 26. In response, DEC provided a revised draft of the LOR.

44. The Nation submitted comments on the draft LOR in December 2019, requesting a section on Consultation and Environmental Justice and a requirement that, upon new projects seeking to locate at STAMP, GCEDC provide “[s]upplementation of the 2012 FGEIS to take account of possible (1) adverse impacts on historic properties at Tonawanda and (2) existing and additional burdens on Tonawanda; and (3) disproportionate adverse environmental impact[s] on Tonawanda.” Draft STAMP LOR Nation Comments, Attachment to E-mail from Alex Page, Counsel, Tonawanda Seneca Nation, to David E. Witt, Indian Nations Affairs Coordinator, N.Y. Dep’t Env’t Conservation [Dec. 17, 2019], attached to the Novak Affirmation as Exhibit 27. As discussed further below, the Nation did not receive a response until 10 months later, during the COVID-19 pandemic.

45. On March 12, 2020, the Nation closed its governmental offices and placed virtually all its employees on administrative leave due to the COVID-19 pandemic. Affidavit of Christine Abrams at ¶¶ 4–6, attached to the Novak Affirmation as Exhibit 28. Much of the Nation lacks internet access and cell service is spotty throughout the Territory, so Nation employees were not able to work from home. *Id.* at ¶ 5. The COVID-19 pandemic thus had a significant impact on the operations of the nation. *Id.* at ¶ 4; Affidavit of Chief Kenith Jonathan at ¶¶ 17–18, Exhibit 1. From March 2020 through March 2021, the Nation’s Office Administrator was the sole Nation employee who continued to work regularly in the office to continue the operations of the Nation. Affidavit of Christine Abrams, Exhibit 28.

46. On August 6, 2020, GCEDC issued a Resolution concerning STAMP Project Modifications related to wastewater treatment, wastewater disposal via a force main, water supply main, and expansion of the STAMP site. GCEDC Findings Statement Resolution [Aug. 6, 2020] (“2020 Resolution”), attached to the Novak Affirmation as Exhibit 29. The 2020 Resolution found that the Project Modifications would not create any adverse impacts to aesthetic resources, community character, or historical or archaeological resources that were not analyzed in the STAMP Environmental Record. *Id.* GCEDC neither consulted with the Nation before issuing the Resolution, nor informed the Nation of the Resolution when it was issued.

47. In October 2020, DEC provided the Nation with a revised draft LOR. E-mail from David E. Witt, Indian Nations Affairs Coordinator, N.Y. Dep’t Env’t Conservation, to Alex Page, Counsel, Tonawanda Seneca Nation, and Christine Abrams, Tonawanda Seneca Nation [Oct. 6, 2020], attached to the Novak Affirmation as Exhibit 30. The Nation provided comments on December 28, 2020. E-mail from Alex Page, Counsel, Tonawanda Seneca Nation, to David E. Witt, Indian Nations Affairs Coordinator, N.Y. Dep’t Env’t Conservation [Dec. 28, 2020], attached to the Novak Affirmation as Exhibit 31. In a response to the Nation’s submission. GCEDC requested a call on the LOR, stating that it was “close to having a tenant commit to the STAMP site in early spring.” E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Alex Page, Counsel, Tonawanda Seneca Nation, and David E. Witt, Indian Nations Affairs Coordinator, N.Y. Dep’t Env’t Conservation [Dec. 29, 2020], attached to the Novak Affirmation as Exhibit 32. On December 31, 2020, the Nation requested that information on a possible new tenant be discussed in a separate meeting with the Council of Chiefs. E-mail from Christine Abrams, Tonawanda Seneca Nation, to Kimberly Merchant, N.Y. Dep’t Env’t Conservation, et al. [Dec. 31, 2020], attached to the Novak Affirmation as Exhibit 33.

48. On January 4, GCEDC offered to set up a virtual meeting with the Nation but provided no information regarding the latest potential new tenant at STAMP. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Tonawanda Seneca Nation et al. [Jan. 4, 2021], attached to the Novak Affirmation as Exhibit 34. The Nation later learned that also on January 4, the “GCEDC sent letters indicating intent to maintain lead agency status regarding Project Gateway to all interested and involved parties,” but it did not send that information to the Nation. Minutes of GCEDC Board Meeting [Feb. 4, 2021], attached to the Novak Affirmation as Exhibit 35.

49. On January 12, 2021, the sole employee managing the Nation’s Office was required to quarantine due to COVID-19 exposure and was unable to work in the Nation Office from January 12 to January 20. Affidavit of Christine Abrams, Exhibit 28.

50. Throughout January 2021, the Nation ramped up efforts to obtain a COVID-19 vaccine supply for its citizens. Affidavit of Christine Abrams, Exhibit 28. These efforts were difficult and time-consuming, particularly since the Nation’s Administrator was quarantined for over a week. *Id.*

51. On February 4, 2021, thirty days after circulation to interested and involved agencies (excluding the Nation) of its Notice of Intent to reestablish lead agency status for purposes of SEQRA with respect to Project Gateway, GCEDC reestablished lead agency status. Exhibit 35.

52. On January 26, GCEDC, for the first time, sent the Nation substantive information about Project Gateway, including the January 4 Notice of Intent and a December 30, 2020 SEQR Environmental Assessment (“EA”) Form. Gateway Project Full Env’t Assessment Form [Dec. 30, 2020], attached to the Novak Affirmation as Exhibit 36. The Nation immediately requested a meeting to discuss the materials. E-Mail from Alex Page, Counsel, Tonawanda

Seneca Nation, to Mark Masse, Sr. V.P. Operations, GCEDC [Jan. 26, 2021], attached to the Novak Affirmation as Exhibit 37.

53. On January 27, GCEDC invited the Nation's leadership to a Zoom meeting on February 5, 2020, but provided no further information about the proposed Project Gateway hydrogen production facility, the nature of its operations, or its potential impacts on the Nation. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Alex Page, Counsel, Tonawanda Seneca Nation [Jan. 27, 2021], attached to the Novak Affirmation as Exhibit 38.

54. On February 4, 2021, GCEDC enacted the February 4, 2021 Resolution finding that all potential environmental impacts associated with Project Gateway had been adequately addressed and that the Project would not result in any adverse impact upon the Tonawanda Seneca Nation's Territory as a property of religious and cultural significance. February 4, 2021 Resolution, attached to the Novak Affirmation as Exhibit 39.

55. The next day, on February 5, GCEDC met with Nation representatives via Zoom and provided preliminary information to the Nation regarding Project Gateway. E-mail from Mark Masse, Sr. V.P. Operations, GCEDC, to Tonawanda Seneca Nation and Counsel [Feb. 8, 2021], attached to the Novak Affirmation as Exhibit 40. GCEDC did not, however, provide the Nation with notice or information regarding the February 4 Resolution, either during the February 5 meeting or in follow up communications on February 8.

56. The Nation first learned of the February 4, 2021 Resolution on February 23, 2021, when the Nation's Counsel received a copy from counsel to GCEDC. E-mail from Matthew Fitzgerald, Counsel, GCEDC, to Alex Page, Counsel, Tonawanda Seneca Nation [Feb. 23, 2021], attached to Novak Affirmation as Exhibit 41.

57. On March 23, the Nation requested by letter sent via electronic mail that GCEDC rescind the February 4, 2021 Resolution because it purported to assess impacts of Project Gateway on the Nation without the Nation's input. Letter from Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation, to Steve Hyde, President, GCEDC [Mar. 23, 2021] ("March 2021 Letter of Nation to GCEDC"), attached to the Novak Affirmation as Exhibit 42. The letter noted that, aside from the EA Form forwarded by GCEDC to the Nation in late January, the Nation received no information about the project until after the Resolution was enacted. *Id.* Nor was the Nation ever consulted about how a hydrogen production facility's operations might impact Nation cultural practices, sacred sites, plants, animals or environment. *Id.*

58. On March 24, GCEDC signed the STAMP LOR. Letter of Resolution Between New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, and Genesee County Economic Development Center Regarding the Western New York Science & Technology Advanced Manufacturing Park, Doc. No. 10PR01963 [Mar. 24, 2021], attached to the Novak Affirmation as Exhibit 43. The LOR affirmed procedural requirements applicable to certain permitting actions by DEC and required consultations with the Nation on adverse impacts to the Nation's territory as a TCP for projects locating at STAMP. March 2021 Letter of Nation to GCEDC, Exhibit 42.

59. On March 25, GCEDC enacted a "Final Resolution" approving Plug Power's application for Project Gateway. Final Resolution: Plug Power Inc. Project, Resolution No. 03/2021-04 [Mar. 25, 2021] ("March 25, 2021 Final Resolution"), attached to the Novak Affirmation as Exhibit 44. On March 30, GCEDC issued a letter to the Nation denying the Nation's request to rescind the February 4, 2021 Resolution. Letter from Mark Masse, Sr. V.P. Operations, GCEDC, to Chief Roger Hill, Council of Chiefs, Tonawanda Seneca Nation [Mar.

30, 2021], attached to the Novak Affirmation as Exhibit 45.

FIRST CAUSE OF ACTION: GCEDC Failed to Take A Hard Look at Potential Significant Adverse Impacts to the Environment in Violation of SEQRA

60. Petitioners repeat and re-allege the allegations contained in paragraphs 1–59 above, and incorporate such allegations by reference as if set forth herein.

61. In its SEQRA analysis contained in the February 4, 2021 Resolution, GCEDC failed to take the requisite “hard look” at the potentially significant environmental impacts of the Gateway Project on the Tonawanda Seneca Nation. The inadequate analysis included the failure to take a hard look at impacts to the reservation as a Traditional Cultural Property; the community character of the Nation and the current and planned future uses of the reservation; risks to health and safety, such as the risk of catastrophic explosion and the Nation’s ability to respond; aesthetic impacts, and impacts to the plants and wildlife.

62. GCEDC’s failure to take a hard look at the impacts of the Project on the Tonawanda Seneca Nation violates SEQRA and was made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

SECOND CAUSE OF ACTION: GCEDC Issued Unsupported SEQRA Findings

63. Petitioners repeat and re-allege the allegations contained in paragraphs 1–62 above, and incorporate such allegations by reference as if set forth herein.

64. GCEDC’s February 4, 2021 Resolution finds that (1) “all potential environmental impacts associated with Project Gateway are adequately addressed in the STAMP GEIS and the STAMP Findings and that no further SEQR compliance relative to Project Gateway is required;” (2) “the requirements of 6 N.Y.C.R.R. Part 617 have been met;” and (3) “the Project remains one which avoids or minimizes adverse environmental effects to the maximum extent practicable....”

February 4, 2021 Resolution at 11, Exhibit 39.

65. GCEDC's SEQRA findings for Project Gateway are unsupported and in violation of SEQRA, 6 N.Y.C.R.R. §617.11 because they provide an insufficient rationale for its decision in the February 4, 2021 and March 25, 2021 Resolutions.

66. As a result, GCEDC's February 4, 2021 and March 25, 2021 Resolutions were issued in violation of SEQRA, 6 N.Y.C.R.R. §617.11, and were arbitrary and capricious, and an abuse of discretion.

WHEREFORE, Petitioner respectfully requests that this Court enter judgment against Respondent pursuant to CPLR §§ 3001; 7803(1), 7803(3), and 7806 as follows:

1. Adjudging and declaring that Respondents have acted arbitrarily, capriciously, and contrary to law by issuing the unsupported February 4, 2021 Resolution and March 25, 2021 Resolution and by approving Project Gateway in a way that fails to conform to the requirements of state law in the manner described herein;

2. Annuling, voiding, and vacating the February 4, 2021 Resolution and March 25, 2021 Final Resolution of the GCEDC;

3. Ordering that a Supplemental Environmental Impact Statement be completed addressing the impacts of Project Gateway on the Tonawanda Seneca Nation; and

4. Granting Petitioner the costs and disbursements of this action; and

5. Granting such other and further relief as the Court deems just and proper.

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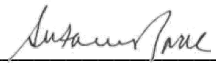
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Dated this 4th day of June, 2021.
New York, New York

Respectfully submitted,

EARTHJUSTICE

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** Admission pro hac vice pending*

