

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

ONEIDA TRIBE OF INDIANS OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:10-cv-00137-WCG
)	
VILLAGE OF HOBART, WISCONSIN,)	Hon. William C. Griesbach
)	
Defendant/Third-Party Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA, UNITED STATES)	
DEPARTMENT OF THE INTERIOR, and KENNETH)	
SALAZAR, Secretary of the Interior,)	
)	
Third-Party Defendants.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF
THIRD-PARTY DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Third-Party Defendants United States of America; United States Department of the Interior; and Kenneth Salazar, Secretary of the Interior (collectively, “the United States”) submit this Memorandum of Law in support of their Motion to Dismiss the Third-Party Complaint. As set forth below, this Court lacks jurisdiction over the claims raised in the Third-Party Complaint against the United States because there is no applicable waiver of federal sovereign immunity. The Village has also failed to state a claim reviewable by this Court. The United States therefore respectfully requests that the Court dismiss the Third-Party Complaint.

This case principally concerns an action filed by the Oneida Tribe of Indians of Wisconsin (“Tribe”) against the Village of Hobart, Wisconsin (“Village”), seeking a declaration that the Village lacks authority to impose certain stormwater charges on lands held by the United States in trust for the Tribe.¹ On July 12, 2010, the Village filed a third-party complaint against the United States, alleging that the federal Clean Water Act (“CWA”) requires the United States, as title holder to the tribal trust lands, to pay the Village’s storm water fees “to the extent the Tribe is not the responsible party” to do so. The Village’s complaint also challenges the legality of 25 C.F.R. § 1.4 – the federal regulation exempting tribal trust land from state and local property laws – under various Articles and Amendments to the U.S. Constitution and under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. See generally Third-Party Complaint, Dkt. No. 15 (hereafter “TPC”), ¶¶ 43-50; 52-59; 61-68; 70-71; 73-77.

¹ The only land at issue in this case is land held in trust for the Tribe by the United States, hereafter referred to as “tribal trust lands.”

All of the claims in the Third-Party Complaint must be dismissed. First, the Village has failed to identify any final federal action that could be reviewable under the APA, which waives federal sovereign immunity for judicial review for “final agency action.” 5 U.S.C. § 706. The only federal action the Village identifies occurred in 1965, and any challenge to that action is barred under the applicable statute of limitations.

Second, Section 313 of the CWA, upon which the Village relies as providing a waiver of federal sovereign immunity, does not apply to the Village’s attempt to enforce its stormwater charges on tribal trust lands. Section 313 requires federal facilities that discharge pollutants, as well as property over which the federal government has jurisdiction, to comply with state and local water pollution laws, 33 U.S.C. § 1323(a), but those state and local laws must necessarily be validly applied in order for the United States to be held to them. Section 313 does not grant state and local governments any new regulatory authority that those entities did not already have. Because the Village lacks authority to impose its stormwater charge on tribal trust lands in the first place, Section 313 does not apply to make the United States liable to pay the charges. As this brief explains below, fundamental principles of Indian law establish that the Village lacks regulatory authority over Indian lands, including tribal trust lands such as those at issue in this case. This principle is rooted in the Indian Commerce Clause in the U.S. Constitution and has been repeatedly confirmed by the Supreme Court in cases dating back to 1832. Moreover, although the Village points to the CWA as a source of authority to impose its fees, the Village in fact lacks authority under the CWA to impose stormwater regulations on, or otherwise to regulate, tribal trust lands. The State of Wisconsin (“State”) obtained approval from the U.S. Environmental Protection Agency (“EPA”) to implement a pollutant permitting program under

the CWA in 1974, but the State's application did not request, and EPA did not grant, authority to regulate pollutant discharges on tribal trust land. Indeed, the State specifically requested that it not be given CWA regulatory authority over any Indian lands within the State.² The Village, as a subdivision of state government, therefore cannot derive any CWA-based authority from the State, which lacks such authority itself. Accordingly, EPA, and not the State or Village, retains authority to implement the CWA "on Indian lands" in Wisconsin, 40 C.F.R. § 123.1(h), including on the trust lands held for the Tribe. Nor, contrary to the Village's contentions, does the CWA directly authorize the Village's stormwater charge.

Third, all of the Village's challenges to 25 C.F.R. § 1.4 fail under the APA. The Village alleges that 25 C.F.R. § 1.4 violates a number of constitutional provisions, and alleges that the Secretary of the Interior ("Secretary") lacked authority to promulgate that regulation. As stated above, the APA waives federal sovereign immunity only for challenges to final agency actions; here the Village does not identify any agency action, final or otherwise, other than the promulgation of the regulation itself, which occurred in 1965. The APA carries a six-year statute of limitations, which has long since expired for any challenge to 25 C.F.R. § 1.4.

Finally, in its Answer and Counterclaims to the Tribe's Complaint, the Village contends that "[s]ome or all of" the land that the United States holds in trust for the Tribe was not validly acquired in trust. Answer, Dkt. No. 4, Countercl. ¶ 11. Although the Village does not raise this issue in its Third-Party Complaint against the United States, this memorandum will briefly

² Tribal trust lands such as those at issue in this case are one type of "Indian lands." The exterior boundaries of the Oneida Reservation – the location of which is not at issue in this case – include tribal trust land as well as other types of land.

demonstrate that there is no waiver of federal sovereign immunity for any claim seeking to invalidate the United States's title in the land.

Accordingly, and for the reasons elucidated below, the entire Third-Party Complaint should be dismissed for lack of jurisdiction and failure to state a claim.

II. FACTS AND PROCEDURAL HISTORY

The Oneida Tribe of Indians of Wisconsin is a federally recognized Indian tribe. 74 Fed. Reg. 40,218, 40,220 (Aug. 11, 2009); Oneida Tribe of Indians of Wisc. v. Village of Hobart, 542 F. Supp. 2d 908, 910 (E.D. Wis. 2008). The Tribe is a successor in interest to the Oneida Nation, which was recognized by the United States in a series of treaties beginning in 1784. Complaint, Dkt. No. 1, ¶ 4. The Tribe occupies the Oneida Reservation in Wisconsin, which was established by the 1838 Treaty with the Oneida. The Reservation encompassed 64,000 acres of tribal land; a large percentage of that land fell out of Indian ownership between 1889 and 1934. Oneida Tribe, 542 F. Supp. 2d at 910-12. Today, the United States holds in trust for the Tribe approximately 1420 acres of land that are located within the Village. Complaint, Dkt. No. 1, ¶ 8. Some of these lands were treaty lands; others were acquired in trust pursuant to authority granted to the Secretary in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. The Tribe also owns land in fee within the Reservation. The Tribe has promulgated its own water control ordinances and environmental laws. Complaint, Dkt. No. 1, ¶¶ 19-21.

The Town of Hobart (now the Village) was created by the state legislature in 1903 and lay wholly within the exterior boundaries of the reservation. Oneida Tribe, 542 F. Supp. 2d at 912. In 2002, the Village incorporated under Wisconsin law, granting it additional authority under State law. Id. at 913. In July 2007, the Village began enforcement of a village ordinance

that imposes a monetary charge on all property located within the Village for the purpose of managing stormwater run-off. Id., ¶ 9. The Village levied this charge on both the Tribe's trust and fee land. Id., ¶ 12. The Tribe paid the charges for its fee land under protest and declined to pay the charges assessed on its trust land. Id., ¶¶ 12-13. In March 2009, the Tribe and Village entered into an agreement, pursuant to which (among other things) the Tribe deposited the disputed trust-land charges into an escrow account. Id. ¶¶ 14-15.

The Tribe filed a complaint against the Village on February 19, 2010, seeking declaratory and injunctive relief from the Village's attempts to assess its stormwater charge on tribal trust land. Dkt. No. 1. The Tribe argues, among other things, that the stormwater charge is really a tax that may not lawfully be imposed on tribal trust land. Id., ¶ 28. In March 2009, in response to a request from the Tribe, the Midwest Regional Director of the Bureau of Indian Affairs opined that the stormwater charge is a tax from which the Tribe is exempt. Id., Exh. D. With respect to the Third-Party Complaint, this Court need not reach the issue of whether the charge constitutes a tax, because the Third-Party Complaint should be dismissed on its face. Should this Court deny the United States's motion to dismiss the Third-Party Complaint, the issue of whether the stormwater charge constitutes a tax, which is a mixed question of law and fact, may be addressed in summary judgment motions.

On April 20, 2010, the Village filed an answer, affirmative defenses, and counterclaims. Dkt. No. 4. On July 12, 2010, the Village filed a third-party complaint against the United States, seeking a declaratory judgment that the United States is responsible for paying the charges as well as the issuance of "a monetary judgment for all fees currently due and owing." TPC, Dkt.

No. 15, p. 15. The United States now moves to dismiss the Third-Party Complaint for lack of jurisdiction and failure to state a claim upon which this Court may grant relief.

III. STATUTORY AND REGULATORY BACKGROUND

A. The Indian Reorganization Act

The IRA was enacted in 1934 as part of the federal government's return to a policy supporting "principles of tribal self-determination and self-governance." Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 85 (2d Cir. 2000) (quoting County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992)). Congress enacted the IRA in part to reverse the disastrous consequences of the General Allotment Act of 1887, which had eroded the tribal land base and weakened tribal organizations,³ and to promote Indian self-government and economic self-sufficiency. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152-54 (1973); Hagen v. Utah, 510 U.S. 399, 425 n.5 (1994). The "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Morton v. Mancari, 417 U.S. 535, 542 (1974). The Act sought "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804 at 6 (1934)). The IRA also "end[ed] the alienation of tribal land and facilitat[ed] tribes' acquisition of additional acreage and

³ From the 1870s until passage of the IRA in 1934, the United States followed a policy, reflected in the General Allotment Act, ch. 119, 24 Stat. 388, of allotting parcels of tribal land to individual members and conveying "surplus" tribal land to non-Indians. The allotment policy ultimately resulted in a large-scale transfer of Indian lands out of Indian ownership, which undermined tribal communities and impoverished the tribes and their members. See Hodel v. Irving, 481 U.S. 704, 707-08 (1987) (describing allotment policy as "disastrous for the Indians"); see also Felix Cohen, Handbook of Federal Indian Law § 1.04 (2005 ed.).

repurchase of former tribal domains.” Cohen, Handbook of Federal Indian Law § 1.05. To this end, Section 5 of the IRA “authorizes the Secretary of the Interior to acquire land in trust for Indians.” City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 220 (2005) (citing 25 U.S.C. § 465). The Secretary has acquired numerous parcels of land in trust for the Tribe since 1934.

B. The Clean Water Act

1. The NPDES Permitting System

The CWA was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, Congress prohibited the discharge of any “pollutant” from a “point source” into the waters of the United States, unless that discharge complies with other provisions of the Act. 33 U.S.C. § 1311(a).⁴ “Under the Act, the primary means of imposing water pollution control . . . is a permit system called the National Pollutant Discharge Elimination System (NPDES). Each point source must obtain a NPDES permit before it may emit identified pollutants into American waters. The NPDES permit restricts the quantity, rate, and concentration of pollutants that the point source may emit into the water Any discharge without a NPDES permit is illegal.” Amer. Paper Inst. v. EPA, 890 F.2d 869, 871 (7th Cir. 1989) (citing 33 U.S.C. § 1311(a)).

NPDES permits are issued by EPA, except where EPA grants specific approval to a state or Indian tribe to run its own NPDES program. 33 U.S.C. § 1342(a)-(d). A state or tribe⁵

⁴ The CWA defines the term “pollutant” broadly, to encompass a long list of substances, including industrial, municipal and agricultural wastes. 33 U.S.C. § 1362(6). Similarly, the Act contains a broad definition of “point source,” i.e., “any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, . . . or conduit . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

⁵ In 1987 Congress amended the CWA to provide that federally recognized Indian tribes may be treated in a manner similar to states for a number of purposes, including administering the

wishing to administer an NPDES program must submit a complete program description for EPA approval. 40 C.F.R. §§ 123.21, 123.22. If a state seeks NPDES authority over discharges within Indian country, it must demonstrate adequate authority to carry out its proposed program on those lands. 40 C.F.R. § 123.23(b). Where the state has not demonstrated such authority and has not been authorized by EPA, and the relevant tribal government has not obtained authorization to administer the NPDES program, EPA administers the program on Indian lands, including tribal trust lands. 40 C.F.R. § 123.1(h).

2. Regulation of Urban Stormwater

In 1987, Congress introduced into the NPDES program a framework for regulating stormwater discharges. “The NPDES permitting system originally used individual permits, which was feasible for regulating discharges from wastewater facilities or industrial plants. However, by the 1980’s it became clear that the individual permitting process was unworkable to regulate storm water discharges which can occur virtually anywhere. Congress responded in 1987 by adding § 402(p) to the CWA.” Tex. Indep. Producers & Royalty Owners Ass’n v. EPA, 410 F.3d 964, 967-68 (7th Cir. 2005). Among other things, this provision directed EPA to require permits for municipal separate storm sewer systems (“MS4s”). 33 U.S.C. § 1342(p). MS4 systems come in three sizes: large (a system serving a population of 250,000 or more), medium (a system serving a population of between 100,000 and 250,000) and small (a system serving fewer than 100,000 persons). Id. § 1342(p)(2); 64 Fed. Reg. 68722 (Dec. 8, 1999).⁶ The

NPDES permitting program. 33 U.S.C. § 1377(e); 40 C.F.R. § 123.31.

⁶ Congress established a two-phase approach for requiring MS4 operators to obtain NPDES permits. In 1987, Congress required permits for medium and large MS4s; in 1999, Congress required permits for small MS4s. Tex. Indep. Producers, 410 F.3d at 967-68.

Village is a small MS4. See Notice of Draft NPDES Permit for Village of Hobart, Apr. 23, 2010, at 2 (attached as Exh. 1). The Tribe also operates a small MS4. See Notice of Draft NPDES Permit for Oneida Tribe, Apr. 23, 2010, at 2 (attached as Exh. 2).

3. Federal Facilities

The CWA also establishes water quality control obligations for the federal government. The statute requires federal agencies to comply with valid federal, state, interstate, and local water pollution requirements. Specifically, CWA Section 313(a) provides that:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a). Thus, CWA Section 313(a) specifically delineates the obligation of the federal government to comply with local requirements respecting the abatement and control of water pollution where the government either “has jurisdiction” over property or is engaged in an activity, resulting (or potentially resulting) in the discharge of pollutants. Section 313 does not grant any new regulatory authority to state or local governments.

C. Wisconsin’s NPDES Program

In February 1974, EPA authorized Wisconsin to administer its own NPDES program. 39 Fed. Reg. 26,061 (July 16, 1974). From the beginning, Wisconsin’s program authority specifically excluded Indian lands from its scope, as demonstrated by a number of documents

surrounding the approval. First, the approval letter from the EPA Administrator to then-Wisconsin Governor Patrick Lucey states, “The program that you conduct . . . must at all times be in accordance with . . . the Memorandum of Agreement between [EPA Region V and the Wisconsin Department of Natural Resources (‘WDNR’)] [‘MOA’].” Ltr. from Russell E. Train, EPA Administrator, to Patrick J. Lucey, Governor of Wisconsin, Feb. 4, 1974, at 1 (attached as Exh. 3). The letter then states that the MOA “gives Wisconsin the first opportunity to take enforcement action for violations of all federally-issued permits except those issued to agencies and instrumentalities of the federal government and for Indian activities on Indian lands.” *Id.*, at 2 (emphasis added). The MOA itself states the same exception for “Indian lands.” MOA between WDNR and EPA, approved Feb. 4, 1974, at 9 (attached as Exh. 4).

Subsequent updates to EPA’s approval of Wisconsin’s NPDES program have confirmed the State’s and EPA’s intention that discharges on all Indian lands be excluded from the scope of Wisconsin’s regulatory jurisdiction under the CWA, and that discharges on Indian lands instead be regulated by EPA. In 1979, the State and EPA modified the MOA to enlarge Wisconsin’s authority and to include permitting for federal facilities. At the request of the State, the MOA maintained the exclusion of Indian lands from Wisconsin’s permitting authority.⁷ EPA thus

⁷ In June 1979, the Secretary of WDNR explained to EPA that if the State’s proposed new authority to permit federal facilities “requires the Department to regulate discharges from point sources operated by Indian tribes or Indian tribal organizations on Indian lands and reservations, the Department is unprepared to accept this responsibility.” Ltr. from Anthony S. Earl, Secretary of WDNR, to John McGuire, EPA Region V Administrator, June 21, 1979, at 1 (attached as Exh. 5.) The letter attached an opinion of the Attorney General of Wisconsin “concluding that [WDNR] is without authority” to regulate on Indian lands. *Id.*, at 2. Accordingly, the MOA was modified to include permitting at federal facilities “but exclud[ed] permits to Indian tribes or tribal organizations discharging from point sources located on Indian lands or reservations in Wisconsin.” Modification to MOA between WDNR and EPA, approved Dec. 3, 1979 (attached as Exh. 6).

retained permitting authority on Indian lands in Wisconsin, including tribal trust lands.⁸

In 2000, EPA again confirmed that WDNR's authority to administer the NPDES program does not include the Tribe's Reservation, "[a]ny land held in trust by the U.S. for any Indian tribe," or "[a]ny other land, whether on or off a reservation that qualifies as Indian Country." 65 Fed. Reg. 50,528, 50,529 (Aug. 18, 2000) (approval of Wisconsin's NPDES program for sewage sludge management).

Thus, EPA retained and continues to retain sole authority to issue permits for discharges on Indian lands in Wisconsin, including the Tribe's trust land.⁹ Indeed, the Village itself – a political subdivision of the State – acknowledged as much by seeking NPDES permit authorization from EPA to regulate stormwater runoff within the reservation. Exh. 1, at 2. The Tribe, which also operates a small MS4, has also applied for a permit from EPA. Exh. 2, at 2.

D. The Village's Stormwater Ordinance

The Village states that its stormwater management program was enacted "[p]ursuant to federal and state law." TPC, Dkt. No. 15, ¶ 18. In support of this statement, the Village cites the CWA's requirements that an operator of a small MS4 obtain an NPDES permit and implement a

⁸ EPA retention of permitting authority on Indian lands is common practice when states are authorized to implement NPDES programs. (EPA often uses the term "Indian country" to describe the reach of its authority.) See, e.g., *Approval of Application of Louisiana to Administer NPDES Program*, 61 Fed. Reg. 47,932, 47,933 (1996) (EPA will issue NPDES permits for discharges in Indian country within Louisiana); *Approval of Application of South Dakota to Administer NPDES Program*, 59 Fed. Reg. 1535, 1542 (1994) (withholding State's authority to issue NPDES permits in Indian country, including for discharges in "lands for which there is a significant controversy over whether or not the land is Indian Country").

⁹This retention of authority is in keeping with the federal government's longstanding exclusive role in Indian affairs. The federal government "bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245-46 (10th Cir. 2000) (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Morton v. Mancari* 417 U.S. 535, 555 (1974)).

stormwater management program. Id. ¶¶ 14-16. Furthermore, the Village contends specifically that its stormwater charge is required or at least authorized by federal and state law. “To remain in compliance with federal and state laws on storm water management, the Village must collect fees to finance planning, design, construction, maintenance, administration, and other storm water measures. The fees are determined as set forth in the Village’s storm water ordinance, and used solely for purposes of the storm water management program.” Id. ¶ 24. “To maintain compliance with federal and state laws, the Village created a storm water management program, which is funded by fees that the Village charges” Id. ¶ 36.

The Village has applied to EPA for an NPDES permit based on its status as a small MS4, but the application remains pending. Exh. 1, at 2. The State of Wisconsin’s list of currently state-permitted MS4s does not include the Village.¹⁰ Moreover, the Tribe also has a pending NPDES permit application based on its own operation of a small MS4. Exh. 2, at 2.

IV. STANDARDS OF REVIEW

A. Standard for Dismissal under Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a court may dismiss an action for lack of subject matter jurisdiction. “[T]he district court must accept the complaint’s well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff’s favor.” Transit Express, Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir. 2001) (citing Rueth v. EPA, 13 F.3d 227, 229 (7th Cir. 1993)). However, the plaintiff bears the burden of establishing jurisdictional requirements. Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009). Moreover, when considering a motion to dismiss for lack of jurisdiction, “the

¹⁰ The list is available at <http://www.dnr.state.wi.us/org/water/wm/ww/permlists.htm>.

district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.” Johnson v. Apna Ghar, Inc., 330 F.3d 999, 1001 (7th Cir. 2003) (quoting Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1999)).

B. Standard for Dismissal under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a court to dismiss a complaint when it fails “to state a claim upon which relief can be granted.” “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks, alteration, and citations omitted). Generally, under this standard, the court accepts the factual allegations within the complaint as true, drawing reasonable inferences and resolving ambiguities in favor of the pleader. See Christensen v. County of Boone, 483 F.3d 454, 457 (7th Cir. 2007); Curtis v. Bembenek, 48 F.3d 281, 283 (7th Cir. 1995).

C. Federal Sovereign Immunity

“As a sovereign, of course, the United States cannot be sued without its consent, and when consent is given, the terms of that consent delimit the scope of the court’s jurisdiction.” Bartley v. United States, 123 F.3d 466, 467 (7th Cir. 1997) (citing United States v. Dalm, 494 U.S. 596, 608 (1990); United States v. Mottaz, 476 U.S. 834, 841 (1986)). “A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.” Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted).

Waivers of sovereign immunity are to be strictly construed in favor of the sovereign. See Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1329 (7th Cir. 1990); United States v. Chicago Golf Club, 84 F.2d 914, 916 (7th Cir. 1936).

D. Review of Agency Action Under the APA

The APA waives the United States's sovereign immunity for judicial review of certain administrative decisions. The statute provides for judicial review of two types of administrative action: “[1][a]gency action made reviewable by statute and [2] final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Two conditions must be met for an administrative act to be a “final agency action.” “First, the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.” Home Builders Ass’n v. U.S. Army Corps of Eng’rs, 335 F.3d 607, 614 (7th Cir. 2003) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

Even where an agency has taken final action and the APA waives the United States’s sovereign immunity, judicial review of the action is limited. A court may only set aside an agency action if, based on the administrative record, the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); Habitat Educ. Ctr. v. U.S. Forest Serv., 609 F.3d 897, 900 (7th Cir. 2010). “Under this standard, our inquiry is ‘searching and careful’ but ‘the ultimate standard of review is a narrow one.’ We only must ask ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” Highway J Citizens Group v. Mineta, 349 F.3d 938,

952 (7th Cir. 2003) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)).

“The court is not empowered to substitute its judgment for that of the agency.” Sierra Club v. Marita, 46 F.3d 606, 619 (7th Cir. 1995) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

When a question of statutory construction is raised, courts must show deference to the interpretation given by the agency in the exercise of its delegated authority. United States v. Mead Corp., 533 U.S. 218, 228 (2001); EPA v. National Crushed Stone Ass’n, 449 U.S. 64, 83 (1980); Sierra Club v. EPA, 375 F.3d 537, 540 (7th Cir. 2004). Even if a statute is susceptible to more than one interpretation, a court must accept the interpretation chosen by the agency if it is “reasonable.” Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984). An agency’s interpretation of its own regulations is entitled to even greater deference. Courts must give “controlling weight” to an agency’s interpretation of its own regulations, “unless it is plainly erroneous or inconsistent with the regulation.” Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotations and citations omitted). See Auer v. Robbins, 519 U.S. 452, 461 (1997) (citations omitted) (Secretary’s interpretation of own regulations is controlling unless “plainly erroneous or inconsistent with the regulation”).

Finally, the “Indian canons of construction” hold that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (citing McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164, 174 (1973)); see also County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

V. ARGUMENT

At the outset, the Third-Party Complaint should be dismissed because it purports to bring an APA claim but fails to meet the requirements for judicial review under that statute. With regard to its attempt to require the United States to pay stormwater charges, the Village has identified no federal action at all, let alone the “final agency action” that is required for APA review. With regard to its constitutional challenges to 25 C.F.R. § 1.4, the Village challenges only the promulgation of the regulation itself, for which the statute of limitations has long ago expired. This Court need go no further in order to dismiss the Third-Party Complaint.

In addition, the Village’s reliance on Section 313 of the CWA as a waiver of sovereign immunity allowing its claim to go forward is misplaced. Section 313 requires federal facilities and properties to comply with state and local water pollution laws, but the section does not render otherwise inapplicable requirements applicable to the United States. The Village lacks authority to impose its stormwater charge on tribal trust lands, so the waiver of sovereign immunity contained in Section 313 does not apply to the Village’s attempt to enforce that charge on such lands.

Finally, this memorandum will briefly demonstrate that there is no waiver of federal sovereign immunity for any claim the Village may make that seeks to invalidate the United States’s title to land it holds in trust for the Tribe.

A. **This court lacks jurisdiction over the Village’s stormwater claims under the APA because the Village fails to challenge any “final agency action.”**

The Village cites the APA as a basis for subject matter jurisdiction in this case. TPC, Dkt. No. 15, ¶ 7. The APA, as noted above, waives the United States’s sovereign immunity for

judicial review of two types of administrative action: “[1][a]gency action made reviewable by statute and [2] final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. The Village has failed to identify any federal agency action at all in its claim for declaratory and injunctive relief that would require the United States to pay the Village’s stormwater charges. Therefore, the APA does not waive sovereign immunity for the Village’s claims against the United States, and this Court lacks jurisdiction to hear those claims.

For the APA’s waiver of sovereign immunity to apply, the Village must identify a final federal agency action that is the “consummation of the agency’s decisionmaking process” and that is “one by which rights or obligations have been determined or from which legal consequences will flow.” Home Builders Ass’n v. U.S. Army Corps of Eng’rs, 335 F.3d 607, 614 (7th Cir. 2003) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). “[T]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” Id. (quoting W. Ill. Home Health Care v. Herman, 150 F.3d 659, 662 (7th Cir. 1998)). However, the Village has not pointed to a single action – final or otherwise – taken by the federal government with respect to the Village’s stormwater charge. The Village has never sent the United States a bill for the stormwater charge or tried to collect from the United States in any other way, and the Third-Party Complaint does not allege any facts to the contrary. This lawsuit is the first time that the Village has ever sought to impose its fee on the United States. In short, the United States has engaged in no reviewable agency action that entitles the Village to bring suit under the APA.

Nor can the Village rely on Section 313 of the CWA as a way to challenge “agency action made reviewable by statute,” which is the other type of permissible APA review. 5 U.S.C. § 706.

The Village has simply not identified any agency action by the United States pertaining to “Federal, State . . . [or] local requirements . . . respecting the control and abatement of water pollution.” Instead, the Village asks this Court to grant declaratory judgment against the United States without ever having confronted a federal agency with its demands, let alone received a final agency determination in response. The APA does not permit such a course of action.¹¹

B. Section 313 of the CWA does not apply to this case because the Village lacks authority to impose its stormwater charges on tribal trust lands.

The Village argues that CWA Section 313 provides a waiver of sovereign immunity authorizing its suit to enforce its stormwater charges against the United States. TPC, Dkt. No. 15, ¶ 48. This reliance is misplaced. Section 313 requires federal facilities and properties to comply with state and local water pollution laws, but does not grant state or local governments any new regulatory authority. 33 U.S.C. § 323(a). Because the State of Wisconsin and its subdivisions lack regulatory authority on tribal trust lands in the first place, the waiver of sovereign immunity contained in Section 313 does not apply to the Village’s attempt to enforce its stormwater charge on such lands.

A centuries-old body of Supreme Court law holds that state and local governments such as the Village generally have no authority, absent explicit Congressional consent, to regulate tribal trust lands. Moreover, as described above, Wisconsin and its political subdivisions

¹¹ The Declaratory Judgment Act, which the Village cites as source of subject matter jurisdiction, TPC, Dkt. No. 1, ¶ 7, provides that “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration” 28 U.S.C. § 2201(a). The Declaratory Judgment Act specifies an available remedy; it does not contain its own grant of jurisdiction or waiver of sovereign immunity. “[T]he Declaratory Judgment Act is not an independent source of federal subject matter jurisdiction,’ and requires an ‘independent basis for jurisdiction.’” Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 935 (7th Cir. 2008) (quoting GNB Battery Tech. v. Gould, Inc., 65 F.3d 615, 619 (7th Cir. 1995)).

specifically lack CWA enforcement authority on Indian lands within the State, including the tribal trust lands at issue in this case. The Village's contention that federal and state law – in particular, the CWA – authorize its stormwater management charges is simply false. The Village cannot derive authority to regulate discharges on tribal trust lands from the State because the State itself lacks such authority. Nor has the Village received an NPDES permit from EPA to operate its MS4 – and there is no evidence that such a permit, even if granted, would allow the Village to regulate tribal trust land. The Tribe has its own MS4 application pending before EPA, and in any event, the CWA's MS4 permitting provisions do not provide specific authority for, or even discuss, such fees. Therefore, contrary to the Village's assertion, neither federal nor state CWA law has authorized the Village's ordinance as applied to tribal trust lands. The Village cannot rely on Section 313 of the CWA to enforce authority it does not have.

1. Fundamental principles of Indian law hold that the Village has no independent regulatory authority over tribal trust lands.

The Supreme Court recognizes that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” United States v. Wheeler, 435 U.S. 313, 323 (1978) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)). In conjunction with the sovereignty of tribes, there is “a ‘deeply rooted’ policy in our Nation’s history of ‘leaving Indians free from state jurisdiction and control.’” Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (quoting McClanahan, 411 U.S. at 168). The Court has recognized this principle since the days of Chief Justice Marshall. See Worcester v. Georgia, 31 U.S. 515, 557 (1832) (Marshall, C.J.) (Indian nations are “distinct political communities, having territorial boundaries, within which their authority is exclusive”). “Absent explicit congressional

direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." Okla. Tax. Comm'n, 508 U.S. at 128. "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Williams v. Lee, 358 U.S. 217, 220 (1959).

In the twentieth century, the Supreme Court's fidelity to this principle led the Court to strike down a wide variety of state taxes and regulations as invalid on Indian lands. See, e.g., Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) (state may not impose motor fuels excise tax on fuel sold by tribal retail stores on tribal trust land); Moe v. Confed. Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480-81 (1976) (state may not impose personal property tax on property located within reservation, assess vendor license fee on Indian cigarette vendor operating business on reservation, or tax on-reservation cigarette sales from Indians to Indians)¹²; Fisher v. Dist. Ct. of Sixteenth Jud. Dist., 424 U.S. 382, 389 (1976) (state court lacked authority to adjudicate child custody dispute arising on Indian reservation where all parties were tribal members); Williams, 358 U.S. at 220 (state court lacked jurisdiction to hear lawsuit by non-Indian against Indians where action arose on the reservation, because exclusive

¹² The law is more complex where non-Indians are involved. Compare Moe, 524 U.S. at 483 (upholding state requirement that Indian cigarette sellers collect a tax on cigarette sales to non-Indians) with New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 344 (1983) (finding state hunting and fishing laws pre-empted on reservation, even as applied to non-members of the tribe). However, this case involves only Indian activity on tribal trust land. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (citing Moe, 524 U.S. at 480-81). In this context, Congress has established a mechanism that accounts for both the need to control water pollution in Indian country and protection of tribal sovereignty. See 33 U.S.C. § 1377 (providing for tribes to be treated in the same manner as states for the purposes of administering the NPDES permitting program).

jurisdiction lay in tribal court).

The broad reasoning behind these decisions is twofold. First, the principle that states may not regulate on Indian lands without express Congressional consent recognizes the role of the federal government, dating to the founding of this Nation, as the entity responsible for Indian affairs. This responsibility derives from the Indian Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, which addressed the confusion over whether States had authority over Indian affairs pursuant to the Articles of Confederation by expressly giving Congress the power to “regulate commerce . . . with the Indian tribes.” From the early days, the Supreme Court has recognized the exclusive authority of the United States over Indian affairs. See Worcester, 31 U.S. at 561 (regulation of relationship between the United States and Indian tribes, “according to the settled principles of our constitution, [is] committed exclusively to the government of the union.”); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs”); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”); United States v. Wheeler, 435 U.S. 313, 319 (1978) (“Congress has plenary authority to legislate for the Indian tribes in all matters.”). Second, the principle serves to uphold the well-acknowledged federal goal of encouraging and assisting tribal sovereignty and self-determination. As the Supreme Court stated in Williams, “There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of [tribes] over Reservation affairs and hence would infringe on the right of the Indians to govern themselves The cases in this Court have consistently guarded the authority of Indian governments over their reservations.” Williams, 358 U.S. at 223.

“[C]ongressional authority [over Indian affairs] and the ‘semi-independent position’ of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” White Mountain Apache, 448 U.S. at 142 (quoting Williams, 358 U.S. at 220) (internal citations omitted) (prohibiting Arizona from applying its motor carrier and use fuel taxes to non-Indian logging company operating solely on reservation). In the present case, both of these barriers clearly apply: the federal government intentionally retained CWA enforcement authority on Indian lands in Wisconsin; and the Tribe has its own environmental and pollution control laws. Complaint, Dkt. No. 1, ¶¶ 19-21. Accordingly, Village imposition of its pollution control ordinances on Indian trust land would infringe on both federal and tribal authority.

2. Neither Wisconsin’s NPDES program nor EPA has authorized the Village to impose stormwater charges on Indian lands.

The Village claims that its stormwater management program, including the fee, is validly applied to the United States because it was enacted pursuant to state and federal law. TPC, Dkt. No. 15, ¶¶ 18, 24, 36. “To remain in compliance with federal and state laws on storm water management, the Village must collect fees to finance planning, design, construction, maintenance, administration, and other storm water measures.” Id. ¶ 24. However, as explained above, Wisconsin’s NPDES program specifically and deliberately excludes Indian lands from its reach. Therefore, the program cannot authorize, much less require, the Village’s fee to be assessed on tribal trust lands.

The Village's reliance on the CWA and the federal MS4 regulations as justifying its stormwater charge is also misplaced. Indeed, the Third-Party Complaint conveys the mistaken impression that the Village currently holds a federal NPDES permit, when in fact it does not. "The CWA mandates, under 33 U.S.C. 1342(p), that the Village's NPDES permit 'require controls to reduce the discharge of pollutants . . .'" Id. ¶ 15. While this is an accurate statement of what the CWA requires once a permit has been issued, it incorrectly implies that the Village has already been granted a permit. Likewise, the Village contends that "[f]ederal regulations, pursuant to 40 C.F.R. § 122.34(a), 'require at a minimum that [the operator of a regulated small MS4] develop, implement, and enforce a storm water management program . . .'" Id. ¶ 16. The regulation cited by the Village actually states, "Your NPDES MS4 permit will require at a minimum that you develop, implement, and enforce a storm water management program . . ." 40 C.F.R. § 122.34(a). Because the Village does not currently have a permit, the federal MS4 regulations do not require the Village to do anything. Moreover, even if the Village did have a valid permit issued by EPA, the CWA's MS4 permitting provisions do not provide specific authority for, or even discuss, fees or charges for stormwater management programs. See 33 U.S.C. § 1342(p). Thus, the Village's assertion that the CWA authorizes it to assess its stormwater charge on tribal trust land is incorrect.

3. Section 313 of the CWA is a limited waiver of sovereign immunity; it does not grant the Village any new authority to impose local regulations on tribal trust lands.

Section 313 "contains a limited waiver of sovereign immunity." In re Operation of the Mo. River Sys., 418 F.3d 915, 917 (8th Cir. 2005). "The federal facilities section[] of the CWA . . . govern[s] the extent to which federally operated facilities . . . are subject to the requirements . . ."

. of both [the CWA] and EPA-approved, state-law regulation and enforcement programs.” U.S. Dep’t of Energy v. Ohio, 503 U.S. 607, 613 n.4 (1992) (superseded in part on other grounds by statute, Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505).

Section 313 does not, however, grant any new authority to states or local governments that those entities did not already have.

Had Congress intended Section 313 to bestow new authority on states and local governments – in particular, the authority to regulate and to impose fees on tribal trust land – it would have said so.¹³ Instead, Section 313 does not contain any authority-granting language at all, must less a specific reference to tribal trust land. This Congressional silence contrasts sharply with CWA Section 518, part of the 1987 amendments to the CWA, in which Congress specified particular assistance for sewage needs of Indian tribes and also provided for federally recognized Indian tribes to be treated in the same manner as states for a number of purposes, including administering the NPDES permitting program. 33 U.S.C. § 1377(a)-(f). See Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001) (“In 1987, Congress amended the Act to authorize the EPA to treat Indian tribes as states under § 518 of the Act. Once a tribe has “treatment-as-state” (TAS) status, the statute permits it to establish water quality standards for bodies of water within its reservation and to require permits for any action that may create a

¹³ “Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”)). See also United States v. Dion, 476 U.S. 734, 738-39 (1986) (quoting Menominee Tribe v. United States, 391 U.S. 404, 412 (1968) (“We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain. . . . We do not construe statutes as abrogating treaty rights in ‘a backhanded way.’”).

discharge into those waters.”). If Congress had intended such an unprecedented role for States on tribal trust lands as the Village seeks, Congress could have clearly provided so in Section 313 or elsewhere in the CWA. Congress did not do so.

Accordingly, because the Village lacks authority to impose its stormwater charge on tribal trust land in the first place, it cannot use the waiver of sovereign immunity in Section 313 to sue to enforce that charge.

4. Any ambiguity in Section 313 must be construed in favor of tribal sovereignty by limiting state and local authority on tribal trust lands.

Even were this Court to find Section 313 ambiguous as to whether it grants state and local governments the authority to impose stormwater charges on tribal trust lands, the Indian canons of construction require construal of the ambiguity in favor of the Tribe. “Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.” White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (citing McClanahan, 411 U.S. at 174-75). “Courts are consistently guided by the ‘purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow.’ We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.” NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1195 (10th Cir. 2002) (quoting Reich v. Great Lakes Indian Fish & Wildlife Comm’n, 4 F.3d 490, 496 (7th Cir. 1993)). “Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Montana, 471 U.S. at 766 (citations omitted) (applying Indian canons and invalidating state tax on Indian oil and gas royalties). Construing

Section 313 of the CWA in the light most favorable to Indians requires the conclusion that it does not apply to the Village's suit seeking to impose monetary fees on tribal trust land.

C. None of the Village's challenges to 25 C.F.R. § 1.4 states a valid claim under the APA.

The Village argues that the long-standing federal regulation published at 25 C.F.R. § 1.4 violates a number of constitutional provisions and that the regulation was beyond the Secretary of the Interior's authority. The regulation provides in pertinent part:

Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property . . . belonging to any Indian or Indian tribe . . . that is held in trust by the United States

25 C.F.R. § 1.4(a).

The Village makes five separate challenges to 25 C.F.R. § 1.4 (TPC, Dkt. No. 15, Third – Seventh Claims for Relief, ¶¶ 59, 62, 68, 71, 77). All of the Village's claims fail under the APA. The APA waives federal sovereign immunity only for challenges to final agency actions, and here the Village does not challenge any agency action, final or otherwise, other than the promulgation of the regulation itself, which occurred in 1965. The APA carries a six-year statute of limitations, which has long since expired for any challenge to 25 C.F.R. §1.4. All five challenges should be dismissed for failure to state a claim.

1. APA claims must be brought within a six-year statute of limitations.

With an exception not relevant here, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first

accrues.” 28 U.S.C. § 2401(a).¹⁴ This includes actions filed under the APA. “There is a general six-year statute of limitations for civil actions against the United States found in 28 U.S.C. § 2401(a), which applies to lawsuits brought pursuant to the APA.” Solid Waste Agency of N. Cook County. v. U.S. Army Corps of Eng’rs, 191 F.3d 845, 853 (7th Cir. 1999), rev’d on other grounds, 531 U.S. 159 (2001); see also Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283, 1286-87 (5th Cir. 1997) (six-year statute of limitations applies to APA claims); Chemical Weapons Working Group, Inc. v. U.S. Dep’t of the Army, 111 F.3d 1485, 1494-95 (10th Cir. 1997) (same). “The federal courts have applied this limitations period to a wide variety of actions against the Government, including claims arising under the Administrative Procedure Act Indeed . . . ‘the words “every civil action” mean what they say . . . [.] § 2401(a) applies to all civil actions whether legal, equitable or mixed.’” Macklin v. United States, 300 F.3d 814, 821 (7th Cir. 2002) (quoting Spannaus v. U.S. Dep’t of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987)).

2. The statute of limitations has expired because the Village challenges the enactment of a regulation that was promulgated in 1965.

Two of the Village’s five claims directly attack the promulgation of 25 C.F.R. § 1.4 itself. Because the regulation was adopted in 1965, the statute of limitations for challenging it expired decades ago. See, e.g., Harris v. FAA, 353 F.3d 1006, 1008 (D.C. Cir. 2004) (dismissing as untimely an APA claim brought in 2001 by air traffic controllers challenging recruitment notice published in 1993).

First, the Village argues that the promulgation of 25 C.F.R. § 1.4 exceeded the Secretary’s authority in that it removes land from state and local jurisdiction. TPC, Dkt. No. 15,

¹⁴ The exception is “as provided by the Contract Disputes Act of 1978.” 28 U.S.C. § 2401(a).

at ¶¶ 58-59 (Third Claim for Relief). The Village makes clear that it is particularly challenging the Secretary's act of promulgating the regulation: "In creating 25 C.F.R. § 1.4 . . . the Secretary of the Interior . . . exceeded the scope of his authority under the IRA and other laws, and adopted regulations that are manifestly contrary to the statute." *Id.* ¶ 53. Second, and similarly, the Village contends that the Secretary failed to "supply a reasoned analysis and justification for" the adoption of 25 C.F.R. § 1.4. *Id.* ¶¶ 61-62 (Fourth Claim for Relief).

However, this action by the Secretary took place 45 years ago, on June 9, 1965. 30 Fed. Reg. 7520. Therefore, the statute of limitations for challenging the regulation under the APA expired in 1971, and the Village's challenges are time-barred. "The right disposition of a time-barred suit against the United States is dismissal with prejudice." Wis. Valley Improvement Co. v. United States, 569 F.3d 331, 334 (7th Cir. 2009).

3. The Village fails to bring an as-applied challenge to the regulation because it has not identified any "final agency action" permitting suit under the APA.

The other three of the Village's five claims purport to bring an as-applied challenge to 25 C.F.R. § 1.4. *See* TPC, Dkt. No. 15, ¶ 68 (Fifth Claim for Relief) (contending regulation is "unconstitutional as applied in this case" because it deprives the Village of a republican form of government in violation of the Guarantee Clause); ¶ 71 (Sixth Claim for Relief) (contending regulation is "unconstitutional as applied in this case" because it violates the Tenth Amendment); ¶¶ 75-77 (Seventh Claim for Relief) (alleging that the United States is "applying" the regulation in violation of the Fourteenth Amendment rights of non-Indian Village citizens). Leaving aside the questionable merits of these claims, these allegations utterly fail to identify a "final agency action" that would invoke the APA's waiver of sovereign immunity. *See, e.g., Fund for*

Animals, Inc. v. Bureau of Land Mgmt., 460 F.3d 13, 19 (D.C. Cir. 2006) (dismissing challenge to agency's budget request because it did not constitute even agency action, "much less 'final agency action'"); Flue-Cured Tobacco Coop. Stabilization Corps. v. EPA, 313 F.3d 852, 854 (4th Cir. 2002) (dismissing challenge to report characterizing tobacco as carcinogen because report was not final agency action); Amer. Trucking Assoc. v. United States, 755 F.2d 1292, 1298 (7th Cir. 1985) (dismissing challenge to informal report issued by Interstate Commerce Commission because report did not constitute final agency action).

As explained above, the United States has taken no action at all, let alone a final action, vis-a-vis the Village's stormwater charge. For the APA's waiver of sovereign immunity to apply, the Village must identify a federal agency action that is the "consummation of the agency's decisionmaking process" and that is "one by which rights or obligations have been determined or from which legal consequences will flow." Home Builders Ass'n, 335 F.3d at 614 (quoting Bennett, 520 U.S. at 177-78). Here, there has been no agency decisionmaking process. No federal agency has even been presented with any question about which to make a decision. The United States has taken no action determining any rights or obligations of the Village or anyone else. Therefore, there is no waiver of sovereign immunity for the Village's claims, and they should be dismissed.

D. The United States has not waived sovereign immunity for claims challenging title to Indian lands.

In its Answer and Counterclaims to the Tribe's Complaint, the Village contends that "[s]ome or all of" the land that the United States holds in trust for the Tribe was not validly acquired in trust. Answer, Dkt. No. 4, ¶ 11. Although the Village does not raise this issue in its

Third-Party Complaint, the United States will very briefly demonstrate that it has not waived sovereign immunity for any claim seeking to invalidate the United States's title in the land.

The Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, prohibits suits challenging the United States's title in trust or restricted Indian lands. See Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961-62 (10th Cir. 2004) (citing Mottaz, 476 U.S. at 843). The QTA waives federal sovereign immunity for suits to adjudicate disputed title to lands, but explicitly states that the waiver does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a(a). See Shawnee Trail Conservancy v. U.S. Dep't of Agric., 222 F.3d 383, 388 (7th Cir. 2000) (noting the statute's "preservation of immunity in cases where the United States claims an interest in land as trust or restricted Indian land"). For a suit to be prohibited under the QTA, a plaintiff need not explicitly characterize its action as seeking to quiet title in Indian lands. As long as the relief sought would interfere with the United States's title to the land, the Indian lands exception to the QTA bars the suit. See Neighbors, 379 F.3d at 961-62 (action seeking declaratory judgment that trust acquisition of Indian lands was null and void barred by the QTA); Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 143 (9th Cir. 1987) (action barred by QTA where the "effect of a successful challenge would be to quiet title in others than the Tribe").

Accordingly, to the extent the Village seeks a judgment from this Court invalidating the United States's title to lands it holds in trust for the Tribe, the Village's claim is barred by sovereign immunity under the QTA.

VI. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court dismiss the Third-Party Complaint for lack of jurisdiction and failure to state a claim.

Respectfully submitted this 13th day of October, 2010.

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/s/ Amy S. Tryon

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Exhibit 1

Notice of Draft NPDES Permit for Village of Hobart

April 23, 2010

SEP 23 2010

WN-16J

CERTIFIED MAIL 7001 0320 0005 8914 7607
RETURN RECEIPT REQUESTED

Ms. Elaine Willman
Administrator, Village of Hobart
2990 S. Pine Tree Road
Hobart, Wisconsin 54155

Re: Public Notice of Draft NPDES Permit No. WI-0073024-1
Village of Hobart Small MS4

Dear Administrator Willman:

Your application and supporting documents have been reviewed and processed in accordance with rules adopted under 40 Code of Federal Regulations (CFR) Part 124. Enclosed is the draft National Pollutant Discharge Elimination System (NPDES) permit which applies to the discharge from the above referenced facility.

Pursuant to 40 CFR Part 124.10, a notice is being sent to you and other interested parties. This notice is for the tentative determination to issue the above referenced NPDES permit. We also ask that you post a copy of the notice at Village Hall. The comment period is open until May 30, 2010, in order to solicit input from interested parties, including the general public.

Please review these documents carefully and become familiar with the terms and conditions. Comments concerning the draft permit should be submitted in accordance with the procedure outlined in the enclosed public notice. We suggest that you contact us to discuss major concerns you may have with or objections to the draft permit.

Questions concerning this draft permit may be addressed to Brian Bell or Bob Newport of my staff, at (312) 886-0981 and (312) 886-1513, respectively.

Sincerely yours,

Kevin M. Pierard
Chief, NPDES Programs Branch

[Handwritten signature and date: 10/13/10]

Statement of Basis

NPDES Permit For Stormwater Discharges from the Village of Hobart, Wisconsin's Regulated Municipal Separate Storm Sewer System (MS4) To Waters of the United States

Permit No.: **WI0073024**

Public Notice No.: **10-04-01-A**

Permit issued on [the date of signature and to be determined]

Permit will expire on [five years from the date of signature]

Statutory and Regulatory Background

EPA published Phase I of the national stormwater regulations in 1990 and required medium and large municipal separate storm sewer systems (MS4s) to apply for a National Pollutant Discharge Elimination System (NPDES) permit for their stormwater discharges (Federal Register/Vol. 55, No. 222, 11/16/1990, pg.47990). In 1999, EPA published Phase II of the national stormwater regulations. Operators of regulated small MS4 were required to apply for permit coverage by March 2003 (Federal Register/Vol. 64, No. 235, 12/8/1999, pg.68722). NPDES permits issued to Phase II MS4s require small MS4s to develop and implement a stormwater management program which addresses the six minimum control measures described in the rule:

- Public Education and Outreach
- Public Participation and Involvement
- Illicit Discharge Detection and Elimination
- Construction Site Erosion and Sediment Control
- Post-Construction Erosion and Sediment Control
- Pollution Prevention/Good Housekeeping

For each of the minimum control measures, the operator must develop and implement best management practices (BMPs) to reduce pollutants in discharges to the maximum extent practicable, and establish measurable goals for each minimum control measure. See 40 CFR 122.34(b) and (d).

The Village of Hobart MS4 (Permittee) is located within the Green Bay urbanized area and is a regulated small MS4 community. An urbanized area as delineated by the Bureau of Census is defined as a central place or places and the adjacent densely settled surrounding area that together have a residential population of at least 50,000 people and overall population density of at least 500 people per square mile.

A Federal NPDES permit is being issued for Hobart MS4 discharges located within the boundaries of the Reservation of the Oneida Tribe of Indians of Wisconsin. See Appendix 1 to the Preamble - Federally - Recognized American Indian Areas Located Fully or Partially in Bureau of The Census Urbanized Areas (Federal Register/Vol. 64, No. 235, 12/8/1999, pg. 68803). NPDES permits for discharges in Indian Country are issued by U.S. EPA. *Indian Country*, as defined in 18 USC 1151, means: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished. This definition includes all land held in trust for a Federally-recognized American Indian Tribe. Pursuant to the definition, the Reservation of the Oneida Tribe of Indians of Wisconsin is part of Indian Country and permits for discharges within the Reservation boundaries are the responsibility of U.S. EPA.

Village of Hobart Application History

The Permittee is a regulated small MS4 community and its population is 5,873 as reported on the Permittee's October 1, 2006 notice of intent (NOI) submitted to the Wisconsin Department of Natural Resources.

On January 24, 2007, the Permittee submitted the NOI to the U.S. Environmental Protection Agency which had previously submitted to the Wisconsin Department of Natural Resources to apply for coverage under the Wisconsin Pollutant Discharge Elimination System MS4 general permit. The Permittee requested coverage under a NPDES MS4 permit for its stormwater discharges which are located within the Oneida Reservation.

On May 23, 2007, EPA sent a follow-up letter to the Village of Hobart requesting any construction approvals and whether discharges from its small MS4 affect Federally-listed endangered or threatened species or critical habitat, or historic properties. On April 14, 2008, EPA also sent letters to the Oneida Tribal Historic Preservation Officer (THPO) and the Green Bay Office of the U.S. Fish and Wildlife Services stating that we were drafting a small MS4 permit for the Village of Hobart and requesting a determination as to whether the stormwater discharges from the affect endangered species or historic properties. (See Requirements of Federal Law, below).

On the basis of preliminary staff review and applicable standards and regulations, the Regional Administrator of the EPA, Region 5, proposes to issue a permit for discharges from the Permittee's MS4.

Why EPA regulates MS4s and what kinds of pollutants may discharge to U.S. waters

Stormwater discharges from MS4s in urbanized areas are a concern because of the presence of pollutants in these discharges. Common pollutants include oil and grease from roadways, pesticides from lawns, sediment from construction sites, and trash such as cigarette butts, paper

wrappers, and plastic bottles. Bacteria is also commonly present in stormwater discharges. Stormwater picks up and transports these pollutants and then discharges them, untreated, to waterways via separate storm sewer systems. When left uncontrolled these discharges may impair receiving waters, thereby discouraging recreational use of the resource, contaminating drinking water supplies, and interfering with habitat of fish, other aquatic organisms, and wildlife.

Requirements of Federal Law

Comply with Endangered Species Act

Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them is not likely to jeopardize the continued existence of listed species or modify their critical habitat. EPA has contacted the U.S. Fish and Wildlife Service (USFWS), Green Bay Field Office. According to the USFWS, the bald eagle is found on the Oneida Reservation. In an April 30, 2008 letter, the USFWS concurred with EPA's determination that issuance of the permit will not affect endangered or threatened species.

Comply with National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires that Federal agencies having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking or independent agency having authority to license any undertaking shall take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. Federal agencies shall afford the Advisory Council on Historic Preservation established under Title II of NHPA a reasonable opportunity to comment with regard to such undertaking.

EPA has no evidence/information that historic or archeological sites will be affected by issuance of the permit. In a May 2, 2008 letter, the Oneida Tribal Historic Preservation Office concurred with EPA's findings that issuance of the permit will have no impact on historical or cultural sites within the project area.

Summary of Permit Conditions

Permit Coverage

The proposed permit will cover stormwater discharges from all existing and new outfalls of the Permittee's MS4, located within village boundaries and also within the Green Bay urbanized area. This permit also authorizes the discharge of certain non-stormwater sources provided, as described in Part 1.2.2.2 of the permit, that EPA has not determined these sources to be substantial contributors of pollutants to the MS4.

Stormwater Management Plan and Six Minimum Control Measures

The Permit requires the Permittee to develop and implement a stormwater management program (SWMP) which includes BMPs and measurable goals for the following six minimum control measures:

1. Public Education and Outreach - Informing individuals, businesses and organizations within the MS4 area as to the impact of contaminated stormwater discharges on surface water quality and how they can help reduce stormwater contamination.
2. Public Participation and Involvement - Creating opportunities for individuals and organizations to participate in the development and implementation of activities to reduce the contamination of stormwater.
3. Illicit Discharge Detection and Elimination - A program to detect and eliminate cross-connections, dumping of wastes and other non-stormwater discharges into the storm sewer system.
4. Construction Site Runoff Control - A program to implement erosion and sediment controls for construction sites where one or more acres of land is disturbed.
5. Post-Construction Runoff Control - A program requiring the development, implementation and maintenance of controls on sites after development or redevelopment to address stormwater pollutants and flow issues. The post-construction requirements in the proposed permit include performance standards addressing Total Suspended Solids Control, Peak Discharge Rate, and Infiltration/Hydrology. The Infiltration/Hydrology performance standards are needed to help ensure new development/redevelopment, and the impervious surfaces that are constructed, do not impair the quality of the receiving waters. The requirements are equivalent to State of Wisconsin post-construction requirements.
6. Pollution Prevention/Good Housekeeping - A program to minimize pollutant discharges from municipal operations such as garages, salt piles, landscaping and storage and use pesticides, etc.

The Permittee will submit the minimum control measures required in the storm water management program to EPA Region 5 for review and approval according to the compliance schedule in the permit.

Effluent Limits

Section 2 of the permit contains non-numeric effluent limits. This section of the permit requires the Permittee to reduce the discharge of pollutants to the maximum extent practicable (MEP) in compliance with the management practices, control techniques, systems, design and engineering methods, and other provisions required under this permit. This section of the permit also

prohibits non-stormwater discharges into the storm sewer system (except as allowed pursuant to Section 1.2.2.2 of the permit) and requires that the Permittee shall not discharge the following substances from the MS4:

- Solids that settle to form putrescence or otherwise objectionable sludge deposits.
- Oil, grease, or other floating material that form noticeable accumulations of debris, scum, foam, or sheen.
- Color or odor that is unnatural and to such a degree as to create a nuisance.
- Toxic substances in amounts harmful to aquatic life, wildlife, or humans.
- Nutrients conducive to excessive growth of aquatic plants and algae to the extent that such growth is detrimental to desirable forms of aquatic life, creates conditions that are unsightly, or is a nuisance.
- Any other substances that impair, or threaten to impair, beneficial uses of the receiving waters.

Section 5 of the permit contains discharge observation/assessment requirements to assess compliance with the effluent limits and the minimum control measures enumerated in the permit.

Controlling Discharges to the Maximum Extent Practicable

The Permittee must reduce the discharge of pollutants to the maximum extent practicable (MEP) to protect water quality, and satisfy the applicable water quality requirements of the Clean Water Act. The federal Clean Water Act (CWA) requires that regulated MS4s "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator [of EPA] or the State determines appropriate for the control of such pollutants." EPA sees MEP as an iterative process -- MEP should continually adapt to current conditions and new BMPs and technologies. Successive iterations of BMPs and measurable goals will be driven by the objective of ensuring discharges support achievement of water quality standards.

For the purposes of this permit and this permit cycle, EPA Region 5 considers MEP to be implementation of measures to meet Sections 2 (Effluent Limitations), 3 (Special Conditions) and 4 (Stormwater Management Program) of the permit. With regard to the post-construction control measures, if the permittee complies with the requirements in Section 4 of the permit and in Appendix A, EPA Region 5 would consider that to meet MEP for this permit cycle.

Compliance Monitoring and Assessment of Program Effectiveness

EPA regulations require permits to prescribe monitoring as needed to assure compliance with the effluent limits. See 40 CFR 122.44(i). The Permittee must also evaluate program effectiveness, the appropriateness of identified BMPs, and progress toward achieving identified measurable goals. The results of annual program reviews will be reported on in annual reports to EPA.

The proposed permit contains discharge observation and assessment requirements. The objective of these requirements is to assess stormwater management program performance and to determine compliance with the narrative effluent limitations in Section 2 of the permit. The importance of these objectives is weighed against logistical considerations and the burden to the MS4 operator. The proposed permit requires the Permittee to conduct visual observations/assessments of at least 20% of the Permittee's outfalls (discharge locations) each year in the spring, summer, or fall. Visual observations/assessments must be within ½ day after the start of a measurable storm event.

In addition to conducting visual observations/assessments during or soon after wet weather events, the program to detect and eliminate illicit discharges requires field screening in dry weather. Flow in the MS4 in dry weather is a strong indication there may be an illicit connection conveying flows to the stormwater system or illegal dumping.

If the permittee discharges to surface waters for which a total maximum daily load (TMDL) has been approved, the permittee will describe a monitoring program to determine whether the stormwater controls are adequate to meet the waste load allocation or other performance requirements of the TMDL. Currently, EPA has not approved any TMDLs for water bodies to which the County's MS4 discharges. Information on approved TMDLs in Region 5 can be found at:

Recordkeeping

The Permittee must retain records of all information required to be generated under the permit for a period of at least three years. In accordance with 40 CFR 122.34(g)(2), the Permittee must make the records and the description of the stormwater management program available to the public if requested to do so in writing.

Annual Report

In accordance with 40 CFR 122.34(g)(3), the Permittee must submit annual reports to EPA, Region 5 office, as described in Part 4.3 of the permit. The first annual report is due March 31, 2011.

Procedures for reaching a final decision on the proposed permit

Comment Period: Interested parties may submit written comments on the draft permit within 30 days of the date of the public notice. Comments should be delivered or mailed to:

Attention: Brian Bell
U.S. Environmental Protection Agency, Region 5
NPDES Programs Branch (WN-16J)
77 West Jackson Boulevard
Chicago, Illinois 60604

Interested parties may also send electronic comments via email to: bell.brianc@epa.gov

Where to find a copy of the proposed permit: Send your request to the above address or via email to bell.brianc@epa.gov, or an electronic copy of the draft permit can be found at the following internet address:

Procedures for requesting a hearing: Any person may request a public hearing on the issuance of this permit. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. The request must be submitted in writing within 30 days of the date of the Public Notice, and should be mailed or delivered to the above address or via email to: bell.brianc@epa.gov. EPA, Region 5 will hold a public hearing if there is a significant degree of public interest in the draft permit.

For additional information: Please contact Brian Bell at the above address, via email to: bell.brianc@epa.gov or by calling (312) 886-0981.

Exhibit 2

Notice of Draft NPDES Permit for Oneida Tribe

April 23, 2010

APR 23 2010

WN-16J

CERTIFIED MAIL 7001 0320 0005 8914 7591
RETURN RECEIPT REQUESTED

Ms. Deborah Thundercloud
General Manager
Oneida Tribe of Indians of Wisconsin
PO Box 365
Oneida, WI 54155

Re: Public Notice of Draft NPDES Permit No. WI-0073032-1
Oneida Tribe Small MS4

Dear Ms. Thundercloud:

Your application and supporting documents have been reviewed and processed in accordance with rules adopted under 40 Code of Federal Regulations (CFR) Part 124. Enclosed is the draft National Pollutant Discharge Elimination System (NPDES) permit which applies to the discharge from the above referenced facility.

Pursuant to 40 CFR Part 124.10, a notice is being sent to you and other interested parties. This notice is for the tentative determination to issue the above referenced NPDES permit. We also ask that you post a copy of the notice at the Tribal Center. The comment period is open until May 28, 2010, in order to solicit input from interested parties, including the general public.

Please review these documents carefully and become familiar with the terms and conditions. Comments concerning the draft permit should be submitted in accordance with the procedure outlined in the enclosed public notice. We suggest that you contact us to discuss major concerns you may have with or objections to the draft permit.

Questions concerning this draft permit may be addressed to Brian Bell or Bob Newport of my staff, at (312) 886-0981 and (312) 886-1513, respectively.

Sincerely yours,

Kevin M. Pierard
Chief, NPDES Programs Branch

Statement of Basis

NPDES Permit For Stormwater Discharges from the Oneida Tribe of Indians of Wisconsin's Regulated Municipal Separate Storm Sewer System (MS4) To Waters of the United States

Permit No.: **WI0073032**

Public Notice No.: **10-04-01-A**

Permit issued on [the date of signature and to be determined]

Permit will expire on [five years from the date of signature]

Statutory and Regulatory Background

EPA published Phase I of the national stormwater regulations in 1990 and required medium and large municipal separate storm sewer systems (MS4s) to apply for a National Pollutant Discharge Elimination System (NPDES) permit for their stormwater discharges (Federal Register/Vol. 55, No. 222, 11/16/1990, pg.47990). In 1999, EPA published Phase II of the national stormwater regulations. Operators of regulated small MS4 were required to apply for permit coverage by March 2003 (Federal Register/Vol. 64, No. 235, 12/8/1999, pg.68722). NPDES permits issued to Phase II MS4s require the small MS4s to develop and implement a stormwater management program which addresses the six minimum control measures described in the rule. These include:

- Public Education and Outreach
- Public Participation and Involvement
- Illicit Discharge Detection and Elimination
- Construction Site Erosion and Sediment Control
- Post-Construction Erosion and Sediment Control
- Pollution Prevention/Good Housekeeping

For each of the minimum control measures, the operator must develop and implement best management practices (BMPs) to reduce pollutants in discharges to the maximum extent practicable, establish measurable goals for each BMP and assign a responsible person to ensure the BMPs and measurable goals are met.

The Oneida Tribe Municipal Separate Storm Sewer System (Permittee) is a regulated small MS4 as indicated in Appendix 1 to the Preamble - Federally - Recognized American Indian Areas Located Fully or Partially in Bureau of The Census Urbanized Areas (Federal Register/Vol. 64, No. 235, 12/8/1999, pg.68803).

An urbanized area as delineated by the Bureau of Census is defined as a central place or places and the adjacent densely settled surrounding area that together have a residential population of at least 50,000 people and overall population density of at least 500 people per square mile.

A Federal NPDES permit is being issued for the Oneida MS4 discharges located within the boundaries of the Reservation. See Appendix 1 to the Preamble - Federally - Recognized American Indian Areas Located Fully or Partially in Bureau of The Census Urbanized Areas (Federal Register/Vol. 64, No. 235, 12/8/1999, pg. 68803). NPDES permits for discharges in Indian Country are issued by U.S. EPA. *Indian Country*, as defined in 18 USC 1151, means: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished. This definition includes all land held in trust for a Federally-recognized American Indian Tribe. Pursuant to the definition, the Reservation of the Oneida Tribe of Indians of Wisconsin is part of Indian Country and permits for discharges within the Reservation boundaries are the responsibility of U.S. EPA.

Oneida Tribe Application History

The Permittee is a regulated small MS4 community. The population within the Reservation is 21,321, as reported on the Permittee's September 16, 2009 notice of intent (NOI) submitted to U.S. EPA.

On May 23, 2007, EPA sent a letter to the Oneida Tribe requesting application information, including general information codified at 40 CFR 122.21(f) and minimum measures listed in 40 CFR 122.34, and whether discharges from its small MS4 affect Federally-listed endangered or threatened species or critical habitat, or historic properties. On September 16, 2009, the Oneida Tribe responded with the requested information.

On the basis of preliminary staff review and applicable standards and regulations, the Regional Administrator of the EPA, Region 5, proposes to issue a permit for discharges from the Permittee's MS4.

Why EPA regulates MS4s and what kinds of pollutants may discharge to U.S. waters

Stormwater discharges from MS4s in urbanized areas are a concern because of the presence of human made pollutants in these discharges. Common pollutants include oil and grease from roadways, pesticides from lawns, sediment from construction sites, and trash such as cigarette butts, paper wrappers, and plastic bottles. Stormwater picks up and transports these pollutants and then discharges them, untreated, to waterways via separate storm sewer systems. When left uncontrolled these discharges may impair the waterways, thereby discouraging recreational use of the resource, contaminating drinking water supplies, and interfering with habitat of fish, other aquatic organisms, and wildlife.

Requirements of Federal Law

Comply with Endangered Species Act

Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them is not likely to jeopardize the continued existence of listed species or modify their critical habitat. EPA has contacted the U.S. Fish and Wildlife Service (USFWS), Green Bay Field Office. According to the USFWS, the bald eagle is found on the Oneida Reservation. In an April 30, 2008 letter, the USFWS concurred with EPA's determination that issuance of the permit will not affect the Bald Eagle or other threatened or endangered species.

Comply with National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires that Federal agencies having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking or independent agency having authority to license any undertaking shall take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. Federal agencies shall afford the Advisory Council on Historic Preservation established under Title II of NHPA a reasonable opportunity to comment with regard to such undertaking.

EPA believes that no historic or archeological sites will be affected by issuance of the permit. In a May 2, 2008 letter, the Oneida Tribal Historic Preservation Office concurred with EPA's findings that issuance of the permit will have no impact on historical or cultural sites within the project area.

Summary of Permit Conditions

Permit Coverage

The proposed permit will cover stormwater discharges to waters of United States from all existing and new outfalls of the Permittee's MS4 located within the Oneida Reservation. This permit also authorizes the discharge of certain non-stormwater sources provided, as described in Part 1.2.2.2 of the permit, that EPA has not determined these sources to be substantial contributors of pollutants to the MS4.

Stormwater Management Program and Six Minimum Control Measures

The permit requires the Permittee to develop and implement a stormwater management program which includes best management practices (BMPs) and measurable goals for each of the following six minimum control measures:

1. **Public Education and Outreach - Informing individuals, businesses and organizations within the MS4 area as to the impact of contaminated stormwater discharges on surface water quality and how they can help reduce stormwater contamination.**
2. **Public Participation and Involvement - Creating opportunities for individuals and organizations to participate in the development and implementation of activities to reduce the contamination of stormwater.**
3. **Illicit Discharge Detection and Elimination - A program to detect and eliminate cross-connections, dumping of wastes and other non-stormwater discharges into the storm sewer system.**
4. **Construction Site Runoff Control - A program to require erosion and sediment controls for construction sites where one or more acres of land is disturbed.**
5. **Post-Construction Runoff Control - A program requiring the development, implementation and maintenance of controls on sites after development or redevelopment to address stormwater pollutants and flow issues. The post-construction requirements in the draft permit include performance standards addressing Total Suspended Solids Control, Peak Discharge Rate, and Infiltration/Hydrology. The Infiltration/Hydrology performance standards are needed to help ensure new development/redevelopment, and the impervious surfaces that are constructed, do not impair the quality of the receiving waters. The requirements are equivalent to post-construction requirements applicable in other parts of the State of Wisconsin.**
6. **Pollution Prevention/Good Housekeeping - A program to minimize pollutant discharges from Tribal operations such as garages, salt piles, landscaping and storage and use pesticides, etc.**

The Permittee will submit the minimum control measures required in the storm water management program to EPA Region 5 for review and approval according to the compliance schedule in the permit.

Effluent Limits

Section 2 of the permit contains non-numeric effluent limits. This section of the permit requires the Permittee to reduce the discharge of pollutants to the maximum extent practicable (MEP) in compliance with the management practices, control techniques, systems, design and engineering methods, and other provisions required under this permit. This section of the permit also prohibits non-stormwater discharges into the storm sewer system (except as allowed pursuant to Section 1.2.2.2 of the permit) and requires that the Permittee shall not discharge the following substances from the MS4:

- Solids that settle to form putrescence or otherwise objectionable sludge deposits.

- Oil, grease, or other floating material that form noticeable accumulations of debris, scum, foam, or sheen.
- Color or odor that is unnatural and to such a degree as to create a nuisance.
- Toxic substances in amounts harmful to aquatic life, wildlife, or humans.
- Nutrients conducive to excessive growth of aquatic plants and algae to the extent that such growth is detrimental to desirable forms of aquatic life, creates conditions that are unsightly, or is a nuisance.
- Any other substances that impair, or threaten to impair, beneficial uses of the receiving waters.

Section 5 of the permit contains discharge observation/assessment requirements to assess compliance with the effluent limits and the minimum control measures enumerated in the permit.

Controlling Discharges to the Maximum Extent Practicable

The Permittee must reduce the discharge of pollutants to the maximum extent practicable (MEP) to protect water quality, and satisfy the applicable water quality requirements of the Clean Water Act. The federal Clean Water Act (CWA) requires that regulated MS4s “reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator [of EPA] or the State determines appropriate for the control of such pollutants.” EPA sees MEP as an iterative process -- MEP should continually adapt to current conditions and new BMPs and technologies. Successive iterations of BMPs and measurable goals will be driven by the objective of ensuring discharges support achievement of water quality standards.

For the purposes of this permit and this permit cycle, EPA Region 5 considers MEP to be implementation of measures to meet Sections 2 (Effluent Limitations), 3 (Special Conditions) and 4 (Stormwater Management Program) of the permit. With regard to the post-construction control measures, if the permittee complies with the requirements in Section 4 of the permit and in Appendix A, EPA Region 5 would consider that to meet MEP for this permit cycle.

Compliance Monitoring and Assessment of Program Effectiveness

EPA regulations require permits to prescribe monitoring as needed to assure compliance with the effluent limits. See 40 CFR 122.44(i) The Permittee must also evaluate program effectiveness, the appropriateness of identified BMPs, and progress toward achieving identified measurable goals. The results of annual program reviews will be reported on in annual reports to EPA.

The proposed permit contains discharge observation and assessment requirements. The objective of these requirements is to assess stormwater management program performance and to determine compliance with the narrative effluent limitations in Section 2 of the permit. The importance of these objectives is weighed against logistical considerations and the burden to the MS4 operator. The proposed permit requires the Permittee to conduct visual observations/

assessments of at least 20% of the Permittee's outfalls (discharge locations) each year in the spring, summer, or fall. Visual observations/assessments must be within ½ day after the start of a measurable storm event.

In addition to conducting visual observations/assessments during or soon after wet weather events, the program to detect and eliminate illicit discharges requires field screening in dry weather. Flow in the MS4 in dry weather is a strong indication there may be an illicit connection conveying flows to the stormwater system or illegal dumping.

If the permittee discharges to surface waters for which a total maximum daily load (TMDL) has been approved, the permittee will describe a monitoring program to determine whether the stormwater controls are adequate to meet the waste load allocation or other performance requirements of the TMDL. Currently, EPA has not approved any TMDLs for water bodies to which the County's MS4 discharges. Information on approved TMDLs in Region 5 can be found at:

Recordkeeping

The Permittee must retain records of all information required to be generated under the permit for a period of at least three years. In accordance with 40 CFR 122.34(g)(2), the Permittee must make the records and the description of the stormwater management program available to the public if requested to do so in writing.

Annual Report

In accordance with 40 CFR 122.34(g)(3), the Permittee must submit annual reports to EPA, Region 5 office, as described in Part 4.3 of the permit. The first annual report is due March 31, 2011.

Procedures for reaching a final decision on the proposed permit

Comment Period: Interested parties may submit written comments on the draft permit within 30 days of the date of the public notice. Comments should be delivered or mailed to:

Attention: Brian Bell
U.S. Environmental Protection Agency, Region 5
NPDES Programs Branch (WN-16J)
77 West Jackson Boulevard
Chicago, Illinois 60604

Interested parties may also send electronic comments via email to: bell.brianc@epa.gov

Where to find a copy of the proposed permit: Send your request to the above address or via email to bell.brianc@epa.gov, or an electronic copy of the draft permit can be found at the

following internet address:

Procedures for requesting a hearing: Any person may request a public hearing on the issuance of this permit. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. The request must be submitted in writing within 30 days of the date of the Public Notice, and should be mailed or delivered to the above address or via email to: bell.brianc@epa.gov. EPA, Region 5 will hold a public hearing if there is a significant degree of public interest in the draft permit.

For additional information: Please contact Brian Bell at the above address, via email to: bell.brianc@epa.gov or by calling (312) 886-0981.

Exhibit 3

Letter from Russell E. Train, EPA Administrator,
to Patrick J. Lucey, Governor of Wisconsin

February 4, 1974



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 4 1974

THE ADMINISTRATOR

Dear Governor Lucey:

Your request dated November 7, 1973, for approval to conduct a State Permit Program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Federal Water Pollution Control Act of 1972 (the "Act") is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency under subsection (a) of Section 402 of the Act as to all discharges in the State of Wisconsin other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with Section 402 of the Act, all guidelines promulgated pursuant to Section 304(h)(2) of the Act, and the Memorandum of Agreement between the Regional Administrator of EPA's Region V and the Administrator of the Division of Environmental Protection, Wisconsin Department of Natural Resources, which I have also approved today (copy enclosed).

In addition, this approval is based upon Mr. Frangos' December 27 letter to Mr. McDonald in which he states that interim effluent limitations will be adopted by the DNR as emergency rules by February 1, 1974 for the categories of sources listed in Wisconsin regulation NR 220. I understand that these rules as well as your procedural rules have been adopted and are presently in effect.

I strongly support Wisconsin's goal, as set forth in paragraph 4 of the November 29, 1973 letter to Region V, of issuing NPDES permits to all dischargers in the State of Wisconsin by December 31, 1974. We note with concern that some States which have assumed the NPDES program have not taken their permit issuance commitments seriously, thereby compromising their chances of meeting the December 31 deadline. Because all facilities discharging without an NPDES permit after that date will be in violation of the Act and possibly subject to severe penalty provisions, we vigorously urge the State of Wisconsin to honor this important commitment. In order to facilitate EPA's review of the State's progress in processing permits, we are

asking our Regional Office to request from Mr. Frangos a weekly report identifying by name the permits drafted, sent to public notice, and issued by the Division of Environmental Protection.

The Memorandum of Agreement has established an important relationship between the parties for enforcement of permit violations as well as for permit issuance. It gives Wisconsin the first opportunity to take enforcement action for violations of all federally-issued permits except those issued to agencies and instrumentalities of the federal government and for Indian activities on Indian lands. Of course, if the State does not take appropriate enforcement action for violations of either State- or federally-issued NPDES permits the Agreement does not intend to and will not foreclose direct enforcement action in any case where EPA determines that federal enforcement proceedings are warranted.

We note with pleasure that Wisconsin becomes one of the first eight States to receive authority to administer the NPDES program. The Wisconsin DNR has already set a good example by drafting permits during the federal administration of the NPDES program. This achievement is accredited to the energy shown by Mr. Frangos and his staff at the DNR in their efforts to make it possible.

Speaking on behalf of the Environmental Protection Agency and its staff, let me assure you that we will do everything possible to aid you in your commitment to eliminate the blight of water pollution.

Sincerely yours,

/s/

Russell E. Train

Honorable Patrick J. Lucey
Governor of Wisconsin
Madison, Wisconsin 53702

Enclosure

cc: Mr. Thomas G. Frangos, Administrator
Division of Environmental Protection
Wisconsin Department of Natural Resources

bcc: AX (2) OGC Chron
Richard Johnson, AGW Reading
Albert C. Printz, AGW
Valdas V. Adamkus, Deputy RA, Region V
James McDonald, Director, Enforcement Div., Region V

Written by Henry Balikov, Region V, 1/2/74
Rewritten by Henry Balikov and Bob Emmett, AGW, 1/4/74
Rewritten by Henry Balikov and Bob Emmett, AGW, 1/28/74

Exhibit 4

Memorandum of Agreement Between
the State of Wisconsin Department of Natural Resources
and United States Environmental Protection Agency, Region V

February 4, 1974

MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

AND

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION V

INTRODUCTION

The Environmental Protection Agency (EPA) Guidelines for state program elements necessary for participation in the National Pollutant Discharge Elimination System (NPDES), 40 CFR 124, prepared pursuant to the authority contained in Section 304(h)(2) of the Federal Water Pollution Control Act Amendment of 1972 (referred herein as the Federal Act) were published in the Federal Register on December 22, 1972. Various sections of the Guidelines permit the chief administrative officer of a state water pollution control agency and the Regional Administrator of EPA to reach agreement on the manner in which the 40 CFR 124 Guidelines are to be implemented.

To satisfy the requirements of the Guidelines, the following procedures are hereby agreed to by the Administrator of the Division of Environmental Protection, State of Wisconsin Department of Natural Resources (referred to herein as the Administrator), and the Regional Administrator.

The sections and subsections of 40 CFR 124 related to these agreements are: 124.22, 124.23, 124.35(b), 124.35(c), 124.41(c), 124.44(d), 124.46, 124.47, 124.61(b), 124.62(c), 124.71(c), 124.72(b), 124.73(b)(2), and 124.80(d). The terms used in this Memorandum of Agreement have the same meaning as those used and defined in 40 CFR 124.1

I. RECEIPT AND USE FEDERAL DATA

- A. The two purposes of this part of the agreement are: (1) to provide for the transfer of data bearing on NPDES permit determinations from the EPA to the Wisconsin Department of Natural Resources and (2) to insure that any significant deficiencies in the transferred NPDES application will be corrected prior to issuance of an NPDES permit.
- B. Commencing immediately after the effective date of this agreement the Regional Administrator will transmit to the Administrator a list of all NPDES permit applications received by EPA. This list will include the name of each discharger, SIC Code, application number and indicate those applications which EPA has determined are administratively complete.

- C. After receipt of the list, the Administrator will indicate the order to be used by EPA to transmit the application files to him. The application file will include the NPDES permit application and any other pertinent data collected by EPA. The application files will be transmitted to the Administrator according to the order indicated. EPA will retain two copies of each file transmitted to the Administrator and route one copy to the Permit Branch and the second to the Regional Data Management Section, Surveillance and Analysis Section.
- D. For an application identified by EPA as not administratively complete, EPA will obtain the necessary information from the discharger and complete the application prior to its transmittal to the Administrator. The Administrator will obtain effluent data and any other additional information for those applications identified by EPA as administratively complete which he deems necessary to update or process the application.
- E. For each application for which additional information was obtained by the Administrator, two (2) copies of each completed application or completing amendments and a cover letter indicating that the application has been determined to be complete will be transmitted by the Administrator to the Regional Administrator, Attention: Permit Branch. One copy will be routed by the Regional Administrator to the Regional Data Management Section, Surveillance and Analysis Division, for processing into the National Data Bank and the other copy will be placed in the NPDES Permit Branch file.

II. TRANSMISSION OF NPDES APPLICATION FORMS TO REGIONAL ADMINISTRATOR

- A. After final approval of Wisconsin's NPDES permit program, the Administrator will assume initial responsibility for determining that applications submitted to the Department after that date are complete. When the Administrator determines that the NPDES forms received from the applicant are complete, two (2) copies of the forms with a cover letter indicating that the forms are complete will be transmitted to the Regional Administrator, Attention: Permit Branch. If EPA concurs with the Administrator, one (1) copy will be routed to the Regional Data Management Section, Surveillance and Analysis Division, through the Compliance Section, Enforcement Division for processing into the National Data Bank and the other copy will be placed in the Regional NPDES Permit Branch file. If the Regional Administrator does not concur that the application is complete, he shall within 20 days notify the Administrator by letter in which respects the application is deficient. No NPDES permit will be issued by the Administrator until the deficiencies are corrected.
- B. After receipt of an NPDES short form application from the Administrator, the Regional Administrator may identify the discharge as one for which an NPDES standard form shall be submitted. The Regional Administrator shall notify the Administrator of any such determination made with respect to any such discharge. After receipt of this determination the Administrator shall require the applicant to submit an NPDES standard application form or any other information requested by the Regional Administrator.

- C. When requested by the Regional Administrator, the Administrator will transmit copies of notices received by him from publicly owned treatment works pursuant to 40 CFR 124.45(d) and (e) and Section 147.14, Wisconsin Statutes, within 20 days of receipt of the request.
- D. The Regional Administrator may waive his right to receive copies of NPDES application forms with respect to classes, types and sizes within any category of point sources and with respect to minor discharges or discharges to particular navigable waters or parts thereof. Such written waiver must be issued by the Regional Administrator before the Administrator can discontinue transmitting copies of NPDES forms to EPA.

III. PUBLIC ACCESS TO INFORMATION

- A. The Administrator will protect any information (other than effluent data) contained in such NPDES form, or other records, reports or plans as confidential upon a showing by any person that such information, if made public, would divulge methods or processes entitled to protection as trade secrets of that person. If, however, the information being considered for confidential treatment is contained in an NPDES form, the Administrator will forward such information to the Regional Administrator for his concurrence in any determination of confidentiality. If the Regional Administrator does not agree that some or all of the information being considered for confidential treatment merits such protection, he will request advice from the Office of the General Counsel, stating the reasons for his disagreement with the determination of the Administrator. The Regional Administrator will simultaneously provide a copy of the request to the Administrator and to the person claiming trade secrecy. The General Counsel will determine whether the information in question would, if revealed, divulge methods or processes entitled to protection as trade secrets. In making such determinations, he will consider any additional information submitted to the Office of the General Counsel within 30 days of receipt of the request from the Regional Administrator. If the General Counsel determines that the information being considered does not contain trade secrets, he will so advise the Regional Administrator and will notify the person claiming trade secrecy of such determination by certified mail. No sooner than 30 days following the mailing of such notice, the Regional Administrator will communicate to the Administrator his decision not to concur in the withholding of such information and the Regional Administrator will then make available to the public, upon request, that information determined not to constitute trade secrets, unless an appeal is made to EPA by the person claiming trade secrecy. Following an appeal, the determination made by EPA will be conclusive unless reviewed in an appropriate district court of the United States.
- B. Any information accorded confidential status, whether or not contained in an NPDES form, will be disclosed by the Administrator, upon written request, to the Regional Administrator, or his authorized representative, who will maintain the disclosed information as confidential.

IV. TRANSMISSION TO REGIONAL ADMINISTRATOR OF PROPOSED NPDES PERMIT

A. At the time a public notice required by 40 CFR 124.32 and Section 147.09, Wisconsin Statutes, is issued, the Administrator will transmit one copy of the NPDES public notice, the fact sheet (if one is required) and proposed NPDES permit to the Regional Administrator, Attention: NPDES Permit Branch. The information transmitted with the proposed permit will include any and all terms, conditions, requirements or documents which are part of the proposed NPDES permit or which affect the State's authorization of the discharge of pollutants.

B. The Regional Administrator will be provided 45 days from the time he receives the proposed NPDES permit from the Administrator within which to object to, as provided for in Section 402(d)(2) of the Federal Act, comment upon or make a recommendation with respect to the proposed NPDES permit. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days. The Regional Administrator shall notify the Administrator within the time periods set forth above if EPA objects to or concurs with the issuance by the Administrator of the NPDES permit as proposed.

C. If a proposed NPDES permit issued with a public notice is modified as a result of comments received by the Department during the thirty-day comment period or as a result of a public hearing, the Administrator will transmit a revised copy of the proposed NPDES permit to the Regional Administrator, Attention: NPDES Permit Branch, and shall specify the reasons for the modifications.

The Regional Administrator shall be provided 45 days from the time he receives the proposed NPDES permit, as revised, within which to object, comment upon or make recommendations with respect to any such revisions. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days. The Regional Administrator shall notify the Administrator within the time periods set forth above if EPA either objects to or concurs with the issuance by the Administrator of the NPDES permit as revised.

D. Upon receipt of any written comments on any proposed NPDES permit from any State whose waters may be affected by the issuance of such a permit, the Administrator shall consider such written recommendations and may modify the proposed NPDES permit accordingly. If the Administrator fails to accept, in whole or in part, the written recommendations of such a State, he shall immediately notify the Regional Administrator of his reasons for so doing. The Regional Administrator, notwithstanding the provisions of Paragraph B above, shall be provided 45 days from the time he receives such notification from the Administrator within which to object to, comment upon or make recommendations with respect to the issuance of the proposed NPDES permit. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days.

- E. No later than 120 days from the date of EPA approval of Wisconsin's NPDES permit program, the Regional Administrator, pursuant to Section 402(e) of the Federal Act, shall consider whether to waive his right to receive, review, object to or comment upon proposed NPDES permits for all industrial discharges into navigable waters with daily discharges of less than 100,000 gallons per day and all discharges from publicly owned treatment works of less than 500,000 gallons per day and for all discharges, irrespective of size, for such categories and classes of point sources as the Regional Administrator shall specify at that time.

The Regional Administrator shall promptly notify the Administrator of his decision. If the Regional Administrator does not respond to the Administrator within this 120-day period, his right to receive, review, object to or comment upon proposed permits of less than the above levels shall be considered waived.

V. TRANSMISSION TO REGIONAL ADMINISTRATOR OF ISSUED NPDES PERMITS

The Administrator will transmit to the Regional Administrator two (2) copies of every issued NPDES permit, Attention: NPDES Permit Branch, together with any and all terms, conditions and requirements of the NPDES permit. The Administrator will transmit the above information, together with a copy of the Administrator's letter to the applicant forwarding the NPDES permit, at the same time the NPDES permit issued by the Department is transmitted to the applicant.

VI. COMPLIANCE REPORTS

On the last day of the months of February, May, August and November the Administrator will transmit to the Regional Administrator, Attention: Compliance Section, Enforcement Division, a list of all instances, as of 30 days prior to the date of such report, of failure or refusal of an NPDES permittee to comply with an interim or final requirement of a schedule of compliance or to notify the Department of compliance or noncompliance with each interim or final requirement. The list will be available to the public for inspection and copying and will contain at least the following information with respect to each instance of noncompliance.

1. The name and address of each noncomplying NPDES permittee;
2. A short description of each instance of noncompliance (e.g., failure to submit preliminary plans, two-week delay in commencement of construction of treatment facilities, etc.);
3. A short description of any action or proposed action by the permittee or the Administrator to comply or enforce compliance with an interim or final requirement; and
4. Any details which tend to explain or mitigate an instance of noncompliance with an interim or final requirement (e.g., construction delayed due to materials shortage, etc.).

VII. MONITORING

- A. Any discharge authorized by an NPDES permit which (1) is not a minor discharge, (2) the Regional Administrator requests, in writing, to be monitored, or (3) contains toxic pollutants for which an effluent standard has been established pursuant to Section 307(a) of the Federal Act, will require monitoring by the permittee for at least the following:
- (i) Flow (in gallons per day); and
 - (ii) All of the following pollutants:
 - a. Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) which are subject to reduction or elimination under the terms and conditions of the permit;
 - b. Pollutants which the Department finds, on the basis of information available to it, could have significant impact on the quality of navigable waters;
 - c. Pollutants specified by the Administrator of EPA, in regulations issued pursuant to the Federal Act, as subject to monitoring; and
 - d. Any pollutants in addition to the above which the Regional Administrator requests, in writing, to be monitored.
- B. The Regional Administrator may make the request specified in A (2) and (3) above at any time before an NPDES permit is issued.
- C. The Administrator will ensure that the Regional Administrator receives two (2) copies of all NPDES reporting forms submitted to the Department. If the Regional Administrator determines that the NPDES reporting forms are complete, he shall route one copy to the Permit Branch and the second to the Regional Data Management Section, Surveillance and Analysis Division, for processing into the National Data Bank. If the Regional Administrator determines that the NPDES reporting forms submitted to the Department are not complete or are otherwise deficient, he shall specify to the Administrator in which respects the forms are deficient. Upon receipt of the specification of deficiencies, the Administrator shall require the permittee to supply such additional information as the Regional Administrator specifies.
- D. The Administrator will evaluate data submitted by NPDES permittees in NPDES reporting forms and other forms supplying monitoring data for possible enforcement or remedial action.

On the last day of the months of February, May, August and November the Administrator will transmit to the Regional Administrator, Attention: Compliance Section, Enforcement Division, a list of all instances, as of 30 days prior to the date of such report, of each failure or refusal of an NPDES permittee to comply with an interim or final effluent limitation. The list will be available to the public for inspection and copying and will contain at least the following information:

1. The name and address of each noncomplying NPDES permittee;
2. A short description of each instance of noncompliance;
3. A short description of any action or proposed action by the permittee or the Administrator to comply or enforce compliance with an interim or final effluent limitation; and
4. Any details which tend to explain or mitigate an instance of noncompliance with an interim or final effluent limitation.

VIII. MONITORING RESULTS

During the term of a permit, upon request of the Regional Administrator, the Administrator shall notify and require the permittee to extend the normal three-year retention of monitoring records required under 40 CFR 124.62(c).

IX. RECEIPT AND FOLLOW-UP OF NOTIFICATIONS AND REQUESTS

If the Administrator determines that a condition of a permit to a publicly owned treatment works relating to a new introduction or changes in the volume or character of pollutants introduced into such treatment works is violated, he shall notify the Regional Administrator in writing and consider taking action to restrict or prohibit the introduction of pollutants into treatment works.

X. MODIFICATION, SUSPENSION AND REVOCATION OF NPDES PERMITS

- A. If an NPDES permit is modified, suspended or revoked by the Administrator for good cause, a copy of the proposed modification, suspension or revocation shall be transmitted to the Regional Administrator, Attention: NPDES Permit Branch. The Regional Administrator will be provided 45 days from the time he receives the proposed modification, suspension or revocation from the Administrator within which to object, as provided for in Section 402(d)(2) of the Federal Act, comment upon or make a recommendation with respect to the proposed modification, suspension or revocation.

Upon request of the Regional Administrator, the Administrator shall provide the Regional Administrator additional time for review, provided that the total review period does not exceed 90 days.

- B. If the Administrator, upon request of the permittee, decides to revise or modify a schedule of compliance for good cause, he shall notify the Regional Administrator in writing. The Regional Administrator shall notify the administrator in writing of his acceptance or rejection of such request within 20 days of receipt of the notice.

XI. EMERGENCY NOTICE

The Administrator or his authorized representative will notify the Regional Administrator by telephone as soon as he is notified of any actual or immediate threat to the health or welfare of persons resulting from the discharge of pollutants. The Administrator or his authorized representative will utilize the telephone numbers identified in the current Regional Oil and Hazardous Materials Contingency Plan to notify the Regional Administrator. Telephone contact may be made with either the EPA District Offices or the Regional Offices, as the Administrator determines appropriate.

XII. CONTROL OF DISPOSAL OF POLLUTANTS INTO WELLS

The Regional Administrator shall transmit to the Administrator any policies, technical information, or requirements specified by the Administrator of EPA in regulations issued pursuant to the Act or in directives issued to Environmental Protection Agency Regional Offices.

XIII. OTHER ITEMS

- A. Attached hereto is a list of major dischargers which shall be given priority in processing and a schedule for such processing. This schedule is premised on the availability of guidance material from EPA for dischargers identified. Also attached is a six-month schedule covering all permits to be processed in the six-month period. This is the first part of the schedule aimed at completing all permits to be issued in the State of Wisconsin by December 31, 1974. The schedule will be expanded by the Department on a quarterly basis thereafter to identify the remainder of the workload until all permits are issued. A copy of each quarterly schedule will be forwarded by the Administrator to the Regional Administrator for review.
- B. After the effective date of this agreement, the Administrator and the Regional Administrator shall pursue additional discussions as to appropriate responsibilities with respect to the input of application and monitoring data into the National Data Bank.
- C. This Memorandum of Agreement may be modified by the Administrator and the Regional Administrator following the public hearing to evaluate the State Program submitted pursuant to Section 402(b) of the Federal Act on the basis of issues raised at the hearing. The hearing record will be left open for a period of five days following the hearing to permit any person to submit additional written statements or to present views or evidence tending to rebut testimony presented at the public hearing. Any revisions of agreements following public hearing will be finalized, reduced to writing and signed by the Administrator and the Regional Administrator prior to forwarding of this Memorandum of Agreement and the recommendations of the Regional Administrator to the Administrator of EPA for review and approval. The Administrator and Regional Administrator will make any such revised agreements available to the public for inspection and copying.

- D. All agreements between the Wisconsin Department of Natural Resources and the Regional Administrator are subject to review by the Administrator of EPA. If the Administrator of EPA determines that any provisions of such agreement do not conform to the requirements of Section 402(b) of the Federal Act or to the requirements of Section 304(h)(2) Guidelines, he will notify the Administrator and Regional Administrator of any revisions or modifications which must be made in the written agreements.
- E. This Memorandum of Agreement will take effect after it has been executed by the Administrator and the Regional Administrator and concurred in by the Administrator of EPA.
- F. This Memorandum of Agreement shall remain in effect until such time as it is modified or suspended.
- G. After the date of approval of Wisconsin's Pollutant Discharge Elimination System Permit Program, the Department shall be primarily responsible for the administration and enforcement of all federally issued NPDES permits issued prior to that date, except those NPDES permits issued to agencies and instrumentalities of the federal government and for Indian activities on Indian lands as provided by 40 CFR 125.2(a)(2)

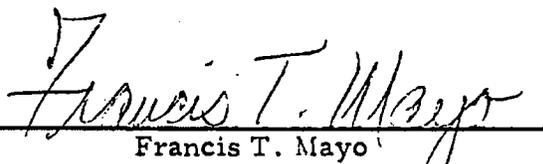
State of Wisconsin
Department of Natural Resources

U.S. Environmental Protection Agency
Region V

By

By


Thomas G. Frangos, Administrator
Division of Environmental Protection


Francis T. Mayo
Regional Administrator

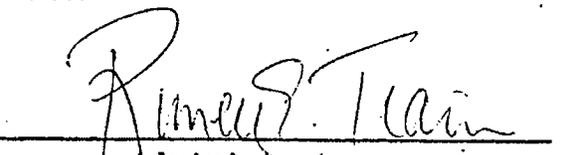
12/19/73

12/17/73

Date

Date

APPROVED:


Rimey Train
Administrator
Environmental Protection Agency

2/4/74
Date

Exhibit 5

Letter from Anthony S. Earl, Secretary of WDNR,
to John McGuire, EPA Region V Administrator

June 21, 1979



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Anthony S. Earl
Secretary

June 21, 1979

BOX 7921
MADISON, WISCONSIN 53707

IN REPLY REFER TO: 8300
RECEIVED

JUN 27 1979

EPA REGION 5
OFFICE OF REGIONAL
ADMINISTRATOR

Mr. John McGuire
Regional Administrator
United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. McGuire:

In a letter dated April 3, 1978, Mr. George R. Alexander, Jr., then Regional Administrator of Region V, proposed to transfer to this Department the responsibility for the administration of the National Pollutant Discharge Elimination System (NPDES) permit program for Federal facilities located in Wisconsin upon a showing that the Department possessed adequate authority to administer the NPDES permit program for such facilities. Mr. Alexander's letter also stipulated that the existing Memorandum of Agreement between our agencies be modified to reflect this additional delegation of responsibilities.

Since the Department of Natural Resources is the central pollution control agency of the State of Wisconsin and presently has authority under State law to regulate discharges from Federal facilities, I can see no good purpose to be served by maintaining separate Federal and State permit programs for these facilities. Consequently, I am requesting that the United States Environmental Protection Agency delegate to this Department the responsibility for the administration of the NPDES permit program as it applies to Federal facilities located in Wisconsin.

However, based on our review of your proposed modification of the existing Memorandum of Agreement, a question has arisen concerning the scope of the proposed delegation of NPDES responsibilities contemplated by EPA at this time. Although the letter of April 3, 1978 addresses State assumption of NPDES permit issuance and enforcement responsibilities as they relate to Federal facilities in Wisconsin, the proposed modification of the Memorandum of Agreement requires the State of Wisconsin to be responsible for "the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Wisconsin, including permits applicable to Federal facilities" (Emphasis supplied). If this broad undertaking requires the Department to regulate discharges from point sources operated by Indian tribes or Indian tribal organizations on Indian lands and reservations, the Department is unprepared to accept this responsibility. An opinion of the Attorney General of Wisconsin dated July 31, 1978 concluded that under current Wisconsin law the

TO: John McGuire - June 21, 1979

2.

Department does not have this authority. Consequently, we have revised the proposed modification of the Memorandum of Agreement to make the delegation of NPDES administrative responsibilities consistent with the July 31, 1978 opinion of the Attorney General.

In furtherance of our request, I am submitting the following documents:

1. A copy of the statement of the Attorney General of Wisconsin dated August 15, 1973 certifying that the State of Wisconsin, acting through its Department of Natural Resources, possesses all the authority required by Section 402(b) of the Federal Clean Water Act, as amended, 33 U.S.C. 1251 et seq., and 40 CFR Part 124 for administration of the NPDES permit program within the jurisdiction of this State;
2. A copy of an opinion of the Attorney General of Wisconsin dated February 21, 1979 expressing the opinion that Federal facilities and any officer, agent, or employe thereof responsible for the discharge of pollutants into waters of the State are subject to the requirements of ch. 147, Wis. Stats.;
3. Three signed copies of our proposed modification of the existing Memorandum of Agreement;
4. A copy of an opinion of the Attorney General of Wisconsin dated July 31, 1978 concluding that the Department is without authority to regulate discharges from point sources operated by Indian tribes and tribal organizations on Indian lands and reservations in Wisconsin; and
5. Mailing labels for our statewide permit program public notice list.

If members of your staff have any questions concerning these materials, please have them contact Mr. Carl Blabaum, Director of the Bureau of Water Quality, at (608) 266-3910.

Sincerely,



Anthony S. Earl
Secretary

cc: Andrew Damon - 14
Thomas Kroehn - 14
Carl Blabaum - 11