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TONAWANDA SENECA NATION
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December 15, 2022

Secretary Deb Haaland
United States Department of Interior

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',

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 update our letters of August 2022 and November 2022, regarding the need for full NEPA review, including consultation with the Nation, of the proposed wastewater pipeline right of way through the Iroquois National Wildlife Refuge.

As we have informed you, the United State Fish and Wildlife Service granted a right of way permit for the wastewater pipeline in August 2021 without consultation with the Nation or assessment of the direct, indirect, or cumulative impacts of the wastewater pipeline on the Nation, its Territory, or its people.

In recent weeks, the Biden Administration has clarified the obligations of the United States to consult with Indian Nations and has, for the first time, mandated that each Federal agency not only consult, but aim to reach consensus with Indian Nations on federal actions that may impact them. *See* Memorandum on Uniform Standards for Tribal Consultation, President Joseph R. Biden, Jr., November 30, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/ ("[A]gencies should strive for consensus with Tribes or a mutually desired outcome").

In addition, the Department of Interior has issued an updated consultation policy that emphasizes the particular need for consensus in circumstances where, as here, treaty rights are at stake. *See* Policy on Consultation with Indian Tribes, November 30, 2022, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf; and Procedures for Consultation with Indian Tribes, November 30, 2022, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-5_2.pdf.

The wastewater pipeline and the facility connected to it lie adjacent to the Nation's Reservation Territory on land taken from the Nation in the 1800s. Together with the projects they would facilitate, the wastewater treatment facility and pipeline threaten a wide range of impacts to the Nation's treaty-protected Territory, waters, plants, animals, and culture, locating the impacts of Department action on this matter in the center of the Department's Consensus-Seeking Model, where reaching consensus holds the highest importance and requires the most "dedicated efforts by Department officials to achieve consensus." *See* Procedures for Consultation at 5.4(G).

The Nation objects to the pipeline, to the wastewater treatment facility to which it be connected, and to the industrial manufacturing projects proposed to be sited adjacent to the Nation and served by the wastewater treatment facility – we do not want our Territory, people or future generations to be burdened by the negative impacts of these projects, particularly since no studies have been conducted to determine the scope of those impacts. We renew our call to you to require that U.S. Fish and Wildlife Service withdraw the right of way permit, which was based on an inadequate environmental analysis, and reopen the NEPA process to complete a full environmental review process that complies with the law and with the consultation policies in effect at the time the Right of Way was issued in 2021, as well as the consultation policies more recently enacted by the Administration and the Department. We ask that you immediately initiate formal consultation with the Nation regarding this matter.

Da:h ne'hoh,

Chief Roger Hill
Council of Chiefs
Tonawanda Seneca Nation

cc:

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

EARTHJUSTICE

June 16, 2022

Submitted via FOIAOnline

Department of Interior
U.S. Fish and Wildlife Service
Northeast Region

Re: **Freedom of Information Act Request for Documents Regarding USFWS Approval of Right of Way through the Iroquois National Wildlife Refuge for the STAMP Offsite Sanitary & Process Wastewater Sewer Force Main**

Dear Freedom of Information Officer:

The STAMP Project in western New York seeks to build a 9-mile outfall pipeline from property adjacent to the Tonawanda Seneca Nation's reservation, through the Iroquois National Wildlife Refuge, to discharge into Oak Orchard Creek. The developers of the STAMP project have conveyed that they have received "all necessary approvals and permits" from the U.S. Fish and Wildlife Service to allow the pipeline to be build through the refuge. The developers of the STAMP project have also conveyed that there was an Environmental Assessment and Finding of No Significant Impact for the federal agency action. Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Earthjustice requests a fee waiver for this FOIA request, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. § 2.48.

RECORDS REQUESTED

1) The Environmental Assessment evaluating the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

2) The Finding of No Significant Impact for the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

3) Any compatibility determination for the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge, along will all documentation and analysis used to support the compatibility determination.

4) Any permit issued related to the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

5) Any records regarding public meetings or public hearings held regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

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6) All public comments submitted regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

7) All response to comments regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

8) All notices of any public hearing or public meeting held regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

9) All records relating to U.S. Fish and Wildlife Service's correspondence, conversation, or consultation with the Tonawanda Seneca Nation regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

10) All correspondence between U.S. Fish and Wildlife Service and New York Department of Environmental Conservation regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

11) All correspondence between U.S. Fish and Wildlife Service and: the Genesee County Economic Development Center (GCEDC) regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

12) All correspondence between U.S. Fish and Wildlife Service and: the Genesee Gateway Local Development Corporation (GGLDC) regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

13) All correspondence between U.S. Fish and Wildlife Service and STAMP Sewer regarding the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge.

RECORD DELIVERY

To the extent practicable, Earthjustice requests electronic copies of the above documents. If the documents are to be produced in hard copy, we have staff members in Western New York who could obtain the documents from the Iroquois National Wildlife Refuge.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.48. The Department of the Interior will grant a fee waiver when the Bureaus determines that disclosing

the information is (1) in the public interest because it is likely to contribute significantly to public understanding of government operations or activities and (2) not primarily in the requester's commercial interest. 43 C.F.R. § 2.45 Additionally, to determine whether the request "is not primarily in the commercial interest of the requester" the government will consider two factors: 1) The existence and magnitude of a commercial interest and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in FOIA regulations weighs in favor of granting our fee waiver request. 40 C.F.R. § 2.107(l). Moreover, federal courts have held that FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

A. The Request is in the Public Interest.

Factor 1: How the records concern the operations or activities of the Federal Government.

This request asks for information directly related to agency evaluation and approval of an industrial effluent pipeline being built through the Iroquois National Wildlife Refuge, including the information considered and the public participation involved in making the decision.

Factor 2: How disclosure is likely to contribute significantly to public understanding of those operations and activities.

The documents requested are not readily available to the public. We have spent several hours combing the internet and documents already in our possession and were not able to locate these materials. The records requested specifically relate to the decision-making process used to approve the building of an industrial effluent pipeline through the Iroquois National Wildlife Refuge. There are several groups and organizations that are interested in and opposed to the STAMP development, including the Tonawanda Seneca Nation and the Buffalo Niagara Waterkeeper. We will share this information with those groups. Earthjustice is a public interest environmental law firm with expertise in environmental law generally and NEPA specifically. These records would confirm or refute public statements made by the STAMP project developer that they have received all necessary approvals from U.S. Fish and Wildlife Service and the project has an environmental assessment and finding of no significant impact. The public's understanding of how and why U.S. Fish and Wildlife Service has approved the Proposed STAMP Sanitary and Process Wastewater Sewer Force Main through Iroquois National Wildlife Refuge will be enhanced if these documents are provided to Earthjustice free of charge.

B. There is no Commercial Interest in Disclosure of the Requested Records

This request also meets the second fee waiver requirement because the request "is not primarily in the commercial interest of the requester." 43 C.F.R. § 2.45. Earthjustice is a

501(c)(3) nonprofit organization and does not have any commercial interest that would be furthered by the requested disclosure of information.[1]

* * *

For the foregoing reasons, Earthjustice is entitled to a fee waiver for this request. In the event that fees are not waived, please notify and inform us of the basis for your decision, as required by FOIA.

CONCLUSION

Per FOIA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16, and at minimum this reply "must . . . indicate within the relevant time period the scope of documents [the agency] will produce." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, either through the FOIA Online system, or via email at the contact information below:

Jill Heaps
Earthjustice
Email: jheaps@earthjustice.org

If you find that this request is unclear, please contact me at (212) 845-7392 to discuss the proper scope of this request.

Thank you in advance for your assistance with this matter.

Sincerely,

_____
Jill Heaps

[1] Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).