UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

TONAWANDA SENECA NATION, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE; MARTHA WILLIAMS, in her official capacity as Director of the U.S. Fish and Wildlife Service; THOMAS ROSTER, in his official capacity as Refuge Manager of the Iroquois National Wildlife Refuge; SCOTT KAHAN, in his official capacity as the Northeast Regional Chief; HOLLY GABORIAULT, in her official capacity as Deputy Regional Chief; and DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior, Defendants.	CIVIL ACTION NO.

COMPLAINT

INTRODUCTION

1. The Tonawanda Seneca Nation—a member Nation of the Haudenosaunee, or Iroquois Confederacy—brings this action to halt the construction of an industrial wastewater pipeline through a wildlife refuge on the Nation's ancestral lands, construction that has already resulted in at least five spills of damaging drilling fluid in sensitive wildlife habitat.

2. The U.S. Fish and Wildlife Service's approval of a right of way for an industrial wastewater pipeline through the Iroquois National Wildlife Refuge violates the law that prohibits harmful activity in wildlife refuges—the National Wildlife Refuge System Administration Act. Though the Nation has repeatedly expressed concern about the pipeline, the U.S. Fish and Wildlife Service approved it without engaging in government-to-government consultation with

the Nation, in violation of the National Historic Preservation Act, and without conducting a sufficient environmental review, in violation of the National Environmental Policy Act.

3. In September 2022, when the Nation eventually learned that the U.S. Fish and Wildlife Service approved the pipeline without consulting the Nation, the Nation asked the Service to suspend the permit until it complied with the law. In May 2023, the Service apologized to the Nation for its failure to consult and promised to suspend the approval. But eleven days later, the Service reversed course and said it had no power to stop the pipeline. Construction of the pipeline began in July 2023.

4. Pipeline construction to date has been disastrous. Though the total volume of spilled fluid has not yet been quantified, estimates suggest that the fragile wetlands of the Iroquois National Wildlife Refuge have taken on hundreds of gallons of leaked drilling fluid. Drilling fluid contains bentonite, sodium carbonate, and other substances harmful to plants and animals. In addition, construction has created sinkholes and subsidence damage to roadways. The full scope of the damage to the Refuge and the plant and animal life it is intended to protect is not known. Nor has the Service assessed the damage to the Nation's cultural resources or the environment from continued pipeline construction or from the larger industrial development project that the pipeline is intended to facilitate. Any further efforts to construct this pipeline—efforts that use directional drilling to bore into the soft, peaty wetlands of the Iroquois National Wildlife Refuge—threaten further environmental degradation.

5. Because the U.S. Fish and Wildlife Service (the "Service") illegally approved the Right-of-Way permit to build an industrial wastewater and treated sewage pipeline through the Iroquois National Wildlife Refuge (the "Refuge") to STAMP Sewer Works, the Nation brings this lawsuit.

JURISDICTION AND VENUE

6. This action arises under the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd *et seq.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. The Court has jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* and 28 U.S.C. § 1331 (federal question).

7. The Court has the authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 705–706. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

8. The requested relief would redress the actual, concrete injuries to the Tonawanda Seneca Nation caused by the U.S. Fish and Wildlife Service's failure to comply with duties mandated by the Administrative Procedure Act, the Refuge Act, the National Environmental Policy Act, the National Historic Preservation Act, and their implementing regulations.

9. The challenged agency action is final and subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because the Iroquois National Wildlife Refuge is located in Orleans and Genesee Counties in Western New York.

PARTIES

11. Plaintiff 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.

12. The Nation is a member Nation of the Haudenosaunee, also known as the Six Nations or Iroquois Confederacy, and governs its Territory and citizens according to the Great Law of Peace.

13. 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, 88 Fed. Reg. 2,122, 2114 (Jan. 12, 2023). The Nation is a successor in interest to the Seneca signatories to the 1794 Treaty of Canandaigua, which guarantees the free use and enjoyment of its land. 7 Stat. 44, Art. 3–4.

14. The Nation's federally recognized, treaty-protected Reservation 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 lands currently occupied by the Iroquois National Wildlife Refuge and the Tonawanda Wildlife Management Area are within the ancestral lands of the Tonawanda Seneca Nation.

15. For thousands of years, the Nation and its ancestors occupied, traveled, traded, and utilized resources within its ancestral lands, which include a broad geographical area located in what is now Western New York.

16. The Nation's cultural resources are historically and culturally interrelated and interconnected over many miles within the Nation's ancestral territory, within and outside its current Reservation boundaries, including both the Iroquois National Wildlife Refuge and the Tonawanda Wildlife Management Area. These areas, together with the John White Wildlife Management Area and the Tonawanda Seneca Nation Reservation Territory form the 19,000-acre Tonawanda Iroquois Oak Orchard Wetlands Complex. The Complex is one of the largest remaining contiguous blocks of natural habitat in Western New York that represents some of the

most productive inland wildlife habitat in the eastern United States. U.S. Fish & Wildlife Serv., Iroquois National Wildlife Refuge Comprehensive Conservation Plan 1-2 (Sept. 2011) ("Refuge Conservation Plan"), Exhibit A. This relatively undeveloped corridor protects the culturally significant plants, animals, land, and water resources that are essential to Tonawanda Seneca traditional cultural practices and beliefs.

17. The Nation retains the right to practice its culture, religion and traditional lifeways within its ancestral Territory, both inside and outside its Reservation boundaries.

18. Cultural resources and historic properties of importance to the Nation are located on the Iroquois National Wildlife Refuge, based on traditional cultural knowledge of the Tonawanda Seneca Nation and as confirmed by the Fish & Wildlife Service's 1992 survey of the entire Refuge. Refuge Conservation Plan, 3-28, 3-29.

19. Nation citizens recreate, hunt, and gather traditional medicines in their ancestral territory, including the Iroquois National Wildlife Refuge and Tonawanda Wildlife Management Area. Nation citizens also utilize Reservation Territory for ceremonial activities, recreation, hunting, fishing, and gathering traditional medicines. In particular, citizens rely for these activities on an undeveloped area in the northeast corner of the Reservation Territory known as the "Big Woods." The Big Woods abuts the Tonawanda Wildlife Management Area, which abuts the Iroquois National Wildlife Refuge, forming a wildlife corridor.

20. Construction and operation of the industrial wastewater and treated sewage pipeline through the Iroquois National Wildlife Refuge will harm Nation citizens and their enjoyment of the Refuge, as well as the Nation's cultural resources, which include both historical and archaeological resources and wildlife, plant, and water resources in their ancestral territory in Western New York.

21. The proposed industrial wastewater pipeline is intended to serve the Science and Technology Advanced Manufacturing Park ("STAMP"). The site selected for the STAMP mega-site is directly adjacent to the Tonawanda Seneca Nation's Big Woods and upstream from Nation waters, including wetlands that span the boundary between STAMP and the Nation and that feed into Nation waterways. Industrialization at STAMP, including construction of the pipeline and the wastewater treatment facility to be connected to the pipeline, will lead to noise, traffic, odors, vibrations, light, air and water pollution; will negatively affect the Nation's lands, waters, environment, cultural resources, and places of religious and cultural significance; and will disturb wildlife on and off Reservation territory. These activities threaten to impact the Nation's longstanding treaty rights.

22. For years, the Nation has expressed concern about the STAMP project to federal officials and the project developer, Genesee County Economic Development Center ("GCEDC"). For example, on September 9, 2016, the Nation sent a letter to GCEDC, the U.S. Army Corps of Engineers, and others declaring the Nation's Reservation Territory, including sites adjacent to the western border of the STAMP site, to be a Traditional Cultural Property ("TCP"). Under National Register Bulletin 38, TCP is defined as a property eligible for inclusion in the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history and (b) are important in maintaining the continuing cultural identity of the community. The letter also raised concerns about the potential impacts of development at the STAMP site on the Nation's cultural resources and practices, plants, animals, and waters. Specifically:

> The Nation's sovereign right to its territory, including the natural resources of the territory, is protected by federal treaty. The Nation has federal 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 B.

23. More recently, the Nation has determined that the boundaries of its Traditional Cultural Property are roughly coextensive with the boundaries of the Tonawanda Reservation set aside in the Treaty of Big Tree, 7 Stat. 601 (1797). *See* Letter of Nation to Molly Connerton, U.S. Army Corps of Engineers (May 31, 2023), Exhibit C. A portion of the proposed pipeline lies within the TCP as presently defined by the Nation. *See id*.

24. The Tonawanda Seneca Nation is suing the U.S. Fish and Wildlife Service, Martha Williams, in her official capacity as Director of the U.S. Fish and Wildlife Service, Thomas Roster, in his official capacity as Refuge Manager of the Iroquois National Wildlife Refuge, Scott Kahan, in his official capacity as the Northeast Regional Chief of the Service, Holly Gaboriault, in her official capacity as Deputy Regional Chief, and Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior because their approval of the Project violates the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997, the National Environmental Policy Act, and the National Historic Preservation Act.

25. Defendant United States Fish and Wildlife Service is a federal agency within the United States Department of the Interior. The Service is responsible for administering the National Wildlife Refuge System. The Service, through the Regional Chief and Iroquois National Wildlife Refuge manager, granted the Right-of-Way Permit and compatibility determination at issue in this action. The Service also prepared the Environmental Assessment and Finding of No

Significant Impact at issue in this case. The Service has a duty to comply with the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997, the National Environmental Policy Act, and the National Historic Preservation Act and to initiate government-to-government consultation with any Indian Nations whose interests may be affected by the action.

26. Defendant Martha Williams is the Director of the United States Fish and Wildlife Service. In that capacity, Defendant Williams has supervisory responsibility over the United States Fish and Wildlife Service. Defendant Williams is sued in her official capacity.

27. Defendant Thomas Roster is the Refuge Manager of the Iroquois National Wildlife Refuge. In that capacity, Defendant Roster issued the compatibility determination at issue in this action. Defendant Roster is sued in his official capacity.

28. Defendant Scott Kahan is the Regional Chief of the National Wildlife Refuge System in the Northeast Region. In that capacity, Defendant Kahan signed the Finding of No Significant Impact and concurred in the compatibility determination at issue in this action. Defendant Kahan is sued in his official capacity.

29. Defendant Holly Gaboriault signed the Right-of-Way permit at issue in this case in her role as Deputy Regional Chief, National Wildlife Refuge System, Interior Region 1. Defendant Gaboriault now serves as Acting Regional Chief and is sued in her official capacity.

30. Defendant Deb Haaland is the United States Secretary of the Interior. In that capacity, Defendant Haaland has supervisory responsibility over the United States Fish and Wildlife Service. Defendant Haaland is sued in her official capacity.

STATUTORY AND REGULATORY BACKGROUND

I. THE NATIONAL WILDLIFE REFUGE SYSTEM

31. Congress established the National Wildlife Refuge System in 1966 as a way to acquire and manage federal lands and waters specifically for the purpose of wildlife and plant conservation. *See* H.R. Rep. No. 105-106, at 1 (1997).

32. In 1997, Congress enacted the National Wildlife Refuge System Improvement Act to provide guidance to refuge managers and clarify the refuge system's mission: "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2); *see also* H.R. Rep. No. 105-106, at 17.

33. The National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997 ("the Refuge Act") declares the policy of the United States that "each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established." 16 U.S.C. § 668dd(a)(3)(A).

34. Through the Refuge Act, Congress directed the U.S. Fish and Wildlife Service to "ensure that the mission of the System . . . and the purposes of each refuge are carried out" as well as to "provide for the conservation of fish, wildlife, and plants, and their habitats within the System" and "ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations." *Id.* § 668dd(a)(4)(A), (B), (D).

35. The Refuge Act states that the Service "shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless [the Service] has determined that

the use is a compatible use and that the use is not inconsistent with public safety." *Id.* § 668dd(d)(3)(A)(i).

36. To help achieve the goals of the System, comprehensive conservation plans "describe[] the desired future conditions of a refuge or planning unit;" provide "management direction to achieve the purposes of the refuge;" and maintain and, where appropriate, restore "the ecological integrity of the refuge." 50 C.F.R. § 25.12.

A. Appropriate Uses of Refuges

37. Before permitting a new use on a refuge, the refuge manager must determine if the use is appropriate. 603 FW 1 § 1.3 (2006).

38. The Service's Appropriate Refuge Uses Policy applies "to all proposed and existing uses in the National Wildlife Refuge System" when the Service has jurisdiction over the use. *Id.* § 1.2.

39. An appropriateness determination is "the initial decision process the refuge manager follows when first considering whether or not to allow a proposed use on a refuge." *Id.* § 1.8.

40. If a new use is not appropriate, the refuge manager must deny the use. *Id.* § 1.3.

41. A refuge use is appropriate if it meets at least one of four conditions: (1) the use is a wildlife-dependent use as identified in the Refuge Act; (2) the use contributes to fulfilling the refuge's purpose(s), the System mission, or the goals or objectives described in a refuge management plan approved after October 9, 1997; (3) the use involves the take of fish and wildlife under State regulations; or (4) the use has been found to be appropriate as specified in Section 1.11 of the Service's Appropriate Refuge Uses Policy. *Id.* § 1.6(A).

42. Section 1.11 of the Service's Appropriate Refuge Uses Policy directs that a refuge manager should determine whether or not a use is appropriate based on ten criteria and using the FWS Form 3-2319. *Id.* § 1.11(A).

43. One criterion a refuge manager must consider is whether the use will "contribute to the public's understanding and appreciation of the refuge's natural or cultural resources, or is . . . beneficial to the refuge's natural or cultural resources." *Id*. If not, the Service will "generally not further consider the use." *Id*. § 1.11(A)(3)(i).

B. Economic Uses of Refuges

44. Under the Service Refuge Manual, an economic use is "[a]ny activity involving the use of a refuge or its resources for a profit." *Del. Audubon Soc. v. Salazar*, 829 F. Supp. 2d 273, 289 (D. Del. 2011) (quoting 5 RM § 17.6(D)).

45. The Service "may only authorize a public or private economic use of the natural resources of any national wildlife refuge" after determining "that the use contributes to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission" and that the use is compatible. 50 C.F.R. § 29.1.

46. Any permit for an economic use must "contain such terms and conditions as [the Service] determine[s] to be necessary for the proper administration of the resources." *Id*.

C. Compatible Uses of Refuges

47. The Service may only grant a right-of-way for the construction and operation of a pipeline in a refuge if the Service has first determined that the proposed use is "compatible with the purposes" for which the refuge was established. 16 U.S.C. § 668dd(d)(1)(A); *id.* § 668dd(d)(3)(A)(i); *see also* 50 C.F.R. § 29.21-1(a) ("No right-of-way will be approved unless it is determined by the Regional Director to be compatible.").

48. Prior to granting a right-of-way permit, the Service must prepare a written "compatibility determination" assessing whether the proposed use will "materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1); 50 C.F.R. §§ 25.12, 26.41, 29.21.

49. A compatibility determination must identify the "anticipated impacts of the use on the refuge's purpose and the National Wildlife Refuge System's mission." 50 C.F.R. § 26.41(a)(8).

50. The burden sits with applicants to prove compatibility, not the National Wildlife Refuge manager to prove incompatibility. 603 FW 2 § 2.11(B)(1). A refuge manager must not authorize or permit a use "[i]f information available to the Refuge Manager is insufficient to document that a proposed use is compatible, [and] the Refuge Manager [is] unable to make an affirmative finding of compatibility." 65 Fed. Reg. at 62,490; 603 FW 2 § 2.11(E).

51. A compatibility determination must provide a "logical explanation describing how the proposed use would, or would not, materially interfere with or detract from the fulfillment of the National Wildlife System mission" or purposes of the national wildlife refuge where the use is proposed. *Id*. § 26.41(a)(12).

52. In making a compatibility determination, "[t]he refuge manager must consider not only the direct impacts of a use but also the indirect impacts associated with the use and the cumulative impacts of the use when conducted in conjunction with other existing or planned uses of the refuge, and uses of adjacent land or waters that may exacerbate the effects of a refuge use." 603 FW 2 § 2.11(B)(3).

53. Generally, the Service will not allow compensatory mitigation to make a proposed use compatible. 50 C.F.R. § 26.41(b); 603 FW 2 § 2.11(C).

54. Compensatory mitigation is only permitted for projects involving "maintenance of an existing right-of-way." 50 C.F.R. § 26.41(c). Such maintenance includes "minor expansion or minor realignment to meet safety standards." *Id*. Examples of minor expansion or minor realignment include projects that "expand the width of a road shoulder to reduce the angle of the

slope; expand the area for viewing on-coming traffic at an intersection; and realign a curved section of a road to reduce the amount of curve in the road." 603 FW 2 § 2.11(D).

55. The refuge manager must provide an opportunity for public review and comment before issuing a final compatibility determination by "actively seeking to identify individuals and organizations that reasonably might be affected by, or interested in, a refuge use." 603 FW 2 § 2.12(9)(a); *see also* 50 C.F.R. § 26.41(a)(9).

56. A compatibility determination must be based on the "sound professional judgment" of the refuge manager and Regional Chief and must be "consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of" the Refuge Act and other applicable laws. 16 § U.S.C. 668ee(3); 50 C.F.R. § 25.12. A compatibility determination "cannot be made in an arbitrary manner" and "must be supported by facts." 340 FW 3 § 3.6(A)(3).

57. When evaluating a project for compatibility, a refuge manager may only consider wildlife values, not "any broader social or economic concerns." *Id*.

58. The Service's obligation to prohibit incompatible refuge uses in an ongoing one. A compatibility determination must be reevaluated whenever relevant conditions change or "there is significant new information regarding the effects of the use." 16 U.S.C. § 668dd(d)(3)(B)(vii); *see* 50 C.F.R. § 25.21(f); 603 FW 2.11(H)(1). This duty to reevaluate is triggered whenever "new information could reasonably be expected to change the outcome of the compatibility determination." 603 FW 2.11(H)(4). If the Service determines that an existing use is not compatible, it must "expeditiously terminate or modify the use to make it compatible" within six months, unless the Director of the Service specially authorizes a longer period. 50 C.F.R. § 26.41(d); 603 FW 2.14.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

59. The National Environmental Policy Act ("NEPA") declares "a national policy which will encourage productive and enjoyable harmony between" people and their environment and "promote efforts which will prevent or eliminate damage to the environment" while promoting the health and welfare of our communities. 42 U.S.C. § 4321.

60. NEPA applies to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

61. The White House Council on Environmental Quality ("CEQ") promulgates general regulations implementing NEPA that are binding on all federal agencies. *See* 40 C.F.R. § 1500.3.[1]

62. Each federal agency, including the Department of the Interior, then promulgates its own regulations, consistent with the CEQ regulations, to implement NEPA. 40 C.F.R. § 1507.3(b).

63. NEPA is a "procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process." 40 C.F.R. § 1500.1(a).

64. A decision by the U.S. Fish and Wildlife Service to allow a refuge use is a federal action subject to NEPA. 603 FW 2 § 2.18.

65. Federal agencies fulfill their NEPA obligations in one of three ways: by preparing an environmental impact statement, by preparing an environmental assessment and Finding of No Significant Impact, or by determining the project is subject to a categorical exclusion. 40 C.F.R. §§ 1501.3, 1501.4, and 1508.1(d), (h), (j).

[1] CEQ's most recent modification to its NEPA regulations became effective on September 14, 2020. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The environmental review at issue in this complaint was completed on July 27, 2020. Therefore, the prior version of the CEQ regulations, in effect at the time of the final agency action, govern this case. For the Court's convenience, we indicate this distinction in relevant citations.

66. An agency must prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1501.3(a)(3).

67. The environmental impact statement must include a "full and fair discussion of significant environmental impacts" of the proposed action, as well as "reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

68. An environmental impact statement must be published for public review and comment and the agency that prepared it must request the comments of the "[a]ppropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards." 40 C.F.R. § 1503.1(a)(2)(i).

69. When the significance of the environmental effects is unknown, the agency must prepare an environmental assessment. 40 C.F.R. § 1501.5(a); *see also* 43 C.F.R. § 46.300.

70. In preparing an environmental assessment, the Service must include brief discussions of "the environmental impacts of the alternatives considered" and "a list of agencies and persons consulted." 43 C.F.R. § 46.310(a); *see also* 40 C.F.R. § 1501.5(c); 40 C.F.R. § 1508.9(a) (as effective on July 27, 2020) (Under CEQ regulations, an environmental assessment must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.").

71. Additionally, "[a]n environmental assessment must contain objective analyses that support conclusions concerning environmental impacts." 43 C.F.R. § 46.310(g).

72. Under the NEPA regulations, "effects" or "impacts" include direct, indirect, and cumulative effects. 40 C.F.R. §§ 1508.7, 1508.8 (as effective on July 27, 2020); *see* also 40 C.F.R. § 1508.1(g)(1), (2), (3).

73. "Direct" impacts "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (as effective on July 27, 2020); *see* also 40 C.F.R. § 1508.1(g)(1).

74. "Indirect" impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (as effective on July 27, 2020); *see also* 40 C.F.R. § 1508.1(g)(2).

75. "Cumulative" impacts are those that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (as effective on July 27, 2020); *see also* 40 C.F.R. § 1508.1(g)(3).

76. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (as effective on July 27, 2020).

77. In order for an agency to determine whether the proposed federal action will significantly affect the quality of the human environment requiring the agency to prepare an environmental impact statement, the agency must consider the context and intensity of the action. 40 C.F.R. § 1508.27 (as effective on July 27, 2020).

78. When considering the significance of a proposed action's impact, an agency should consider the unique characteristics of the geographic area, including proximity to cultural resources, wetlands, or ecologically critical areas, the degree to which the effects are likely to be highly controversial, the degree to which the possible effects on the human environment may be uncertain or unknown, whether the action is related to other actions with individually

insignificant but cumulatively significant impacts and the degree to which it may adversely affect areas eligible for listing in the National Register of Historic Places. 40 C.F.R. § 1508.27(b)(3),(4), (5), (7), (8) (as effective on July 27, 2020). An agency should also consider the "degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." 40 C.F.R. at §1508.27(b)(6) (as effective on July 27, 2020).

79. Under the Department of the Interior's NEPA regulations, the Service must "notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed." 43 C.F.R. § 46.305(c).

80. Under the Department of the Interior's NEPA regulations, the Service "must whenever possible consult, coordinate, and cooperate with relevant" Indian Nation governments about the environmental effects of any federal action that could affect them. 43 C.F.R. § 46.155.

81. Pursuant to Executive Order 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), each federal agency is required to develop a process to ensure that impacted Tribes and Indian Nations have a meaningful opportunity to provide input on federal decisions impacting their rights and resources.

82. It is the policy of the Department of the Interior to consult with Indian Nations "on a government-to-government basis whenever DOI plans or actions have tribal implications." Dep't of Interior, Policy on Consultation with Indian Tribes and Alaska Native Corporations, 512 DM 4 § 4.4 (2015).

83. The Department of the Interior recognizes that "[c]onsultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." *Id*. § 4(b).

84. Where a federal agency "has established a policy requiring prior consultation with a tribe [or Nation], and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before [agency] policy is made, that opportunity must be afforded." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979).

85. The Department of the Interior's consultation policy states that "Government-to-government consultation between appropriate Indian Nation officials and the Department requires Department officials to demonstrate a meaningful commitment to consultation by identifying and involving Indian Nation representatives in a meaningful way early in the planning process." Sec'y of Interior Order No. 3317 § 4(a) (Dec. 1, 2022).

86. Executive Order 12,898 mandates that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States," including Indian Nations and Tribes. Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629, 7632 (Feb. 16, 1994).

87. "NEPA creates, through the Administrative Procedure Act, a right of action deriving from Executive Order 12,898." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 9 (D.D.C. 2020), *aff'd*, 985 F.3d 1032 (D.C. Cir. 2021).

88. Indian Nations are one of the populations that must be considered in an environmental justice analysis. *See* CEQ, Environmental Justice: Guidance Under the National Environmental Policy Act, *passim* (Dec. 10, 1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (hereinafter "CEQ Guidance").

89. The CEQ Guidance provides that any agency preparing a NEPA analysis must analyze environmental effects on Indian Nations. CEQ Guidance at 3–5.

90. When considering a proposed action, an agency must determine whether communities of color, low-income communities, or Indian Nations are present, and if so, whether there may be disproportionately high and adverse human health or environmental effects on those populations. *Id*. at 9.

91. Agencies should seek Indian Nation participation in the NEPA process "in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally recognized tribes, and any treaty rights." *Id*.

92. In conducting an environmental justice analysis, an agency must not choose a "unit of geographic analysis" that would "artificially dilute or inflate the affected minority population." *Id*. at 25–26.

93. It is the Department of the Interior's policy to "[e]nsure meaningful involvement of . . . tribal populations in Department . . . activities through proper public participation." Dep't of Interior, Environmental Justice Implementation Policy, 525 DM 1, § 1.5(C) (Jan. 19, 2017).

94. The Department of the Interior states that when determining if an activity adversely impacts Indian Nation populations, it will consider whether they "have suffered or are at risk of suffering disproportionately adverse health or environmental effects or risks or exposure to environmental hazards, from DOI actions" and whether they "have been denied an equal opportunity for meaningful involvement in governmental decision making relating to the distribution of environmental . . . burdens." *Id*. § 1.6(B).

95. The Department of the Interior directs that its departments shall "[d]evelop proper documentation of any findings, determination and/or demonstration regarding potential disproportionate or adverse impacts" to Indian Nation populations. *Id*. § 1.6(E).

96. The Department of the Interior, in NEPA processes, "evaluates disproportionately high and adverse human health or environmental effects impacts" to Indian Nation populations. *Id*. § 1.6(L).

97. At a minimum, the Department of the Interior will, (1) "[a]nalyze proposed actions to determine if potential impacts to . . . [Indian Nation] populations, including human health, economic, and social effects, are disproportionately high and adverse;" (2) "[p]rovide opportunities for . . . [Indian Nation] populations, including through tribal consultation responsibilities under Executive Order 13175, to provide input early and throughout the NEPA process, including identifying potential effects and mitigation measures in consultation with the affected communities;" and (3) "[r]emove any barriers to participation of . . . tribal populations by improving the accessibility of meetings, crucial documents, and notices." *Id*.

98. According to the Service's Tribal Consultation Handbook, "The Service considers environmental justice issues through implementation of [NEPA], the law that requires Federal agencies to consider the interests of under-represented communities when making decisions." U.S. Fish & Wildlife Serv., Tribal Consultation Handbook 45 (2018).

III. THE NATIONAL HISTORIC PRESERVATION ACT

99. The National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101 *et seq.,* was enacted to encourage the preservation and protection of America's historic and cultural resources. *Ind. Coal Council, Inc. v. Luhan*, 774 F. Supp. 1385, 1387 (D.D.C. 1991).

100. Section 106 of the National Historic Preservation Act requires that prior to issuance of a federal permit or license, federal agencies must take into consideration the effects of that "undertaking" on historic properties. 54 U.S.C. § 306108.

101. The term "undertaking" includes any activity or project that requires a federal permit, license, or approval. 36 C.F.R. § 800.16(y).

102. The National Historic Preservation Act sets out four steps to comply with the Section 106 process: (1) determine and document the area of potential effects; (2) review existing information on historic properties within the area of potential effects, including potential historic properties; (3) seek information from consulting parties and individuals who have knowledge of or concerns with the historic properties in the area; and (4) "gather information from any Indian tribe [or Nation] . . . identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal [or Indian Nation] lands, which may be of religious and cultural significance to them and may be eligible for the National Register." *Id.* § 800.4(a). In carrying out these obligations, the "agency official shall acknowledge that Indian [Nations] and tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." *Id.* § 800.4(c)(1).

103. The area of potential effects is defined to include the area where the undertaking "may directly or indirectly cause alterations in the character or use of historic properties" and is "influenced by the specific scale and nature of the undertaking." *Id.* § 800.16(d).

104. Effects are defined to include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id.* § 800.5(a)(1)

105. Under Section 106, any Indian Nation that attaches religious or historic significance to a historic property that might be affected by a federal action must be consulted. *Id.*; *see also id.* §

800.2(c)(2)(ii) (requiring consultation with any Indian Nation "that attaches religious and cultural significance to historic properties that may be affected by an undertaking").

106. The consultation requirement applies regardless of where the historic property is located. *Id.* § 800.2(c)(2)(ii).

107. Consultation with an Indian Nation must occur regarding sites with "religious and cultural significance" that are off tribal lands, and federal regulations instruct agencies to consider that historic properties of religious and cultural significance are often located on ancestral or ceded lands. *Id.* § 800.2(c)(2)(ii)(D).

108. Federal agencies must make "a reasonable and good faith effort to identify any Indian Nations that might attach religious and cultural significance to historic properties" in the potentially affected area and invite them to be consulting parties, and must grant any written request by any such Nation to be a consulting party. *Id.* § 800.3(f)(2).

109. In consultation with any Indian Nation that may attach religious and cultural significance to properties within the area of potential effects, the federal agency official shall take steps necessary to identify historic properties within the area of potential effects, and must evaluate the historic significance of such sites and determine whether they are potentially eligible for listing under the National Register of Historic Places. *Id.* § 800.4(b), (c).

110. Federal agencies must make a reasonable and good faith effort to ensure the process allows full participation by the Indian Nation and that the manner in which the agency consults is respectful of the Indian Nation's sovereignty. *Id.* § 800.2(c)(2).

111. Consultation must recognize the government-to-government relationship between the Federal Government and Indian Nations and be conducted in a manner sensitive to the concerns and needs of the Nation being consulted. *Id*. § 800.2(c)(2)(iii)(C).

112. When consulting an Indian Nation on potential impacts to culturally significant properties, an agency must provide the Nation with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id.* § 800.2(c)(2)(ii)(A).

IV. THE ADMINISTRATIVE PROCEDURE ACT

113. The Administrative Procedure Act ("APA") governs judicial review of an agency's compliance with the Refuge Act, NEPA, and the National Historic Preservation Act.

114. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction [or] authority," or "without observance of procedure required by law." 5 U.S.C. § 706(2).

115. The APA authorizes the award of declaratory and injunctive relief. 5 U.S.C. § 703.

FACTUAL BACKGROUND

I. THE IROQUOIS NATIONAL WILDLIFE REFUGE

116. The Iroquois National Wildlife Refuge was established in 1958 under the authority of the Migratory Bird Conservation Act "for use as an inviolate sanctuary, or for any other management purpose, for migratory birds." 16 U.S.C. § 715d; *see also* Compatibility Determination at 1.

117. The Migratory Bird Conservation Act empowers the federal government to purchase land for the conservation of migratory birds, including for the establishment of inviolate "sanctuaries" wherein migratory bird habitats would be protected from persons "cutting, burning, or destroying

any timber, grass, or other natural growth." Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915, 5918 (Feb. 3, 2020) (quoting Migratory Bird Conservation Act § 10, 45 Stat. 1222, 1224 (1929)).

118. The Refuge is located in both Genesee County and Orleans County, New York, within the ancestral territory of the Tonawanda Seneca.

119. The Refuge is popular for hunting, fishing, and wildlife observation. "Increasing numbers of birdwatchers, photographers, naturalists, hunters, and anglers are drawn to the [R]efuge each year," and those visitors contribute to the local economy. Refuge Conservation Plan 3-26, Exhibit A.

120. At least 268 species of birds have been identified on the Refuge. U.S. Fish & Wildlife Serv., "Iroquois National Wildlife Refuge Birds" (2007), Exhibit D.

121. A heron rookery "that contains approximately 300 nests" is located within the Refuge, "just east of NYS Highway 63." Compatibility Determination at 7, Exhibit E.

122. The short-eared owl is a New York State-listed endangered species that was spotted on the Refuge around April 30, 2021. *See* New York State Dep't of Env't Conservation, "Short-eared Owl," https://www.dec.ny.gov/animals/7080.html (accessed Nov. 24, 2023), Exhibit F; Iroquois National Wildlife Refuge, Facebook (Apr. 30, 2021), https://www.facebook.com/168915473153818/posts/4167865889925403/?mibextid=rS40aB7S9Ucbxw6v, Exhibit G.

123. Fishing in the Refuge is limited to Ringneck Marsh and Oak Orchard Creek. Anglers can access Oak Orchard Creek "from the shore at the bridges on Route 63." U.S. Fish & Wildlife Serv., "Iroquois National Wildlife Refuge" https://www.fws.gov/refuge/iroquois/visit-

us/activities/fishing (accessed Nov. 25, 2023), Exhibit H. Fish species within the Refuge include "northern pike, bluegill, pumpkinseed, yellow perch, white perch, brown bullhead and carp." *Id*.

124. Soil Surveys from Genesee and Orleans County demonstrate the Refuge is dominated by soils developed on organic material. The Genesee County map shows the Refuge contains soils with "Muck association: deep to shallow, very poorly drained organic soils." Exhibit I. Likewise, the Orleans County Map shows soils within the Refuge are characterized by "Deep, very poorly drained soiled formed in organic deposits and fluvaquents and humaquepts, ponded." Exhibit J.

125. In other words, soil within the Refuge along the drilling route is "very soft and appears to be peat." "Frac Out Notification Report" at 2 (Sept. 7, 2023), Exhibit K.

126. The Refuge Conservation Plan includes the vision statement that the Refuge "will be the ecological 'puzzle piece' for Western New York by creating and maintaining unsurpassed habitats including wetlands, grasslands, shrublands, and forests for migratory birds and other wildlife." Refuge Conservation Plan at 1-23, Exhibit A.

127. The Refuge's goals include to "[p]rovide high quality freshwater migration stopover and breeding habitat for waterfowl, marshbirds, shorebirds, and bald eagles" and to "[m]aintain the environmental health and integrity of Oak Orchard Creek." *Id*.

128. The Refuge Conservation Plan recognizes that "[m]anagement of refuge habitats is designed to provide the best possible habitat for migratory waterfowl and waterbirds, while also benefitting several other wetland wildlife species." *Id*. at 3-19.

129. The following uses have been determined to be appropriate or not appropriate for the Refuge:

Table 3-24 Appropriateness Determinations

Appropriateness Determination	Appropriate	Not Appropriate
Haying	X	
Jogging and Bicycling	X	
Walking and Hiking	X	
Cross-country Skiing and Snowshoeing	X	
Furbearer Management	X	
Berry, Fruit and Nut Collecting		X
Commercial Forest Management	X	

Refuge Conservation Plan at 3-43.

130. The following uses have been determined to be compatible uses of the Refuge:

Table 3-25 List of Activities Determined Compatible on the Refuge

Compatibility Determination	Priority Uses	Secondary Uses
Hunting	X	
Fishing	X	
Wildlife Observation	X	
Wildlife Photography	X	
Interpretation	X	
Environmental Education	X	
Furbearer Management		X
Walking and Hiking		X
Cross Country Skiing/Snowshoeing		X
Jogging and Bicycling		X
Commercial Forest Management		X

Refuge Conservation Plan at 3-43.

131. According to the Refuge's Conservation Plan, several activities are not compatible with the Refuge and are not allowed on Refuge land. These include "snowmobiling, all-terrain vehicle (ATV) use, biking on trails, . . . walking dogs off a leash, picking plants, camping, horseback riding, and campfires, just to list a few." *Id*.

II. ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT

132. The Environmental Assessment ("EA") for the industrial wastewater and treated sewage pipeline was finalized in May 2020. Exhibit L.

133. Defendant Scott Kahan signed the Finding of No Significant Impact ("FONSI") for the Right-of-Way and industrial wastewater and treated sewage pipeline on July 27, 2020. Exhibit M.

134. The EA purports to examine the impacts of the issuance of "approximately 14.32 acres of new right-of-way located within the Iroquois National Wildlife Refuge" on the west side of Highway 63 and authorization to build and operate an industrial wastewater and treated sewage pipeline "to extend from the ***proposed*** Western New York Science & Technology Advanced Manufacturing Park (STAMP) site to a discharge location at Oak Orchard Creek." EA at 1 (emphasis added).

135. The EA explains the pipeline's purpose is "to allow for the transport of up to 6 million gallons per day (MGD) of combined sanitary and process wastewater effluent generated… at the [STAMP] Site to the proposed discharge location at Oak Orchard Creek." *Id*.

136. The EA states the "project area" for the industrial wastewater and treated sewage pipeline begins at the STAMP site in Genesee County and ends at the pipeline discharge point into Oak Orchard Creek in Orleans County. *Id*.

137. The industrial wastewater and treated sewage pipeline construction involves installing "approximately 33,000 linear feet of 18" PVC and 20" HDPE sanitary force main, main line valves, maintenance manholes, metering manholes, and Force Main markers" along the 9-mile route. EA at 7. The buried pipeline would stretch 2.7 miles[2] across the Iroquois National Wildlife Refuge and would include stream crossings and state and federal wetland crossings. *Id*. at 8.

[2] The EA describes the distance of pipeline being built through the Refuge as 14,332 linear feet. The Right-of-Way Permit converts that distance to 2.714 miles. Permit at 3, Exhibit S.

A. Impacts from Pipeline Construction

138. The pipeline construction uses horizontal directional drilling. EA at 12. Horizontal directional drilling "techniques require the use of drilling fluid to keep the drilling head cool, stabilize the bore hole and lubricate the pipe during pulling operations." *Id*. The drilling fluid "is made from mixing bentonite and other additives with water to produce a slurry that can be pumped." *Id*.

139. The Service recognizes that bentonite "can be toxic to fish, fish eggs and aquatic invertebrates if discharged in large quantities." Compatibility Determination at 8, Exhibit E.

140. The EA recognizes that a drilling fluid spill or leak can occur as a result of "low density soils or unconsolidated soils." EA at 30.

141. Generally, loose, porous soils and those rich in organic matter have lower bulk density. U.S. Dep't of Agriculture Nat. Res. Conserv. Serv., "Soil Quality Indicators" (June 2008), https://cafnr.missouri.edu/wp-content/uploads/2016/09/bulk-density.pdf, Exhibit N.

142. Peat soils and muck soils are low density soils. *See* D.H. Boelter, "Important Physical Properties of Peat Materials," (1968), https://www.nrs.fs.usda.gov/pubs/jrnl/1968/nc_1968_boelter_001.pdf, Exhibit O; Cornell Univ., "Conservation of Muck Soils in New York" (2015), http://nmsp.cals.cornell.edu/publications/factsheets/factsheet86.pdf, Exhibit P.

143. The EA lists 15 soil types within the entire 9 miles of the pipeline length. EA at 12; EA at Appendix C. The EA does not separately identify the soil types specifically present within the 2.7 miles of the pipeline route through the Refuge.

144. The soils within the Refuge are rich in organic matter, a risk factor for fluid spills directional drilling. *See* Wis. Dep't Nat. Res., Technical Standard, Horizontal Directional

Drilling 6 (Oct. 2022), https://dnr.wisconsin.gov/sites/default/files/topic/Stormwater/1072_HorizDirectionalDrilling_10-2022.pdf, Exhibit Q.

145. The EA concludes, "Rarely, an inadvertent release of drilling fluid can occur during the [drilling] process." EA at 12, 30.

146. The EA recognizes that a "drilling fluid leak during construction . . . could have the potential to contaminate groundwater resources beneath and downstream of the area(s) experiencing a leak." *Id*. at 17.

147. The EA fails to examine the potential impacts of a drilling fluid leak and whether it could contaminate groundwater. Instead, the EA concluded that "[i]f a drilling fluid . . . leak were to occur, it is anticipated that it would be quickly detected and resolved without contaminating groundwater resources." *Id*.

148. The EA concludes that "no direct or indirect impacts are anticipated" to groundwater from a drilling fluid leak. *Id*.

149. The EA recognizes that "[p]ublic health and safety concerns associated with this type of development include the potential for a drilling fluid leak during [horizontal directional drilling] construction." EA at 30.

150. The EA states that staging areas would be able to temporarily contain spilled drilling fluid and would have equipment to "contain the fluid in the event that the fluid broke initial containment." EA at 30.

151. The EA does not analyze the public health or safety risk from an uncontained drilling fluid leak or spill.

152. The EA does not acknowledge that bentonite can be toxic to fish eggs and aquatic invertebrates if discharged in large quantities, nor does the EA identify at which quantities of bentonite from drilling fluid negatively impact fish eggs and aquatic invertebrates.

153. The EA does not analyze the impact of a spill or leak of drilling fluid on birds, mammals, reptiles, amphibians, fish, insects, aquatic or terrestrial invertebrates, plants, wetlands, surface water, or habitats in the Refuge.

154. The impacts of potential spills of drilling fluid during pipeline construction may be significant.

B. Impacts from a Pipeline Leak

155. The EA does not identify what pollutants the pipeline may carry or examine the impact of a pipeline spill on the Refuge, its wetlands, birds, or other wildlife. For example, the EA does not examine the impact that industrial wastewater containing mercury or perfluorinated chemicals (also known as "PFAS" or "forever chemicals") could have on the Refuge and its wildlife and plants, particularly if there was a spill from the pipeline.

156. The EA concludes that there will be "no long-term impacts" to birds from the operation of the pipeline even though the pipeline would operate for 50 years transporting unknown pollutants and pipeline spills and leaks are possible. *Id*. at 28.

157. The EA concludes, without support, that "[p]otential public health and safety impacts resulting from a leak of effluent once the [pipeline] is operational are not anticipated." EA at 3.

158. Although the pipeline will travel underneath Oak Orchard Creek within the Refuge, the EA does not examine the risk of a pipeline leak to Oak Orchard Creek and the wildlife that uses Oak Orchard Creek as habitat or a water source.

159. The impacts of potential spills during the operation of the pipeline may be significant.

C. Impacts to Birds and Wildlife

160. The EA does not examine the impacts the construction and operation of the industrial wastewater and treated sewage pipeline may have on birds or other wildlife in a way that reflects "sound professional judgment" consistent with principles of sound fish and wildlife management and administration, available science, and resources.

161. When examining impacts to avian species, the EA only lists 141 avian species, even though 268 species of birds have been identified on the Refuge. *Compare* EA Appendix E *with* U.S. Fish & Wildlife Serv., "Iroquois National Wildlife Refuge Birds," Exhibit D. The EA contains no explanation of why its analysis was limited to "avian species sighted along Byron (2005-2016) and Harris Hill [Breeding Bird Survey] routes and nesting species at [the Refuge]" instead of all the birds identified on the Refuge. *See* EA at Appendix E.

162. The EA fails to examine the project's impact on the short-eared owl, a New York State-listed endangered species.

163. The EA recognizes that birds, including five state-listed threatened species, may be impacted during construction through "temporary habitat avoidance, temporary habitat loss, noise disturbance, dust generation, exposure to contaminants, and/or injuries resulting from construction vehicle collisions." EA at 25, 27.

164. The EA concludes the Project "may affect, but [is] not likely to adversely affect, the state-listed threatened pied-billed grebe, sedge wren, Henslow's sparrow, bald eagle, or Northern Harrier." EA at 25. The EA does not explain using "sound professional judgment" how birds avoiding habitats being disturbed or destroyed by construction, birds impacted by exposure to dust or contaminants, and birds injured by construction vehicle collisions are not adverse effects on birds.

165. The EA does not acknowledge the existence of the heron rookery located just east of Highway 63 that contains 300 nests, nor does it examine the potential impacts the Project may have on the rookery.

166. The EA acknowledged that "[i]ndividuals and habitats located within the proposed construction limits may be temporarily impacted from construction activities." EA at 28. The EA notes that "potential temporary construction impacts to wildlife may include temporary habitat avoidance, temporary habitat loss, noise disturbance, dust generation, exposure to contaminants, and/or injuries resulting from collisions with construction vehicles." *Id*.

167. The EA claims that construction would be "confined to a period of 8-10 weeks" and that habitats would be "fully restored" following construction. EA at 29.

168. The EA concluded, without support or analysis, "The mammals, reptiles, fish, amphibians and insects using the [Refuge] habitats would not be impacted on a population level" by the Project. EA at 28.

169. The EA failed to explain how impacts to wildlife within the Refuge are only significant where they impact a species at a population level. *Id*.

170. The EA failed to catalog the entire range of wildlife and plants within the Refuge and examine potential impacts on them. The EA failed to identify any invertebrates or aquatic macroinvertebrates in the area and how the Project could affect these species. The EA only included a list "common plants" found along the pipeline route within the Refuge. EA at Appendix D.

171. The Project's impacts on birds, wildlife, and plants within the Refuge may be significant.

D. Indirect and Cumulative Impacts

172. The EA concluded that the industrial wastewater and treated sewage pipeline will have positive socioeconomic benefits because "at full build-out, STAMP is expected to provide more

than 9,000 new jobs to our region . . . and result in significant community development." EA at 32.

173. Other than concluding that the industrial wastewater and treated sewage pipeline will lead to economic benefits by facilitating development at the STAMP site, the EA did not analyze any environmental impacts of the STAMP site build out or other reasonably foreseeable "significant community development."

174. The website for the STAMP site touts it as a "1,250-Acre Mega-Site" suitable for "[r]enewables manufacturing, semiconductor manufacturing, and advanced manufacturing." *Western New York Science & Technology Advanced Manufacturing Park (STAMP)*, GCEDC www.gcedc.com/wnystamp (last accessed Sept. 28, 2023).

175. The EA does not examine the cumulative impacts on the environment of building out the STAMP site, a 1,250-acre mega-site that will include industrial manufacturing and a wastewater treatment facility, when added with the impacts of the industrial wastewater pipeline being built in order to facilitate industrial development on the STAMP site.

176. The EA does not contain a cumulative impacts analysis that examines the impact of the Project along with other past, present, and reasonably foreseeable future actions.

177. The EA fails to examine the cumulative impacts to the Northern Harrier and the Short-eared owl from construction and operation of the industrial wastewater and treated sewage pipeline, together with construction and operation of industrial facilities at the STAMP site.

178. The EA fails to examine the cumulative impact on the Refuge and its wildlife of habitat loss the STAMP site will cause along with the impacts of construction and operation of the pipeline.

179. The indirect and cumulative impacts of the industrial wastewater and treated sewage pipeline may be significant.

E. Impacts to Oak Orchard Creek

180. The EA does not analyze the impact of pipeline on the receiving water, Oak Orchard Creek.

181. The EA fails to acknowledge that Oak Orchard Creek is impaired for phosphorus.

182. The EA does not recognize that the Clean Water Act prohibits new discharges of phosphorus into phosphorus-impaired waterways.

183. The pipeline discharge will contain phosphorus.

184. The EA does not analyze the impact of this new discharge of phosphorus into Oak Orchard Creek or the creek's water quality.

185. The impact of industrial wastewater and treated sewage pipeline discharges on Oak Orchard Creek may be significant.

F. Impacts to Recreational Fishing

186. The EA does not recognize that fishing is a recreational use of the Refuge and that anglers access Oak Orchard Creek from bridges on Highway 63.

187. The EA does not examine how the construction of the pipeline along Highway 63 may impact recreational fishing in the Refuge.

188. The EA does not examine the threat to recreational fishing from a spill of industrial wastewater carried by the pipeline.

189. Harm to recreational fishing from construction and operation of the industrial wastewater and treated sewage pipeline may be significant.

G. Cultural and Historic Impacts

190. The EA states that "the project area is considered to have a high degree of archaeological sensitivity for precontact sites." EA at 29. These sites are directly connected to the Tonawanda Seneca Nation, its ancestors, and its culture.

191. The Archaeological Resources Protection Act of 1979 ("ARPA") requires a permit for any person seeking to excavate or remove any archaeological resource located on public lands. 16. U.S.C. §§ 470aa – mm.

192. For any activity permitted under ARPA that may result in harm to, or destruction of, any religious or cultural site, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance at least 30 days before issuing such permit. 16 U.S.C. 43 C.F.R. § 470cc(c), 43 C.F.R. §§ 7.7, 7.32.

193. The Service issued an ARPA permit to conduct Phase I reconnaissance field research within the Refuge for the pipeline. See ARPA permit No. 2017-01-IRQ, May 26, 2017, Exhibit R.

194. A contractor for GCEDC conducted a Phase I archaeological survey for the proposed disturbance areas located within the Refuge. EA at 29.

195. The Service did not notify or consult with the Nation prior to, during or after conducting the Phase I survey, in violation of ARPA and its implementing regulations.

196. The EA does not contain an analysis of the industrial wastewater and treated sewage pipeline's potential impacts to traditional cultural or historic properties.

197. The EA notes that Tonawanda Seneca Nation "representatives have raised the issue that the Nation's Territory should be considered a Traditional Cultural Property (TCP) eligible for listing on the National Register of Historic Places." *Id*. at 30.

198. The EA contains no analysis of the cumulative impacts of the pipeline and reasonably foreseeable impacts of STAMP development on the Nation's Territory, resources, or TCP.

199. The EA's conclusion that no further review or mitigation was required was reached without input from the Nation.

200. The cumulative impacts of the industrial wastewater and treated sewage pipeline and the reasonably foreseeable impacts of STAMP development on the Nation, its cultural resources, its Territory and its TCP is significant.

H. Environmental Justice

201. The EA states that "U.S. Census data were reviewed for Genesee County, Orleans County, the Town of Alabama, Town of Shelby and the Village of Medina." EA at 33. The EA determined that "[n]one of these locations had minority or poverty populations that approached or exceeded the thresholds for being considered environmental justice populations." *Id*. at 33.

202. The EA concludes "environmental justice is not relevant to the proposed action and will not be evaluated further." *Id*. at 33.

203. The EA acknowledges the existence of the Tonawanda Seneca Nation. It mentions that, when the project developer was considering building a pipeline that would discharge into Whitney Creek, the Nation "had concerns with discharging to Whitney Creek with flows into Tonawanda Creek because the creek flows through the Reservation and is an essential part of the Nation's way of life and cultural heritage." *Id*. at 3.

204. The EA incorrectly suggests that the Tonawanda Seneca Nation's concerns were addressed in the project design. *Id.* at 30.

205. The Service never spoke to or consulted with the Tonawanda Seneca Nation about the industrial wastewater and treated sewage pipeline during the preparation of the EA or FONSI.

206. The EA fails to analyze the impact of the industrial wastewater and treated sewage pipeline on the Tonawanda Seneca Nation.

207. The cumulative impacts of the industrial wastewater and treated sewage pipeline and the development it is intended to spur on the Tonawanda Seneca Nation are significant, disproportionately high, and adverse.

I. The Finding of No Significant Impact (FONSI)

208. The FONSI concluded that any "adverse direct or indirect impacts" of the Project would not contribute to cumulative impacts to habitat or wildlife from "population growth and development." FONSI at 3. The EA did not examine any direct, indirect, or cumulative impacts the Project could have on development even though the EA stated that the purpose of the Project was to facilitate industrial development at the STAMP site and bring 9,000 jobs to the area. EA at 32.

209. The FONSI concluded that the "adverse direct and indirect effects of the proposed action on air, water, soil, habitat, wildlife, aesthetic/visual resources are expected to be minor and short term," despite the fact that the term of the Right-of-Way Permit is valid for 50 years. FONSI at 3. The EA did not examine the potential effects on the environment caused by 50 years of industrial wastewater being conveyed through the Refuge and discharged into Oak Orchard Creek.

III. APPROPRIATENESS REVIEW

210. On June 9, 2020, Defendant Roster determined the "Right-of-Way Easement to Genesee County Economic Development Center" was exempt from an appropriateness determination. "Finding of Appropriateness of A Refuge Use" at 1, 3, Exhibit S.

211. Defendant Roster explained that "Genesee County Economic Development Center has requested to cross the Iroquois National Wildlife Refuge with a treated wastewater force main

pipeline that would originate at the Western New York [STAMP Site] which is south of the refuge to a discharge point that is located north of the refuge." *Id*. at 4.

212. Defendant Roster incorrectly characterized the Right-of-Way and industrial wastewater pipeline as an "existing use." *Id*. at 1.

213. Defendant Roster noted that the "[p]roposed pipeline would be installed mostly within an existing road right-of-way" and concluded, "By definition this use qualifies as exempt under appropriateness review." *Id.* at 4.

214. Although the form Defendant Roster completed suggests that right-of-way permit requests are exempt from appropriateness reviews, the Service policy "Appropriate Refuge Uses," does not provide that right-of-way permit requests are exempt from appropriateness reviews. *See* 603 FW 1. Instead, a right-of-way is a "specialized use," and the Service makes "appropriateness findings for specialized uses on a case-by-case basis." 603 FW 1 § 1.10(D). Specifically, before the Service will consider a specialized use, the Service "must make an appropriateness finding." *Id*. Furthermore, "it is the policy of the Service to discourage the types of uses embodied in right-of-way requests." 340 FW 3 § 3.3.

IV. THE COMPATIBILITY DETERMINATION

215. Defendant Roster signed the Compatibility Determination for the pipeline on July 16, 2020. Exhibit E.

216. Defendant Kahan concurred with the Compatibility Determination on July 27, 2020.

217. The Compatibility Determination describes the Project as "a minor modification to an existing Right-of-Way (ROW)." Compatibility Determination at 1.

218. The Compatibility Determination states that the "Service will grant GCEDC a ROW permit to bury a new wastewater sewer main that would run parallel to New York State (NYS) Highway 63 in order to cross Iroquois National Wildlife Refuge." *Id*.

219. The Compatibility Determination acknowledges the pipeline would enable the discharge of 6 million gallons per day of treated sewage and "processed water" into Oak Orchard Creek. *Id.* at 2.

220. The Compatibility Determination concludes that the pipeline discharge will occur "beyond any Federal, State, and Tribal lands, thus reducing any potential effects this discharge may have on these lands." *Id*.

221. The Right-of-Way would "include other infrastructure to be installed at the time of construction, including 12 maintenance manholes, 2 metering manholes, 26 valves, and 14 force main markers." *Id*.

222. During construction, the Project involves building 27 staging areas within the Refuge, each 20 feet by 60 feet. Clay will be imported to create a cofferdam around the staging area. Compatibility Determination at 3.

223. The Compatibility Determination states that the applicant prepared an environmental assessment that "documents avoiding [the Refuge**]** will increase construction time, infrastructure, environmental impacts, and overall cost to GCEDC." *Id*. at 4.

224. The Compatibility Determination explains the Right-of-Way "would be valid for a period of 50 years to send daily an estimated 6,000,000 gallons" of treated sewage or industrial wastewater from STAMP at full build-out. *Id*. at 3.

225. The Compatibility Determination's analysis of surface water impacts is: "Four streams within the [Refuge] would need to be crossed; however, since the method of installing the [pipeline] is by way of [horizontal directional drilling] the pipe would pass underneath the streambed, thus avoiding direct and indirect impacts to surface water resources." *Id*. at 5.

226. The Compatibility Determination acknowledges that the Project will impact more than half an acre of wetlands.

227. The Compatibility Determination states: "Compensatory mitigation for the permanent loss of wetland acres is proposed to include removing two non-functional refuge access points along the NYS Highway 63." *Id.* at 5–6.

228. The Compatibility Determination recognizes that construction of the industrial wastewater pipeline will cause noise and dust "that may affect individual birds in these locations." *Id*. at 7.

229. The Compatibility Determination admits that there is the potential for "temporary habitat avoidance [by state-listed species] due to construction activities, noise, dust, etc. as partially mentioned in noise section above." *Id*.

230. The Compatibility Determination admits that various bird "species do nest and breed in the habitats adjacent to NYS Highway 63 and the [Area of Projected Impact] (API), and there is movement through the API for birds to access other habitats." *Id*. at 7. Specifically, "a heron rookery is located just east of NYS Highway 63 that contains approximately 300 nests. These birds consistently fly over the road to feed in marshes that are located to the west of NYS Highway 63 and the API." *Id*.

231. The Compatibility Determination recognizes that construction will affect and harass birds in the Iroquois National Wildlife Refuge and will affect areas adjacent to a heron rookery containing 300 nests.

232. The Compatibility Determination's analysis of impacts to non-bird species is limited to a recognition that "animals will avoid the construction areas due to noise, dust, and vehicle movements." *Id*. at 7. The Compatibility Determination assumes that "[v]ehicle and equipment

deployment and noise should push amphibians, reptiles, and small mammals out of the area prior to cofferdam construction." *Id*.

233. The Compatibility Determination acknowledges the possibility that drilling fluid could spill into the Refuge during pipeline construction. *Id*. at 8.

234. The Compatibility Determination further acknowledges that bentonite, the primary drilling fluid, "can be toxic to fish, fish eggs, and aquatic invertebrates if discharged into large quantities." *Id*. at 8.

235. The Compatibility Determination does not define at which quantities a spill of drilling fluid will harm fish, fish eggs, and aquatic invertebrates, nor does it evaluate the likelihood of a drilling fluid spill or leak during construction. The Compatibility Determination does not examine the potential impact of a spill or leak of drilling fluid on birds, mammals, reptiles, insects, terrestrial invertebrates, plants, wetlands, groundwater, or surface water.

236. The Compatibility Determination acknowledges that if the pipeline leaks during operation, "cleanup may not be feasible depending on the leak and when detected." *Id*. at 8. Industrial wastewater and treated sewage "may absorb into the ground or flow away" from the Right-of-Way area. *Id*. The Compatibility Determination acknowledges that "complete effects" of a pipeline leak "will be unknown." *Id*.

237. The Compatibility Determination concludes that a spill of industrial wastewater and treated sewage discharges "would not pose a threat to the environment" based on the assumption that GCEDC would receive a state-issued Clean Water Act permit allowing the wastewater to be discharged into Oak Orchard Creek. *Id*.

238. The Compatibility Determination fails to explain the scientific basis behind the conclusion that treated wastewater and sewage discharges allowed in a free-flowing stream

would not impact birds, mammals, reptiles, insects, fish, terrestrial invertebrates, aquatic invertebrates, plants, wetlands, or groundwater if the pipeline leaked and spilled the wastewater into the Refuge.

239. Neither the EA nor the Compatibility Determination attempt to identify or examine the possible effects a leaking pipeline may have on birds, mammals, reptiles, insects, fish, terrestrial invertebrates, aquatic invertebrates, plants, wetlands, groundwater, or surface water.

240. The Compatibility Determination concludes that "this project will have negligible impacts on refuge resources and not materially interfere [with] or detract from the refuge's purpose." Compatibility Determination at 9. The Compatibility Determination relies on its characterization of the Service's approval as limited to "a minor modification to an existing [Right-of-Way] width" that will "occur mostly within an existing NYS Highway [Right-of-Way]" to conclude the impacts will be negligible. *Id*.

241. The Compatibility Determination's conclusion that the pipeline will not "materially interfere [with] or detract from the refuge's purposes" is also based on an assumption that construction using directional drilling will occur for two to three months. *Id*. at 9.

242. The Compatibility Determination's "Justification" states that the industrial wastewater pipeline "will not conflict with any of the other priority public uses or adversely impact biological resources." *Id*. at 11.

243. The Compatibility Determination states that "the refuge manager has determined that a minor modification of an existing ROW, in accordance with the stipulations provided above is a compatible use that will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose of the refuge." *Id*. at 11–12.

244. The Compatibility Determination did not evaluate whether the construction and operation of the industrial wastewater and treated sewage pipeline was a permissible economic use of the Refuge.

245. The Compatibility Determination did not conclude that construction and operation of the industrial wastewater and treated sewage pipeline contributes to the achievement of the Refuge purposes or the National Wildlife Refuge System mission.

246. Notice of the draft Compatibility Determination was not published in local newspapers.

247. The Tonawanda Seneca Nation was not notified of the draft Compatibility Determination.

248. Six people attended the public meetings about the Right-of-Way Permit.

249. The Compatibility Determination recognized that public commenters raised concern about "impacts within the refuge to all wildlife during construction phase, including salamander and turtles, [and] colonial nesting birds." *Id*. at 10. Commenters were also concerned about drilling underneath Oak Orchard Creek and potential harm to the Refuge from a pipeline leak or spill. *Id*.

250. The Compatibility Determination contains "Stipulations Necessary to Ensure Compatibility." *Id*. at 10–11.

251. One stipulation requires the permittee to set up a construction plan that includes requirements for responding to emergencies such as construction issues and resource damage. *Id*. at 11.

252. The Compatibility Determination includes the stipulation that "compensatory mitigation for wetlands mentioned in this compatibility determination is a minimum and in addition to requirements requested by [the Army Corps of Engineers] or NYS DEC." *Id*.

253. The Compatibility Determination stipulates that "GCEDC will restore 4.5 acres of non-native conifer plantations . . . to offset the additional 3.47 acres needed outside the Highway 63 ROW. The refuge will require a 75 percent survival rate for trees after 5 years." *Id.*

V. THE RIGHT-OF-WAY PERMIT

254. On August 25, 2021, the Service issued to STAMP Sewer Works[3] a Right-of-Way Permit (the "Permit"), signed by Defendant Gaboriault, for the "development, construction, installation, operation, maintenance, repair, and/or removal" of an industrial wastewater and treated sewage pipeline through the Refuge. Right-of-Way Permit at 1, 13. Exhibit T.

255. The Permit states that the pipeline will be built along the west side of Highway 63 through the Refuge. *Id.* at 1.

256. The New York State Department of Transportation holds a right-of-way over Highway 63.

257. Highway 63 predates the Iroquois National Wildlife Refuge.

258. The Permit states that the Regional Chief found that the proposed use is compatible with the purposes for which the Refuge was established, as determined and conditioned by the Compatibility Determination and FONSI. *Id.*

259. The Permit states that the Service "completed consultations under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act and determined that the permit was consistent with both acts." *Id.* at 1–2.

260. The Permit describes the pipeline as 33,000 feet long, with 14,286 feet on Refuge lands and designed to convey 6 million gallons of industrial wastewater and treated sewage. *Id.* at 2.

[3] STAMP Sewer Works is a subsidiary of the Genesee Gateway Local Development Corporation, the non-profit real estate affiliate of the Genesee County Industrial Development Agency, doing business as Genesee County Economic Development Center. Right-of-Way Permit at 1.

The Right-of-Way request includes 12 maintenance manholes, 2 metering manholes, 26 valves, and 14 force main markers. *Id*. at 2.

261. The Permit explains the right-of-way granted to STAMP Sewer Works is 14,286 feet long and 43 feet from the centerline of the existing road—10 feet wider that than the highway right-of-way—to allow for pipeline installation and maintenance. An 800-foot portion of the Right-of-Way is 53 feet from the centerline of the road. *Id*. at 2.

262. The Permit does not involve maintenance of an existing right-of-way and is not a minor expansion or minor realignment to meet safety standards. The Permit does not expand the width of a road shoulder to reduce the angle of the slope, expand the area for viewing oncoming traffic at an intersection, or realign a curved section of a road to reduce the amount of curve in a road.

263. The Permit mandates that STAMP Sewer Works must "apply for and receive any other permits" needed to construct and operate the pipeline. Permit at 5.

264. The Permit provides that STAMP Sewer Water Works must comply with state and federal laws applicable to the Project. *Id*. at 6.

265. The Permit "incorporates by reference all conditions required by 50 C.F.R. part 29, subpart B." *Id*.

266. The Permit does not contain any conditions or stipulations to ensure that the use is compatible with the purpose of the Refuge.

VI. THE TONAWANDA SENECA NATION'S EFFORTS TO VOICE CONCERNS ABOUT THE PIPELINE

267. The Service did not consult the Tonawanda Seneca Nation before issuing the Permit or during the environmental review process.

268. The Tonawanda Seneca Nation sent a letter to Defendant Haaland and Defendant Williams on September 2, 2022, asking them to prevent any pipeline construction, reopen the

NEPA process, conduct consultation, and ensure the environmental review examines the direct, indirect, and cumulative impacts of the STAMP project that the pipeline is intended to service. *See* Exhibit U.

269. On November 18, 2022, the Nation wrote to Defendant Roster to request formal, government-to-government consultation about the pipeline. *See* Exhibit V.

270. Defendant Roster responded on December 9, 2022, that GCEDC "has paused any pipeline construction on the Refuge until further notice" and the Service would be following up. *See* Exhibit W.

271. Defendant Roster's December 9, 2022, letter stated: "The Service acknowledges its trust responsibility for the Tonawanda Seneca Nation and seeks to honor the sovereignty and rights of the Nation by entering formal consultation concerning the right-of-way permit." *Id*.

272. On December 22, 2022, the Nation responded to Defendant Roster, requesting "that federal officials meet with Nation leadership in person, if possible, to discuss a path forward for consultation on this matter." *See* Exhibit X.

273. On January 13, 2023, the Service acknowledged by email of Timothy Binzen that the Nation had "requested a meeting between federal officials and Nation Leadership, in person if possible, to discuss a path forward for government-to-government consultation on this matter" and proposed a list of Service attendees for "this initial meeting." *See* Exhibit Y.

274. The "initial meeting" to "discuss a path forward for government-to-government consultation" was held at the Nation on April 12, 2023.

275. During the April 12 meeting, representatives from the Service apologized for failing to consult prior to issuing the Permit.

276. The April 12 meeting did not discuss in detail how consultation should be conducted going forward, but the Nation repeated the request that construction be halted and the Right-of-Way Permit rescinded until consultation and full environmental review were completed.

277. On May 15, 2023, Defendant Gaboriault wrote to Tonawanda Seneca Nation Chief Roger Hill that the Service would initiate the preparation of a supplemental EA for the Right-of-Way Permit in accordance with NEPA, which would "consider the concerns and comments that the Nation has expressed and will include a new public comment process." *See* Exhibit Z.

278. The May 15, 2023, letter stated that the Service would suspend the Right-of-Way Permit "until a new decision is made." *See id.*

279. On May 23, the Nation wrote to the Service acknowledging the Service's May 15 letter and requesting that the Service "work closely with the Nation on planning and design of the EA process. (*See, e.g.,* Department of Interior Policy on Consultation with Indian Tribes, November 30, 2022, at 4.4)." *See* Exhibit AA.

280. In its May 23 letter, the Nation also stated that "the Nation wishes to consult on definition of the federal undertaking and determination of the affected environment for the ROW permit, as well as in assessment of the direct, indirect and cumulative impacts of the proposed pipeline on the Nation and its spiritually and culturally significant places." *Id*.

281. The Nation's May 23 letter highlighted "the requirement that the EA incorporate Section 106 of the National Historic Preservation Act (NHPA), *see, e.g.* 36 C.F.R. § 800.8(a)(1) ("[A]gencies should consider their section 106 responsibilities as early as possible in the NEPA process")" and emphasized the Service's "obligation to consider the ROW permit's likely effects on historic properties, including the Nation's Traditional Cultural Property ("TCP"), which extends beyond the boundaries of the Nation's federally recognized Reservation

territory and is within the affected environment / Area of Potential Effect (APE) for this action." *Id*.

282. On May 26, 2023, Defendant Kahan sent a letter rescinding the Service's promise to suspend construction pending consultation. *See* Exhibit AB.

283. In the May 26, 2023, letter, the Service claimed that it lacked the authority to suspend the Right-of-Way Permit. *Id*.

284. The Service has previously taken the position that it may revoke a right-of-way permit. *See Driftless Area Land Conservancy v. Rural Utils. Serv.*, 74 F.4th 489, 492 (7th Cir. 2023); *see also id*. at 494 ("A revoked permit lacks legal consequence."); Exhibit AC at 5–6 (August 27, 2021 letter from Service rescinding a compatibility determination and revoking a right-of-way).

285. In the May 26, 2023 letter, the Service committed to providing a draft supplemental EA to the Nation by early July 2023.

286. On June 8, 2023, the Nation wrote to the Service to ask about the status of the Service's commitment that any construction on the pipeline would be postponed pending consultation. Exhibit AD.

287. The Nation's June 8, 2023 email stated, "we absolutely reject the plan . . . that [the Service] will prepare an EA and then provide it to the Nation for review. That is not consultation." *Id*.

288. The Nation's June 8, 2023 email also stated, "[t]he meeting in April was intended to be about how consultation would occur[. N]ow we need to begin to carry out that process." *Id*.

289. On June 9, 2023 the Nation sent a letter to the Service "express[ing] outrage at [the Service]'s . . . May 26 letter to the Nation," in which the Service "disrespect[ed] and dishonor[ed] the Nation-to-Nation relationship by breaking its stated commitment to suspend the

. . . permit pending environmental review and engage in consultations with the Nation." Exhibit AC at 1.

290. The June 9 letter reiterated the Nation's request that the Service withdraw approval of the permit and consult with the Nation and reminded the Service that the industrial wastewater pipeline "traverses the Nation's ancestral territory and Traditional Cultural Property ("TCP"), and . . . would directly affect rights confirmed by federal Treaty as well as the health and welfare of Nation citizens." Exhibit AC at 1–2.

291. The Service responded to the Nation's June 9 letter on June 27, 2023, offering to continue consultation but not responding to the request to withdraw approval of the Permit.

292. On August 23, 2023, attorneys for the Nation met virtually with Martha Ansty, U.S. Department of Interior, Office of the Solicitor, Northeast Region to reiterate the Nation's concerns and relay its request that the permit for the pipeline be rescinded.

293. On September 12, 2023, attorneys for the Nation emailed Martha Ansty, reiterating the Nation's position regarding the pipeline, inadequacy of the Service's process, and lack of consultation.

VII. THE CLEAN WATER ACT PERMIT

294. In September 2022, the New York Department of Environmental Conservation ("DEC") issued a permit under the Clean Water Act to STAMP Sewer Works to discharge pollution from the industrial wastewater and treated sewage pipeline into Oak Orchard Creek.

295. The Nation has opposed the Clean Water Act discharge permit because Oak Orchard creek is impaired for phosphorus and the Clean Water Act prohibits new discharges of phosphorus into a phosphorus-impaired waterway except in narrow circumstances not applicable here.

296. On July 10, 2023, DEC sent a letter to STAMP Sewer Works explaining that there was a problem with the State Pollution Discharge Elimination System permit for STAMP Sewer Works under the Clean Water Act and DEC would not authorize construction of the sewage treatment plant until the issue was resolved. Exhibit AE. Specifically, "[t]o justify issuance of the permit," DEC identified land use changes and construction stormwater practices at the STAMP site "that could have demonstrated a reduction in phosphorus loading from stormwater runoff to offset the increase phosphorus load from the treated effluent to the phosphorus-impaired segment of Oak Orchard Creek." Exhibit AE at 2. DEC noted that "current site drainage does not enter Oak Orchard Creek; thus, eliminating the opportunity to achieve the necessary offsets through land use changes and post construction stormwater management practices implemented on the STAMP site." *Id*. The letter emphasized that DEC cannot approve the Basis of Design Report for the wastewater treatment plants until it has "details on the proposed design as to how STAMP will provide a phosphorus offset… that is consistent with the total phosphorus load corresponding with the selected design phase." *Id*. The letter also identifies serious deficiencies in plans for the proposed wastewater treatment facility intended to discharge via pipeline through the Refuge into Oak Orchard Creek. *Id*.

297. Without a valid discharge permit into Oak Orchard Creek, there is no purpose for the industrial wastewater pipeline.

298. On July 13, the Nation provided the Service with the July 10 letter from DEC. Exhibit AE. The Nation also renewed its call for the Service to hold off any potential construction at the Refuge on the proposed wastewater pipeline pending consultation with the Nation and resolution of all outstanding permitting issues related to the wastewater treatment facility and its discharge.

299. On August 16, 2023, GCEDC sent a letter to DEC asserting that the Clean Water Act permit and related documents do not require GCEDC to "undertake a phosphorus offset plan." Exhibit AF. The letter establishes GCEDC's position that it will not offset its phosphorus discharges into Oak Orchard Creek and urges DEC to approve the design reports for the wastewater treatment facility. *Id*.

VIII. PIPELINE CONSTRUCTION AND DRILLING FLUID SPILLS

300. Pipeline construction began on or about July 18, 2023.

301. Since construction began, there have been at least five spills of drilling fluid into the Refuge.

302. GCEDC and STAMP Sewer reported a spill of drilling fluid on August 15, 2023. "Frac-Out Contingency Plan for Horizontal Drilling" Report, Exhibit AG. The report reflects that the construction crew spilled approximately 15 gallons of drilling fluids. The report reflects that the "soil is very soft and appears to be peat." *Id*.

303. On September 7, 2023, pipeline construction caused another drilling fluid spill, also called a "frac out." The report form for the spill reflects that a construction inspector noticed a "sink hole that had a frac out in it." "Frac Out Notification Report" at 2, Exhibit K. The report states the sink hole was 2 feet in diameter and the "[s]oil is very soft and appears to be peat." *Id*.

304. On September 25, 2023, DEC issued a Notice of Violation to GCEDC and STAMP Sewer Works for spilling drilling fluid into state wetlands within the Refuge. First Notice of Violation, Exhibit AH.

305. The spill resulted "in the discharge of drilling . . . fluids from the site into an adjacent wetland area tributary to Oak Orchard Creek." First Notice of Violation at 1.

306. The discharge "was not contained on the project site and ultimately spread over an area of approximately 200 feet by 120 feet." *Id*.

307. DEC noted that "the installed sediment control measures did not encompass the area around the [spill] location, and thus were not capable of (and did not) effectively minimize the discharge of pollutants." *Id.* at 2.

308. After an inspection on September 8, 2023, the DEC "confirmed that the [spill] caused [drilling] fluids to enter New York State-regulated Freshwater Westland AK-5 and its 100-foot Adjacent Area." *Id*.

309. The DEC also remarked that although the spill "had occurred over twenty-four hours earlier, the [drilling] fluids had not been removed from the impacted freshwater wetland and adjacent area." *Id*.

310. The Right-of-Way Permit requires the permittee to notify the Bureau of Ecosystem Health of any spills of drilling fluid immediately.

311. The permittee's representatives did not call the Bureau of Ecosystem Health "until a week after the [September 7 spill], on Thursday, September 14." *Id.* at 3.

312. DEC staff inspected the wetlands again on September 18 and observed the same conditions as on September 8: "the freshwater wetland and adjacent area remained filled with [drilling] fluids." *Id*.

313. DEC determined that GCEDC and STAMP Sewer are "in violation of [Environmental Conservation Law] Articles 17 and 24, the [Clean Water Act] General Permit for Stormwater Discharges from Construction Activities, the Freshwater Wetland Permit, and the regulations at 6 NYCRR 663." *Id*.

314. On September 29, DEC reported to the Nation that "earlier in the day, during remediation of the August 15, 2023 drilling fluid [spill] in the . . . Iroquois National Wildlife Refuge . . .

approximately two to three more cubic yards[4] of escaped drilling fluid was discovered to have entered the regulated freshwater wetland than was initially reported in August." Exhibit AI. This spilled drilling fluid was neither reported nor remediated for over six weeks after the August 15 incident.

315. The Right-of-Way Permit requires the permittee to "comply with State and Federal laws applicable to the project within which the permit is granted, and to the lands included in the permitted area." Permit at 6.

316. The Service sent a letter to GCEDC on September 29, 2023 ordering that the permittee "[c]ease all drilling within the permit area until authorized by the Service." Exhibit AJ. The letter directs GCEDC to "[c]onduct a thorough geotechnical engineering review to assess the likelihood of an [inadvertent release] along the entirety of the drilling route through the refuge." *Id*. The letter also requires a remediation plan, a monitoring plan to determine the negative impacts to refuge resources, a report on "what went wrong and why," and documentation from the New York State Department of Transportation and the DEC that the issues caused by the spills have been addressed to their standards and requirements. *Id*.

317. DEC investigated on October 2, and found drilling fluid from the August incident in two previously-unidentified locations in state-regulated freshwater wetlands inside the Refuge. Second Notice of Violation at 2, Exhibit AK. STAMP Sewer Works had taken more than six weeks to identify that drilling fluid had been spilled in two additional locations back in August.

318. On November 7, 2023, DEC issued a second Notice of Violation to GCEDC and STAMP Sewer Works regarding the additional August drilling fluid spills. *Id*. Specifically, DEC

[4] Two to three cubic yards of drilling fluid is equivalent to 400–600 gallons.

determined that STAMP Sewer Works had deposited fill in a state-regulated freshwater wetland and regulated adjacent area in violation of Environmental Conservation Law Article 24, 6 NYCRR Part 663, and the Freshwater Wetland Permit. *Id*.

319. STAMP Sewer Works also violated New York's solid waste laws and regulations when attempting to the clean-up of the spills. The second Notice of Violation explained that in August, STAMP Sewer Works used a vacuum truck to recover spilled drilling fluid and dumped it into an unlined pit that was approximately fifteen feet by twenty feet. *Id*. at 3. Then on September 29, DEC saw STAMP Sewer Works using the same pit to dispose of drilling fluid that had been deposited in the wetland from the August spill, and then removed as part of remediation. *Id*.

320. DEC determined that STAMP Sewer Works had intentionally placed drilling fluid in an unlined pit, allowing its constituents to enter the environment and potentially contaminate ground water, in violation of Environmental Conservation Law Chapter 27 and 6 NYCRR 360.2. *Id*. By putting the spilled drilling fluid in a pit they dug, STAMP Sewer Works had constructed and was operating a solid waste management facility without a DEC permit.

IX. THE DRAFT SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT

321. After the Service rescinded its promise to suspend pipeline construction pending consultation and a complete environmental review, the Service prepared a Draft Supplemental Environmental Assessment ("Supplemental Assessment").

322. The Service prepared the Supplemental Assessment without government-to-government consultation. Exhibit AL.

323. On September 7, 2023, the Service emailed the Supplemental Assessment to the Nation and asked for comments. Exhibit AM.

324. The Nation submitted comments on the Supplemental Assessment to the Service on October 20, 2023. Exhibit AN.

325. The Supplemental Assessment does not resolve the Nation's concerns regarding the Service's environmental review of the pipeline, nor does it bring the Service in compliance with the law.

326. The Supplemental Assessment claims to assess potential effects from a potential drilling fluid leak and impacts associated with drilling under Oak Orchard Creek. Supplemental Assessment at 4, Exhibit AL.

327. The Supplemental Assessment concludes that there was a "low probability" of a drilling fluid spill. *Id*. at 17. The Supplemental Assessment states that the drilling contractor would understand the transition points between clay and organic silt soils and would therefore "appropriately manage the risk" of a spill. *Id*.

328. The Supplemental Assessment does not examine the potential impact of a drilling fluid spill on wetlands, wildlife, or plants in the Refuge, nor does it assess potential harms from multiple spills and spills not immediately cleaned up and remediated.

329. The Supplemental Assessment does not acknowledge the drilling fluid spills that had occurred or examined their impact on wildlife, plants, wetlands, groundwater, or surface water in the Refuge.

330. The Supplemental Assessment does not evaluate the reason why the drilling fluid spills occurred, nor does it evaluate the likelihood of future spills if drilling were to continue.

331. The Supplemental Assessment refers to the meeting on April 12, 2023, in which the Service apologized to the Nation as "formal government to government consultation." *Id*. at 2; *See also id.* at 55.

332. The Supplemental Assessment asserts that the pipeline has been designed in accordance with the Nation's comments and that the chosen alternative addresses the Nation's concerns. *Id*. at 41.

333. The Supplemental Assessment acknowledges that Tonawanda Seneca Nation representatives have stated that the Nation's Territory "should be considered a Traditional Cultural Property (TCP) eligible for listing on the National Register of Historic Places," yet concludes that there were no resources eligible for listing on the National Register of Historic Places within the potentially impacted area. *Id*. at 41–42.

334. The Supplemental Assessment finds that the pipeline has the potential for short term environmental justice concerns associated with environmental stressors on the Nation. *Id*. at 51.

335. The Supplemental Assessment finds that the pipeline has the potential to cause disproportionate adverse impacts on the Nation due to increased noise and traffic as well as wildlife disturbance from the construction and installation of the pipeline. *Id*. at 50.

336. The Supplemental Assessment does not evaluate the cumulative impacts of the pipeline on the Nation as a result of the STAMP project. *Id*. at 50 ("[C]oncerns shared by the Nation related to other components of the STAMP Site off-Refuge were not considered in this analysis.").

337. The Supplemental Assessment echoes the EA's finding that the only "reasonably foreseeable" activities with relevant impacts were associated with management activities to promote wildlife habitat. *Id*. at 17, 29, 30.

338. While the Supplemental Assessment states that streams within the Refuge could be impacted by other reasonably foreseeable actions, it finds that the pipeline would not affect

streams within the Refuge and will therefore not cause or contribute to impacts to surface water within the Refuge. Supplemental Assessment at 36.

339. The Supplemental Assessment states that "[t]he final decision on the proposed action will be made at the conclusion of the public comment period for the Draft Supplemental EA." *Id*. at 6.

340. The Service has not amended the Compatibility Determination, withdrawn the Right-of-Way Permit, or halted construction based on the analysis completed in the Supplemental Assessment.

X. LAWSUIT BY ORLEANS COUNTY AND THE VILLAGE OF SHELBY TO BLOCK PIPELINE CONSTRUCTION

341. On September 11, 2023, Orleans County sued GCEDC, STAMP Sewer Works, and others to block the construction of the pipeline in Orleans County. Exhibit AO. The lawsuit alleges that GCEDC is illegally funding a project in Orleans County absent the Orleans County Legislature's consent. It also alleges that STAMP Sewer Works violates state law because it does not provide collection, treatment or disposal of sewage for the residents to Orleans County or the Town of Shelby.

342. On September 28, 2023, Judge Sanford A. Church issued an Order to Show Cause with Temporary Restraining Order directing GCEDC and STAMP Sewer to refrain from any construction within Orleans County pending the return date of the Show Cause Order or written agreement of the parties.

343. On October 13, the Town of Shelby filed a Notice of Motion to Intervene in the lawsuit.

FIRST CLAIM

THE SERVICE VIOLATED THE REFUGE ACT BY ISSUING THE RIGHT-OF-WAY PERMIT.

344. Paragraphs 1–343 are incorporated as if fully set forth herein.

345. The Service cannot issue a right-of-way permit unless the use is compatible with the purposes of the refuge.

346. Before permitting a new use on a refuge, the refuge manager must determine if the use is appropriate. 603 FW 1 § 1.3. A refuge use is generally not appropriate if it "either itself or in combination with other uses or activities, conflicts with a refuge goal, objective, or management strategy." *Id.* § 1.11(A)(3)(e). If a refuge use will not "contribute to the public's understanding and appreciation of the refuge's natural or cultural resources, or is . . . [not] beneficial to the refuge's natural or cultural resources," the Service will generally not further consider the use. *Id*. § 1.11(A)(3)(i).

A. The Industrial Wastewater Pipeline Is an Illegal Economic Use of the Iroquois National Wildlife Refuge.

347. The Service may only authorize a public or private economic use of the natural resources of any national wildlife refuge after determining "that the use contributes to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission." 50 C.F.R. § 29.1.

348. The industrial wastewater and treated sewage pipeline is an economic use because the pipeline uses the land of the Iroquois National Wildlife Refuge to profit STAMP Sewer Works and GCEDC.

349. U.S. Fish and Wildlife Service employee Tom Geser acknowledged in 2016 that the Project is an economic use of the Refuge. Specifically, Mr. Geser stated, "Compatibility

evaluation held to a higher standard for economic development projects. Must determine what it proposed is compatible with this refuge and that it actually contributes to the refuge and [the Service] mission." Email from Tom Geser, U.S. Fish & Wildlife Serv., to Sheila Hess, CC Env't & Planning (Oct. 28, 2016), Exhibit AP.

350. The Service did not conclude that the industrial wastewater and treated sewage pipeline contributes to the achievement of the Refuge's purposes or the National Wildlife Refuge System's mission to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United State for the benefit of present and future generations of Americans." 16 U.S.C. §668dd(a)(2).

351. The industrial wastewater and treated sewage pipeline does not contribute to the achievement of the Iroquois National Wildlife Refuge's purpose as an inviolate sanctuary for birds, nor does it contribute to the U.S. Fish & Wildlife Service's mission.

352. The Service violated the Refuge Act by issuing the Right-of-Way Permit for the industrial wastewater and treated sewage pipeline because it is an economic use of the Iroquois National Wildlife Refuge that does not contribute to the achievement of the refuge's purpose or the National Wildlife Refuge System's mission.

B. The Compatibility Determination Illegally Relies on Compensatory Mitigation to Conclude the Industrial Wastewater and Treated Sewage Pipeline Is a Compatible Use.

353. Refuge Act regulations prohibit "[m]aking a use compatible through replacement of lost habitat values or other compensatory mitigation." 50 C.F.R. § 26.41(b).

354. Refuge Act regulations only allow compensatory mitigation under limited circumstances for projects involving "maintenance of an existing right-of-way," including "minor expansion. . . to meet safety standards." *Id*. § 26.41(c).

355. The Compatibility Determination for the pipeline mandates "[c]ompensatory mitigation for the permanent loss of wetland acres . . . includ[ing] removing two non-functional refuge access points along the NYS Highway 63." Compatibility Determination at 5–6.

356. The Right-of-Way Permit authorizes an industrial wastewater and treated sewage pipeline, a new use that is not maintenance of the existing Highway 63 right-of-way, nor is it a "minor expansion or minor realignment" of the Highway 63 right-of-way "to meet safety standards."

357. The existing Highway 63 right-of-way is held by the New York State Department of Transportation.

358. The existing right-of-way that the New York State Department of Transportation holds over Highway 63 encompasses "rights that were reserved or outstanding at the time of acquisition" of the Iroquois National Wildlife Refuge, and therefore, does not constitute a "right-of-way" within the meaning of Refuge Act regulations. 340 FW 3 § 3.6(A)(1).

359. At no time was the existing road right-of-way designated a "compatible use," as defined in the National Refuge Act.

360. The Service's reliance on compensatory mitigation to conclude that the industrial wastewater and treated sewage pipeline is a compatible use of the Iroquois National Wildlife Refuge violates the Refuge Act.

C. The Right-of-Way Permit Fails to Incorporate Conditions Necessary to Ensure Compatibility.

361. A compatibility determination must include "[s]tipulations necessary to ensure compatibility." 50 C.F.R. § 26.41(11).

362. The Regional Director has the discretion to impose conditions on a right-of-way permit. 50 C.F.R. § 29.21-4(b).

363. The Right-of-Way Permit does not contain the "Stipulations Necessary to Ensure Compatibility" listed in the Compatibility Determination. *See* Compatibility Determination at 10–11.

364. Defendants' issuance of the Right-of-Way Permit violates the Refuge Act by authorizing a use of the Iroquois National Wildlife Refuge that is not compatible with the Refuge's purpose.

D. The Compatibility Determination Is Not Based on Sound Professional Judgment and Is Arbitrary and Capricious.

365. A compatibility determination must provide "[a] logical explanation describing how the proposed use would, or would not, materially interfere with or detract from the fulfillment of the National Wildlife System mission or the purpose" or purposes of the national wildlife refuge where the use is proposed. 50 C.F.R. § 26.41(12).

366. A compatibility determination "cannot be made in an arbitrary manner and . . . must be supported by facts." 340 FW 3 § 3.6(A)(3).

367. The Compatibility Determination admits that the "effects of effluent discharge will be unknown" but concludes that "effluent would not pose a threat to the environment due to [Clean Water Act] permit limits for direct discharge." Compatibility Determination at 8.

368. The conclusion that the effluent would not pose a threat to the environment is arbitrary and capricious, given the fact that the Clean Water Act permit, upon which it relies, no longer can be justified by offsetting the new phosphorus pollution into the phosphorus-impaired Oak Orchard Creek.

369. Further, the impact of the intentional pollution discharge from the pipeline into Oak Orchard Creek is not the same as the impact that an accidental leak of polluted industrial wastewater and treated sewage from the pipeline into the Refuge would have on the Refuge, wildlife, and plant life.

370. The EA supporting the Compatibility Determination fails to consider potentially significant environmental impacts including impacts to the Nation, impacts to birds, wildlife, plants, wetlands, waters, and habitats, and cumulative and indirect impacts.

371. The EA supporting the Compatibility Determination is incomplete, as evidenced by the Service's determination that it needed to complete a Supplemental Assessment, which itself is still not final.

372. The Compatibility Determination's conclusion that the industrial wastewater and treated sewage pipeline is compatible because it is a "minor modification of an existing" right-of-way is arbitrary and capricious. The pipeline is a new use—an industrial wastewater pipeline—adjacent to a roadway that existed prior to creation of the Refuge. The existing roadway was never subject to a Service-issued right-of-way permit or the analysis determining that the roadway is a compatible use. Because the roadway is not subject to a right-of-way permit, the pipeline cannot be a "minor modification" of that permit.

373. The Compatibility Determination admits that bentonite, used as drilling fluid, "can be toxic to fish, fish egg and aquatic invertebrates if discharged in large quantities," but fails to estimate the risk of drilling fluid spills and the harm they would cause. This failure is particularly egregious since drilling fluid has spilled in at least five locations[5] since August 15, 2023, has entered wetlands and remained for weeks.

374. The Service's September 29, 2023, letter requiring GCEDC and STAMP Sewer to "[c]onduct a thorough geotechnical engineering review to assess the likelihood of an [inadvertent

[5] Upon information and belief, the GPS coordinates for three locations where drilling fluid spilled on August 15, 2023 are: N 43° 06.8378' / W 078° 23.4452'; N 43° 06.8374' / W 078° 23.4466'; and N 43° 06.84.17' / W 078° 23.4485'. Upon information and belief, there were two spill locations on September 7—an area defined by a roadside swale and a wooded location. The GPS coordinates for one of these spill locations is N43° 06.8855' W78° 23.4482'.

release of drilling fluid] along the entirety of the drilling route through the refuge" demonstrates the insufficiency of the analysis used to support the Compatibility Determination, which did not anticipate that any drilling fluid spills would occur or would cause any short- or long-term impacts.

375. The Compatibility Determination acknowledged the possibility of a leak of from the pipeline into the Refuge, but failed to assess the potential for harm caused by pollutants in the industrial wastewater and treated sewage or the damage to wetlands and the Refuge itself that would result from "excavating the affected area" to replace the pipe.

376. The Compatibility Determination's conclusion that the industrial wastewater and treated sewage pipeline will have "negligible" impacts on the Refuge resource is arbitrary and capricious and not supported by facts.

377. The Service acted arbitrarily and capriciously and violated the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997 and the Administrative Procedure Act by issuing the Right-of-Way Permit and the Compatibility Determination.

E. The Service Has Failed to Terminate or Modify the Pipeline and its Permit Despite New Information About the Pipeline's Effects

378. The Service must reevaluate a compatibility determination for an existing use when there is significant new information about the effects of the use. 16 U.S.C. § 668dd(d)(3)(B)(vii); see 50 C.F.R. § 25.21(f); 603 FW 2.11(H)(1).

379. If the Service determines that an existing use is not compatible, it must "expeditiously terminate or modify the use to make it compatible." 50 C.F.R. § 26.41; 603 FW 2.14.

380. Pipeline construction has caused five drilling fluid spills that GCEDC and STAMP Sewer Works failed to immediately clean up and remediate.

381. The Service has acted arbitrarily and capriciously by failing to reevaluate the Compatibility Determination and expeditiously terminate or modify the right-of-way in light of the new information that construction presents a high risk of drilling fluid spills occurring and not being quickly remediated.

F. The Industrial Wastewater and Treated Sewage Pipeline Is Not an Appropriate Use of the Iroquois National Wildlife Refuge.

382. The industrial wastewater and treated sewage pipeline is not an appropriate use of the Iroquois National Wildlife Refuge.

383. The industrial wastewater and treated sewage pipeline conflicts with the goal of the Iroquois National Wildlife Refuge by disturbing an "inviolate sanctuary for birds." *See* 16 U.S.C. § 715d; Compatibility Determination at 1.

384. The industrial wastewater and treated sewage pipeline will not "contribute to the public's understanding and appreciation of the refuge's natural or cultural resources," 603 FW 1 § 1.11(A)(3)(i), as its purpose is to facilitate a build-out of a mega-industrial site that may produce up to 6 million gallons a day of industrial wastewater and treated sewage. EA at 1.

385. The industrial wastewater and treated sewage pipeline is not an existing Refuge use.

386. The industrial wastewater and treated sewage pipeline is not exempt from the appropriateness policy.

387. The industrial wastewater pipeline is not administratively determined to be appropriate as one of six specific wildlife-dependent recreational uses or as the take of fish and wildlife under state regulation. 603 FW 1 § 1.3.

388. The industrial wastewater pipeline is not subject to an exemption to the appropriateness policy as a refuge management activity conducted by the Refuge System or a Refuge System-authorized agent designed to conserve fish, wildlife, and plants and their habitats. *Id*. § 1.2(B).

389. The industrial wastewater pipeline is not subject to the exemption to the appropriateness policy that applies to situations where reserved rights or legal mandates require the Service to allow certain uses because neither GCEDC nor STAMP Sewer have a reserved right to Refuge land and no legal mandate required the Service to grant the Right-of-Way. *Id*. § 1.2(A).

390. Defendant Roster failed to use sound professional judgment in determining that the industrial wastewater and treated sewage pipeline was exempt from the appropriateness policy.

391. Defendant Roster failed to use sound professional judgment in failing to complete the Finding of Appropriateness form prior to developing the EA. *See id*. § 1.8 (an appropriateness determination is "the initial decision process the refuge manager follows when first considering whether or not to allow a proposed use on a refuge").

392. Defendant Roster's failure to use sound professional judgment to determine whether the industrial wastewater and treated sewage pipeline was an appropriate Refuge use prior to signing the Compatibility Determination was arbitrary and capricious and contrary to law.

SECOND CLAIM

THE SERVICE VIOLATED NEPA.

393. Paragraphs 1–392 are incorporated as if fully set forth herein.

A. The Service Should Have Prepared an Environmental Impact Statement.

394. An agency must prepare an environmental impact statement for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA regulations require an agency to consider the context and intensity of the action in order to determine its significance. 40 C.F.R. § 1508.27.

395. The Service failed to adequately consider the unique characteristics of the area, a massive wetlands complex that represents one of the largest contiguous blocks of natural habitat in

Western New York and some of the most productive inland wildlife habitat in the eastern United States. These wetlands are important interconnected wildlife areas and harm to one area affects wildlife across the area. Moreover, wildlife in this unique ecosystem includes plant and animal species of special cultural importance to the Nation and impacts to these species constitute impacts to the Nation's cultural resources.

396. The Service failed to consider the highly controversial nature of the industrial wastewater and treated sewage pipeline and its effects and failed to consider the precedent this approval sets. Upon information and belief, this is the first approval of an industrial wastewater and treated sewage pipeline approved through a wildlife refuge. Further, this pipeline is purely aspirational—it is being built in the hopes of inducing intense industrial development immediately adjacent to the Tonawanda Seneca Nation. The precedent that this approval sets flies in the face of the purpose of refuges as "sanctuaries inviolate" for birds.

397. The Service failed to consider that this industrial wastewater and treated sewage pipeline is directly related to industrial development at the STAMP site and is intended to entice industrial manufacturing on a 1,250-acre site next to the Tonawanda Seneca Nation Reservation's carefully preserved and undeveloped Big Woods. These actions, together, are cumulatively significant.

398. The Service failed to consider that the direct impacts of a spill of industrial wastewater from the pipeline are uncertain because the facilities that will use the pipeline are unknown and speculative.

399. The Service failed to consider that the pipeline and resulting STAMP development will impact the Tonawanda Seneca Nation's Reservation Territory and the Nation's Traditional

Cultural Property, which the Nation considers to be eligible for listing in the National Register of Historic Places.

400. The Service failed to consider that the Right-of-Way Permit authorizes STAMP Sewer to use the pipeline for 50 years. Furthermore, the Right-of-Way Permit does not require removal of the pipeline at any point. The fact that the Service has approved operation of a wastewater pipeline for 50 years—leading to potentially 50 years of industrial wastewater and treated sewage spills—and permanent installation of the pipeline in the Refuge in perpetuity increases the likelihood of significant impacts and requires an Environmental Impact Statement.

401. Construction and operation of this industrial wastewater and treated sewage pipeline will have significant impacts because of: (1) the unique characteristics of the geographic area; (2) the highly controversial and precedential nature of the impacts and approval; (3) the degree to which harm from drilling fluid spills and wastewater spills are uncertain or unknown; (4) the fact that it is intended to spur industrial development; and (5) the fact that both the pipeline and the STAMP development will adversely affect the Tonawanda Seneca Nation, its cultural resources, treaty rights, TCP, and Reservation Territory. *See id*. § 1508.27(b)(3), (4), (5), (6), (7), (8) (as effective on July 27, 2020).

402. The Service failed to examine the context of the industrial wastewater and treated sewage pipeline, which requires the preparation of an Environmental Impact Statement. The industrial wastewater and treated sewage pipeline involves private economic use of protected public land—a wildlife refuge—in order to incentivize manufacturing industries to build an industrial "mega-site" directly next to the Nation's Reservation Territory. Furthermore, the industrial wastewater and treated sewage pipeline is proposed by a county economic development agency, which is

using New York state taxpayer funding to push this industrial "mega-site" on land that is part of the Nation's ancestral Territory.

403. The Tonawanda Seneca Nation has for centuries maintained its right to live and practice its culture, religion and traditional ways of life within its ancestral lands. The Service failed to consult with the Nation during the environmental review process and approval of the Right-of-Way Permit. Had the Service consulted with the Nation, the Service would have discovered the significant adverse impacts this industrial wastewater and treated sewage pipeline and the STAMP development will have on the Nation and its treaty-protected rights and resources. For these reasons, the context of the industrial wastewater and treated sewage pipeline requires that the Service prepare an Environmental Impact Statement.

404. Because the Nation has alleged facts raising the substantial possibility that there may be significant impacts, the Service must prepare an Environmental Impact Statement.

405. The Service should have prepared an Environmental Impact Statement before finalizing the Compatibility Determination and issuing the Right-of-Way Permit. Failure to do so is arbitrary and capricious and a violation of NEPA.

B. The EA Fails to Take a Hard Look at the Pipeline's Direct, Indirect, and Cumulative Environmental Impacts.

1. The EA Fails to Take a Hard Look at Pipeline Construction Impacts.

406. The EA fails to acknowledge that the peat and muck soils within the Refuge area, rich in organic matter, which raises the risk of drilling fluid spills during directional drilling.

407. The EA's conclusion that drilling fluid spills occur "rarely," is arbitrary and capricious.

408. The EA's failure to base its conclusion of the risk of a drilling fluid spill during directional drilling on sound science and resources is arbitrary and capricious.

409. The five spills of drilling fluid that have occurred so far during construction demonstrate that the EA's conclusion that drilling fluid spills "rarely" occur is arbitrary and capricious.

410. The fact that drilling fluid spills have remained in the Refuge unremediated for weeks demonstrates that the EA's conclusion that a drilling fluid leak would be "be quickly detected and resolved" is arbitrary and capricious.

411. The Service's September 29, 2023, letter requiring GCEDC and STAMP Sewer to "[c]onduct a thorough geotechnical engineering review to assess the likelihood of an [inadvertent release of drilling fluid] along the entirety of the drilling route through the refuge" demonstrates that the EA's conclusion that there would be no drilling fluid spills and that any spills would be immediately contained was arbitrary and capricious.

412. The EA fails to examine the potential impacts of a drilling fluid leak to groundwater.

413. The EA's conclusion that "no direct or indirect impacts are anticipated" to groundwater from a drilling fluid leak is arbitrary and capricious.

414. The EA's failure to analyze the public health or safety risk from an uncontained drilling fluid leak or spill is arbitrary and capricious.

415. The EA's failure to acknowledge that bentonite can be toxic to fish, fish eggs and aquatic invertebrates if discharged in large quantities is arbitrary and capricious.

416. The EA's failure to identify the quantities at which bentonite from drilling fluid negatively impacts fish, fish eggs and aquatic invertebrates is arbitrary and capricious.

417. The EA's failure to analyze the impact of a spill or leak of drilling fluid on birds, mammals, reptiles, amphibians, fish, insects, aquatic or terrestrial invertebrates, plants, wetlands, groundwater, surface water or habitats in the Refuge is arbitrary and capricious.

2. The EA Fails to Take a Hard Look at Impacts from a Pipeline Leak.

418. The EA's failure to identify what pollutants the industrial wastewater and treated sewage pipeline may carry or to examine the impact of a pipeline spill on the Refuge, its wetlands, birds or other wildlife is arbitrary and capricious.

419. The EA's conclusion that there will be "no long-term impacts" to birds from the 50-year operation of the industrial wastewater and treated sewage pipeline is arbitrary and capricious.

420. The EA's conclusion that there would be no public health or safety impacts from a pipeline leak is arbitrary and capricious.

421. The EA's failure to examine the risk of a pipeline leak to Oak Orchard Creek and the wildlife that uses Oak Orchard Creek as habitat or a water source was arbitrary and capricious.

422. The EA's failure to take a hard look at the potential impacts from a pipeline leak was arbitrary and capricious and violates NEPA.

3. The EA's Analysis of Impacts to Birds and Wildlife is Arbitrary and Capricious.

423. The EA does not examine the impacts the Project may have on birds or other wildlife in a way that reflects "sound professional judgment" consistent with principles of sound fish and wildlife management and administration, available science and resources.

424. The EA's inclusion of only 141 of the 268 species of birds identified on the Refuge is arbitrary and capricious.

425. The EA's failure to examine the impact the construction and operation of the industrial wastewater and treated sewage pipeline may have on the short-eared owl, a New York State-listed endangered species, is arbitrary and capricious.

426. The EA's conclusion that construction and operation of the industrial wastewater and treated sewage pipeline is not likely to adversely impact the state-listed threatened pied-billed

grebe, sedge wren, Henslow's sparrow, bald eagle, or Northern Harrier was arbitrary and capricious.

427. The EA's failure to examine the impact the construction and operation of the industrial wastewater and treated sewage pipeline may have on the heron rookery located just east of Highway 63 that contains 300 nests was arbitrary and capricious.

428. The EA's assertion that impacts to wildlife within the Refuge are only significant where they impact a species at a population level is arbitrary and capricious.

429. The EA's conclusion that the "mammals, reptiles, fish, amphibians and insects using the [Refuge] habitats would not be impacted on a population level" by the construction and operation of the industrial wastewater and treated sewage pipeline was arbitrary and capricious.

430. The EA's failure to catalog the entire range of wildlife and plants within the Refuge and examine potential impacts on them was arbitrary and capricious.

431. The EA's analysis of the impacts the construction and operation of the industrial wastewater and treated sewage pipeline may have on wildlife and plants is arbitrary and capricious and violates NEPA.

4. The EA Fails to Assess Reasonably Foreseeable Indirect and Cumulative Impacts.

432. An EA must discuss the environmental impacts—including the cumulative impacts—of a proposed action. 43 C.F.R. § 46.310(a); 40 C.F.R. § 1508.7 (as effective on July 27, 2020); *see also* 40 C.F.R. § 1508.1(g)(3).

433. An EA must assess a proposed action's cumulative impacts, meaning impacts that could "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions." 40 C.F.R. § 1508.7 (as effective on July 27, 2020).

434. The EA states that the only other "reasonably foreseeable" activities that could impact the project site are mostly associated with management activities to promote wildlife habitat. EA at 19, 29.

435. The EA's failure to discuss any "other past, present, and reasonably foreseeable actions" is arbitrary and capricious.

436. The EA's failure to include a detailed catalogue of past, present, and future actions and projects, and provide adequate analysis about how these actions and projects are thought to have impacted the environment, is arbitrary and capricious.

437. The EA's failure to analyze impacts from development at the STAMP site, which is a reasonably foreseeable future project, is arbitrary and capricious.

438. The EA's failure to identify potential users of the industrial wastewater and treated sewage pipeline or the impact that their construction, operation and wastewater discharge will have on the environment is arbitrary and capricious.

439. The EA's failure to discuss the potential impacts of the industrial wastewater and treated sewage pipeline when added to the impacts of the STAMP site is arbitrary and capricious.

440. The EA's failure to discuss the reasonably foreseeable impacts of discharges from the industrial wastewater and treated sewage pipeline into Oak Orchard Creek is arbitrary and capricious.

441. The EA's failure to identify past and reasonably foreseeable future development that the industrial wastewater pipeline will facilitate—namely, industrial development on the STAMP site—and analyze the impacts of that reasonably foreseeable development on the Nation, its treaty rights, cultural resources, TCP, and Reservation Territory is arbitrary and capricious.

442. The EA's failure to examine the cumulative impacts to the Northern Harrier and the short-eared owl from construction and operation of the industrial wastewater and treated sewage pipeline, together with construction and operation of industrial facilities at the STAMP site, is arbitrary and capricious.

443. The EA's failure to examine the cumulative impact on the Refuge and its wildlife of habitat loss the STAMP site will cause along with the impacts of construction and operation of the industrial wastewater and treated sewage pipeline is arbitrary and capricious.

444. The EA's failure to identify and analyze the indirect and cumulative impacts from the construction and operation of the industrial wastewater and treated sewage pipeline is arbitrary and capricious and violates NEPA.

5. The EA Fails to Assess the Impacts to Oak Orchard Creek.

445. The EA does not analyze the impact of the pipeline on the receiving water, Oak Orchard Creek.

446. The impact of the pipeline's industrial wastewater and treated sewage discharges on Oak Orchard Creek is likely to be significant.

447. One goal of the Refuge is to "[m]aintain the environmental health and integrity of Oak Orchard Creek." Refuge Conservation Plan at 1-23, Exhibit A.

448. The Service's failure to evaluate the impacts of construction and operation of the industrial wastewater and treated sewage pipeline on the health and integrity of Oak Orchard Creek is arbitrary and capricious and violates NEPA.

6. The EA Fails to Assess the Impacts to Recreational Fishing.

449. The EA fails to recognize that fishing is a recreational use of the Refuge and that anglers access Oak Orchard Creek from bridges on Highway 63 inside the Refuge.

450. The EA does not examine how the construction of the pipeline along Highway 63 may impact recreational or subsistence fishing in the Refuge, particularly for anglers accessing Oak Orchard Creek from the bridges on Highway 63.

451. The EA does not examine the threat to recreational or subsistence fishing from a spill of industrial wastewater carried by the pipeline.

452. Harm to recreational or subsistence fishing from construction and operation of the pipeline is likely to be significant.

453. The Service's failure to evaluate the impacts of construction and operation of the industrial wastewater and treated sewage pipeline on recreational or subsistence fishing in the Refuge is arbitrary and capricious and violates NEPA.

7. The EA Fails to Assess the Industrial Wastewater and Treated Sewage Pipeline's Cultural and Historic Impacts.

454. The Service failed to notify or consult with the Nation prior to issuing the Archaeological Resources Protection Act Permit for conducting an archaeological Phase I survey within the Refuge in violation of the Archaeological Resources Protection Act. 16. U.S.C. § 470cc(c), 43 C.F.R. § 7.7, § 7.32.

455. The Service did not notify or consult with the Nation prior to, during or after conducting the Phase I survey, and relied upon a Phase I survey conducted under a permit that was issued in violation of ARPA and its implementing regulations.

456. The EA does not analyze the industrial wastewater and treated sewage pipeline's potential impacts on traditional cultural or historic properties, particularly those directly connected and important to the Tonawanda Seneca Nation, its ancestors, and its culture.

457. The EA does not analyze the cumulative impacts of the pipeline and reasonably foreseeable impacts of STAMP development on the Nation's Territory, resources, or TCP.

458. Had the Service examined the cumulative impact of the pipeline and the reasonably foreseeable impacts of STAMP development on the Nation, its cultural resources, its Territory and its TCP, those impacts would likely be significant.

459. The Service's failure to evaluate the impacts of construction and operation of the industrial wastewater and treated sewage pipeline on the Tonawanda Seneca Nation, ancestors, culture, Territory, resources or TCP is arbitrary and capricious and violates NEPA.

8. The EA Fails to Assess Environmental Justice Impacts.

460. An EA must assess the environmental justice impacts—including impacts on Indian Nations—of a proposed action. *See* 59 Fed. Reg. at 7,629; CEQ Guidance at 3–5.

461. Under Executive Order 12,898 and NEPA guidance, the Service must assess a proposed action's impacts on Indian Nations and assess whether a proposed action would have a disproportionately high and adverse impact on an Indian Nation. *See* 59 Fed. Reg. at 7,629; CEQ Guidance at 3–5.

462. The EA's conclusion that "environmental justice is not relevant to the proposed action and will not be evaluated further" is arbitrary and capricious.

463. The Service's failure to speak with or consult the Nation during preparation of the EA or FONSI about the industrial wastewater and treated sewage pipeline's impacts on the Nation or the impacts of the STAMP project as a whole on the Nation is arbitrary and capricious.

464. The EA's failure to discuss potential impacts to the Nation from the industrial wastewater and treated sewage pipeline, or assess whether the construction and operation of the pipeline would have disproportionately high and adverse impacts on the Nation is arbitrary and capricious.

465. The EA's assertion that the design of the proposed pipeline addresses the Nation's concerns, and that the Nation supports the Project as a result, is false and is arbitrary and capricious.

466. The EA's failure to analyze the industrial wastewater and treated sewage pipeline to determine if it—or the industrial development it is meant to facilitate—would potentially impact the Tonawanda Seneca Nation including by health, economic, and social effects, and to determine whether those effects are disproportionately high and adverse is arbitrary and capricious.

467. Construction and operation of the industrial wastewater and treated sewage pipeline and industrial development on the STAMP site that the pipeline is meant to facilitate will cause disproportionately high and adverse effects on the Nation.

468. The Service's failure to provide opportunities for the Nation to provide input throughout the NEPA process, including identifying potential effects and mitigation measures, is arbitrary and capricious.

469. The Service's failure to remove any barriers to participation of the Tonawanda Seneca Nation by improving the accessibility of meetings, crucial documents, and notices is arbitrary and capricious.

470. The EA's failure to analyze the environmental justice impacts on the Nation of construction and operation of the industrial wastewater and treated sewage pipeline and the Service's failure to solicit input from the Nation during the environmental review process is arbitrary and capricious and contrary to law and violates NEPA.

471. The Supplemental Assessment does not cure the EA's problems and failures.

472. The FONSI's conclusion that the "adverse direct and indirect effects of the proposed action on air, water, soil, habitat, wildlife, aesthetic/visual resources are expected to be minor and short term" is arbitrary and capricious and violates NEPA.

473. The Service's failure to examine impacts of the industrial wastewater pipeline and the STAMP site industrial development renders the EA and FONSI arbitrary and capricious and contrary to NEPA and the Administrative Procedure Act.

THIRD CLAIM

THE SERVICE VIOLATED THE NHPA BY FAILING TO CONSULT WITH THE NATION OR CONSIDER IMPACTS ON NATION CULTURAL RESOURCES

474. Paragraphs 1–473 are incorporated as if fully set forth herein.

475. The land where the Refuge is located, as well as the land along the length of the entire pipeline route and the STAMP site, are ancestral lands of the Tonawanda Seneca.

476. The Nation retains rights within its ancestral lands, including rights protected by treaty.

477. The industrial wastewater and treated sewage pipeline would traverse areas the Nation considers to be its Traditional Cultural Property.

478. The Nation requested consultation in writing in September 2022.

479. An EA must contain a "list of agencies and persons consulted." 43 C.F.R. § 46.310. The EA does not contain such a list.

480. Under Section 106 of the National Historic Preservation Act, a federal agency must consult with Indian Nations and Tribes on federal permits that could affect potentially culturally significant sites. 54 U.S.C. § 303707; 36 C.F.R. § 800.2(c)(2).

481. Consultation with an Indian Nation must occur regarding sites with "religious and cultural significance" regardless of where those sites are located. 36 C.F.R. § 800.2(c)(2)(ii)(D).

482. Prior to approval of a federal undertaking, the agency must: (a) identify the "Historic properties" within the area of potential effects; (b) evaluate the potential effects that the undertaking may have on historic properties; and (c) resolve the adverse effects through the development of mitigation measures. 36 C.F.R. §§ 800.4; 800.5; and 800.6.

483. Throughout these processes, the agency must consult with Indian Nations and tribes that attach religious and cultural significance to properties within the affected area. *Id*. §§ 800.3(f)(2); 800.4(a)(4); 800.5(c)(2)(iii); 800.6(a); and 800.6(b)(2).

484. It is the policy of the Department of the Interior to "consult with tribes on a government-to-government basis whenever DOI plans or actions have tribal implications." Dep't of Interior, Policy on Consultation with Indian Tribes and Alaska Native Corporations, 512 DM 4 § 4.4 (2015).

485. The Department of the Interior recognizes that "[g]overnment-to-government consultation between appropriate Tribal officials and the Department requires Departmental officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representatives in a meaningful way early in the planning process." Sec'y of Interior Order No. 3317 § 4(a) (Dec. 1, 2011).

486. The Department of the Interior recognizes that "[c]onsultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." *Id*. § 4(b).

487. The Department of the Interior's policy on consultation created an expectation by the Tonawanda Seneca Nation that there would be government-to-government consultation with the Service before the Service approved a project that has implications for the Nation's rights and

resources, such as an industrial wastewater and treated sewage pipeline built to facilitate development of an industrial "mega-site" directly adjacent to its Reservation Territory.

488. The Service acknowledged in 2016 that Section 106 consultation with the Tonawanda Seneca Nation was required as part of the Compatibility Determination and Right-of-Way Permit process. *See* Email from Sheila Hess to Tom Roster et al. (May 11, 2016), Exhibit AQ (including a note from a May 10, 2016, STAMP Off-site Utilities Pre-application Meeting, "[f]ederal ROW request and Compatibility Determination (CD) includes NEPA, Section 7, Floodplains, Wetlands, Section 106/Tonawanda Seneca Nation review").

489. The Service held no government-to-government consultation or conversations with the Tonawanda Seneca Nation prior to finalizing the EA, the FONSI, the Compatibility Determination or the Right-of-Way Permit for the industrial wastewater and treated sewage pipeline.

490. Meetings or communications between GCEDC and the Tonawanda Seneca Nation do not satisfy the Service's government-to-government consultation responsibilities.

491. The Service was aware that the Tonawanda Seneca Nation has declared its Territory to be TCP eligible for listing on the National Register of Historic Places. EA at 30. Nonetheless, without consulting the Nation, the Service concluded that there were no resources eligible for listing on the National Register of Historic Places within the potentially impacted area. EA at 29–30; *see also* DSEA at 41–42.

492. As a result of the Nation's letters to Secretary Haaland and Tom Roster, the Service agreed to complete a supplemental environmental assessment, but the Service has not consulted with the Nation about the contents of that document or required a new or supplemental cultural resources investigation. The Service cannot assess the direct, indirect, and cumulative impacts of

the Project on the Tonawanda Seneca Nation and its cultural resources and practices without consulting with the Nation.

493. The Supplemental Assessment refers to the meeting on April 12, 2023, in which the Service apologized to the Nation, as "a formal government to government consultation between the Service and the Tonawanda Seneca Nation." Supplemental Assessment at 2.

494. Prior to the April 12, 2023, meeting, the Service agreed with the Nation that the meeting was "to discuss a path forward for government-to-government consultation on this matter," not formal consultation in and of itself. Exhibit W. The Service knows that the Nation did not and does not consider the April 12 visit to have been formal consultation. *See* June 9, 2023 letter from the Nation to Defendant Haaland and Defendant Kahan, Exhibit AC. The April 12 visit served to discuss how and when consultation would take place and did not allow full participation by the Nation. *See* 36 C.F.R. § 800.2(c)(2); 512 DM 5.

495. The April 12, 2023, visit did not provide the Nation with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A).

496. The Service's failure to consult with the Tonawanda Seneca Nation during the NEPA process for the Project and prior to issuing the Compatibility Determination and Right-of-Way Permit for the Project violated the National Historic Preservation Act, the Archaeological Resources Protection Act, the Department of Interior's policy, and the Administrative Procedure Act.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

A. Enter a declaratory judgment finding that the Defendants have violated the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997;

B. Enter a declaratory judgment finding that the Defendants have violated NEPA;

C. Enter a declaratory judgment finding that the Defendants have violated the National Historic Preservation Act, the Department of Interior's policy, and the Administrative Procedure Act;

D. Enter an order vacating the Right-of-Way Permit, Compatibility Determination, Environmental Assessment, and Finding of No Significant Impact;

E. Enjoin any construction of the industrial wastewater and treated sewage pipeline until Defendants comply with the law;

F. Enter an order requiring Defendants to consult with Plaintiff and comply with the National Historic Preservation Act;

G. Award Plaintiff costs of this action, including reasonable attorney fees; and

H. Grant such further and other relief as this Court may deem just and proper.

DATED: November 29, 2023

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