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Via Certified Mail and Email

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Background

Under U.S. law, any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of their critical habitat.¹ To comply with this mandate, the agency must ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of their critical habitat.² If a proposed action is likely to adversely

project would affect sturgeon habitat, including impacts to benthic habitat and water quality.⁹ The Service determined that installation of the proposed transmission line would result in up to 569 acres of riverbed disturbance in the Hudson and Harlem Rivers.¹⁰ It further found that riverbed disturbance would include the redeposition of suspended sediment, which could

EMF may adversely affect sturgeon, it failed to adequately assess the potential impacts, instead relying on shielding to find that the Project would not result in harm. NMFS failed, however, to provide any science to support its conclusions. It did not provide any information on the effectiveness of the proposed shielding, the potential EMF levels even with the shielding, and did not consider the potential impacts to the species should the shielding break down over time or otherwise fail to adequately limit EMF. NMFS therefore failed to use the best available science to address the potential impacts to Atlantic sturgeon from the Project, as the ESA requires.¹⁷ The impacts of EMF on sturgeon and how increased EMF may inhibit the use of the area as critical habitat must be fully considered during the reinitiated consultation.

Reinitiation and completion of formal ESA Section 7 consultation is therefore required to ensure that critical habitat for endangered Atlantic sturgeon is not destroyed or adversely modified by the Project. Until such consultation is completed, no construction activities may commence. Allowing construction (including any route clearing) to begin before the Department and Service have complied with the requirements of Section 7(a)(2) of the ESA would be an irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures to minimize take of listed species, in violation of ESA Section 7(d).¹⁸ Pursuant to ESA Section 7(d), construction cannot begin, and the status quo must be preserved, until the Department complies with ESA Section 7(a)(2).

Supplemental NEPA Analysis Required

After the publication of the Environmental Impact Statement for the Project, the Department has received new information that demonstrates that the Project will impact the environment in a manner not considered in the Final EIS. Therefore, the Department cannot satisfy its obligations under NEPA without a supplemental analysis that is made available for public comment.¹⁹

Under NEPA and its implementing regulations, agencies are required to prepare supplemental environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the

Effects of Electromagnetic Fields on Behavior of Largemouth Bass and Pallid Sturgeon in an Experimental Pond Setting (Sep. 2015) (available at <https://tethys.pnnl.gov/sites/default/files/publications/Bevelhimer-et-al-2015.pdf>); Mark S. Bevelhimer, et al., Behavioral Responses of Representative Freshwater Fish Species to Electromagnetic Fields, *Transactions of the American Fisheries Society*, 142:3, 802-813 (Apr.

propos[ed] action] will affect the quality of the human environment in a significant manner or to a significant degree, the agency *must* prepare a supplemental environmental impact statement to consider the changes and their impacts.²¹

This standard is clearly satisfied with regards to the Project. As discussed above, critical habitat for the Atlantic sturgeon has been designated in the Hudson River that would be adversely affected by the Project, requiring reinitiation of consultation as well as a supplemental EIS.²² Furthermore, modifications to the Project route that were approved by the New York Public Service Commission on March 19, 2020 and August 13, 2020 require a supplemental analysis of the environmental impacts of the Project.²³ These route changes may alter the impacts of the project on local resources and wildlife along the Project route. The fact that the route was changed suggests that there were (and are) alternatives for the placement of the Project, and these alternatives must be fully analyzed in a supplemental EIS, as NEPA requires.²⁴

The supplemental NEPA analysis must also consider the environmental impacts associated with the development of dams in Canada that would not have been built without the expectation that the electricity from these dams would be exported from Canada to New York via projects such as CHPE. NEPA directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem, as well as cumulative effects.²⁵ Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries.²⁶

²⁰ 40 C.F.R. § 1502.9(c).

²¹ *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

²² See 40 C.F.R. § 1508.27(b)(9) (providing that impacts to endangered species and critical

cities like New York support the development of additional hydroelectric dams by Hydro-Quebec for export projects like CHPE.

And there is no doubt that the CHPE project is driving further dam development that adversely impacts indigenous groups. New hydroelectric dams under construction for export supply via CHPE include the four- dam complex on the Romaine River, a wild river that currently sweeps through northern boreal forest and bio-diverse wetlands, then spreads out into the unique Mingan Archipelago National Park Reserve before spilling into the Gulf of the St. Lawrence on the Lower North Shore east of Havre-Saint-Pierre. Hydro-

Conclusion

For the forgoing reasons, the Department and the Service must reinitiate Section 7 consultation for the Project, or they will be in direct violation of the ESA. Additionally, the Department must supplement the EIS for the Project as discussed herein. The agencies have sixty days to remedy the violations identified in this letter. If these violations are not promptly corrected, we will assume that no corrective action is being taken and will proceed accordingly. Please do not hesitate to contact the undersigned if we can provide additional information or otherwise assist in this matter, rather than having to resort to judicial remedies. We look forward to your prompt response.

Sincerely,



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A handwritten signature in black ink, appearing to read "Matt McPherson".

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