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

ONEIDA TRIBE OF INDIANS OF WISCONSIN, Plaintiff, v. VILLAGE OF HOBART, WISCONSIN, 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.	Case No. 1:10-cv-00137-WCG Hon. William C. Griesbach

REPLY BRIEF IN SUPPORT OF
THIRD-PARTY DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The central theme of the Village's response brief is that the United States has acted unfairly by "requir[ing]" the Village "to create its [own] stormwater ordinances" while refusing to pay the monetary charges that the Village's ordinance establish. Dkt. No. 58, at 5 & n.2; at 6 n.3. This charge is groundless. The Village seeks to regulate Indian trust lands in an unprecedented manner and to levy local stormwater charges on the federal government without explicit congressional authorization to do so. Nothing in the Clean Water Act ("CWA") either requires or authorizes the Village to assess these charges. Moreover, because of the special status of Indian lands under federal law, the Village cannot impose its local regulations on the Tribe's trust land without the express consent of Congress, which is absent in this case.

While the Village claims that the plain language of CWA Section 313(a) requires the United States to pay the Village's stormwater charge as assessed on Indian trust lands, this contention ignores the longstanding Supreme Court precedent holding that waivers of federal sovereign immunity must be clear and explicit, and cannot be inferred from ambiguous language. Indeed, the Supreme Court has twice applied this rule of construction to narrowly interpret Section 313 itself. This Court should do the same, and find that Section 313 does not waive federal sovereign immunity for the Village to assess its stormwater charge against the federal government for Indian trust lands.

ARGUMENT

I. The Village has voluntarily enacted its stormwater charge, which is a local regulation not compelled or authorized by any federal law.

The Village distorts the facts of this case by claiming it has been forced into "the untenable position of being required by the federal government to implement stormwater

management practices, and then being sued for doing just that." Dkt. No. 58, at 1. In fact, while the CWA sets out the minimum requirements for municipalities seeking National Pollutant Discharge Elimination System ("NPDES") permits for discharges from regulated municipal separate storm sewer systems ("MS4s"), 33 U.S.C. § 1342(p)(3)(B) & (p)(6), nothing in the CWA required the Village to implement its MS4 program, much less to assess MS4 program costs on the United States through its municipal stormwater ordinance. The Village has voluntarily chosen to administer its MS4 program and to assess a stormwater charge on Indian trust lands, and it is trying to collect money from the United States despite the lack of an applicable waiver of federal sovereign immunity.

The Village makes much of "the draft NPDES permit the EPA granted to the Village," which it claims "grant[s] authority" to the Village to enforce local stormwater ordinances with no exclusion for Indian trust land. Dkt. No. 58, at 12. This assertion misrepresents the nature and significance of an NPDES permit. The Village, of its own initiative, elected to build and operate a small MS4. Accordingly, the CWA requires the Village to apply for and obtain a permit to discharge stormwater into waters of the United States. 33 U.S.C. §§ 1311(a), 1342(p). To obtain a permit, the Village must agree to abide by certain conditions, including developing and implementing a stormwater management program. Dkt. No. 60, Attach. A, at 4. The Village lies within the boundaries of the Oneida Indian Reservation, which constitutes "Indian country" within the meaning of Environmental Protection Agency ("EPA") regulations. Id. at 2. EPA

retains responsibility for issuing NPDES permits within Indian country in the State of Wisconsin.[1] Id. Thus, the Village applied to the EPA for its NPDES permit. Id.

EPA has, to date, neither granted nor denied the Village's permit application. Based on the application received, EPA has proposed an NPDES permit for public comment and preliminarily indicated that the Village would be authorized to discharge stormwater to waters within Reservation boundaries, provided the Village abides by the conditions enumerated in the proposed permit. Id. at ECF p. 13 (copy of proposed permit). Critically, however, the proposed permit says nothing about trust land, nor does it establish any geographic jurisdiction on the part of the permit-holder. It says only that the Village would be authorized to discharge stormwater from the portion of the Village's MS4 that lies within the Reservation, i.e., within EPA's permitting jurisdiction. Id.[2] The proposed permit also says nothing about charging a fee related to stormwater management. It certainly does not, contrary to the Village's repeated suggestions, require the Village to charge a fee.[3] See Dkt. No. 58, at 5. Thus, the proposed NPDES permit neither requires the Village to regulate the Tribe's trust lands nor grants any authority to the Village to do so.[4]

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[1]EPA has authorized Wisconsin to administer the NPDES permitting program under state law for discharges into state waters outside of Indian country. That EPA authorization specifically excludes Indian country. See Dkt. No. 54, p.4, n.3 (discussion and citations).

[2]Contrary to the Village's implication, lands "within the Reservation" and trust lands are not coextensive. Trust lands are lands formally held in trust by the United States for the Tribe as beneficial owner. The Tribe also owns fee lands within the Reservation boundaries; see Dkt. No. 1 ¶ 12. In addition, the entire Village lies within the Reservation boundaries.

[3]The EPA has not even issued the Village the final permit necessary to fully operate its MS4.

[4]In fact, the Tribe operates its own small MS4 and has applied for its own permit from EPA. Dkt. No. 25-2.

The Village attempts to obscure the fact that its stormwater charge is local and self-initiated by claiming that "it is a federal law that is at issue. It is the federal government, not the Village, that is regulating the land via § 313." Dkt. No. 58, at 5. This statement is plainly wrong and evinces a lack of understanding of Section 313. Section 313 states only that federal agencies are subject to and must comply with specified requirements respecting the control and abatement of water pollution. 33 U.S.C. § 1323(a). Section 313 does not require – or authorize – the Village to administer its MS4 program, to charge a fee, or to do anything else. Thus, the United States in no way has mandated the Village's choice to levy a stormwater charge for tribal trust lands.[5]

II. The Village fails to recognize the special status of Indian trust land, which remains largely free from state and local regulation.

Although the Village's response brief addresses its purported authority to assess stormwater charges under Section 313 at length, see Dkt. No. 58, at 3-6, 9-13, it fails to give full measure to the special status of Indian trust land, which is held by the United States for the

[5]The Village further argues that this Court has subject matter jurisdiction over its claim beyond $10,000 "because the Village's claim arises under a federal law which contains a waiver of sovereign immunity," i.e., CWA Subsection 313. Dkt. No. 58, at 21. The Village is wrong. Its claim does not arise under Section 313 of the CWA. That subsection, rather, is relevant only as a defense to the United States's liability; it does not contain any substantive standards of conduct with which the United States must comply. See Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) ("a defense is not part of a plaintiff's properly pleaded statement of his or her claim"). "[W]hether a case is one arising under [federal law], in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840-41 (1989) (citations omitted). Accordingly, federal question jurisdiction cannot be founded "on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 14 (1983).

benefit of Indian tribes. See 25 U.S.C. § 465. State and local regulation of Indian trust land is limited. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998); see also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); South Dakota v. U.S. Dep't. of Interior, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005) ("State and local governments lack jurisdiction to enforce zoning regulations on trust land."); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1976). In general, only an express statement of Congress to the contrary provides otherwise. See, e.g., Gobin v. Snohomish County, 304 F.3d 909, 912 (9th Cir. 2002); Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001) (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)) ("state laws may be applied to Indians on their reservations if Congress so expressly provides."). The Village seeks to reverse this well-established standard, contending that legislation must contain an express exemption for Indian lands. See Dkt. No. 58, at 13 ("express language excluding Indians and land held for their benefit, would need to be included in the Act to make it unenforceable in this case.") (emphasis in original).[6] The Village has it backward. Not surprisingly, the Village has cited no cases in which a State or political subdivision successfully imposed its local zoning laws, building ordinances, land use codes, or

[6]The Village claims that the United States has taken contrary positions in this case and in a pending case in the Northern District of New York. Dkt. No. 58, at 17. However, the Village misquotes the United States's opening brief in this case. The Village claims that the United States argued "that Congress intended that the Indians for whom the land was acquired in trust . . . would be completely free from state or local regulation, interference and taxation." Id. (citing U.S. Br. at 11). In fact, the government's brief stated that "By acknowledging or acquiring land in trust for a tribe, whether by treaty or pursuant to statute, the federal government removes the land from certain state and local jurisdiction." Dkt. No. 54, at 11 (emphasis added). The jurisdiction at issue in the present case involves only local environmental regulations.

environmental laws to tribal trust lands. If this Court were to find that the Village's local stormwater requirements could be imposed on trust lands absent explicit and unequivocal congressional consent, it would upend the rule against interference with trust lands and tribal governance.

III. Section 313 of the CWA does not contain the express, unequivocal language that would be needed to compel federal payment of local stormwater charges on Indian trust land.

The Village relies heavily on CWA Section 313(a), claiming that this subsection requires a judgment in the Village's favor. Dkt. No. 58, at 3-6. In pertinent part, Section 313(a) provides:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, . . . 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). According to the Village, the language "jurisdiction over any property" resolves this case in favor of the Village. Dkt. No. 58, at 3-4. This assertion demonstrates the Village's misunderstanding of federal sovereign immunity law.

Congress can waive federal sovereign immunity to suit, Block v. North Dakota, 461 U.S. 273, 280 (1983), but it must do so unequivocally. Under the Supreme Court's strict construction rule, any waiver of sovereign immunity must not only be express, but also must be "construed strictly in favor of the sovereign" and "not 'enlarged . . . beyond what the language requires.'" Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (citations omitted). The waiver may not be implied, assumed, or based upon inference or ambiguity. Lane v. Pena, 518 U.S. 187, 192 (1996); 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). As shown below, the waiver in Section 313, even though it uses seemingly broad language, must be read narrowly and may not be expanded to cover more than Congress has made explicit. Given the longstanding special treatment of Indian lands described above, an explicit mention of Indian lands is necessary to include them in Section 313's waiver. Such explicit language is lacking.

The Village also relies on the January 4, 2011 amendment to Section 313 (the "2011 Amendment"), which added subsection 313(c) to the law. Dkt. No. 58, at 4. Prior to the 2011 Amendment, Section 313 contained no explicit authorization for assessment of local stormwater management fees against federal facilities. In the 2011 Amendment, Congress for the first time did include such an express waiver, providing in Section 313(c)(1) that the "reasonable service charges" described in Section 313(a) include reasonable, nondiscriminatory fees, charges, or assessments for stormwater management programs. 33 U.S.C. § 1323(c)(1). As shown more fully below, however, the 2011 Amendment is irrelevant to the issue presented in this case because neither before nor after the Amendment's enactment did Section 313 unequivocally provide for the application of local water pollution control requirements as to Indian trust lands. Nothing in the Amendment refers to Indian trust lands, either directly or indirectly, or suggests that Congress considered the reach of Section 313 to trust lands. Similarly, nothing in the Amendment suggests that Congress contemplated waiving tribal or federal sovereign immunity for trust lands. Without express language making clear that Congress included Indian trust lands within the scope of federal obligations under Section 313, the Village's attempt to assess its fees

against the United States is barred by the doctrine of sovereign immunity.[7]

A. History of the CWA's sovereign immunity waiver for federal facilities

Evidence presented to Congress during debate on early amendments to the CWA "disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities," S. Rep. No. 92-414, at 67 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3733 (Oct. 28, 1971), and led Congress to conclude that "[f]ederal facilities generate considerable water pollution." Id. at 3746. None of the proffered examples pertained to tribal trust lands, however. In 1972, concerned that "[l]ack of Federal leadership has been detrimental to the water pollution control effort" and aware that the "Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute," id. at 3733-34, Congress expanded the federal facilities compliance requirements. Once again, Congress made no reference to tribal trust lands in its findings. See Pub. L. No. 92-500, § 2, 86 Stat. 816, 875 (Oct. 18, 1972) (codified as 33 U.S.C. § 1323).

B. Any waiver of the United States's sovereign immunity must be clear and unequivocal.

Analysis of the applicability of Section 313(a) must be guided by the bedrock rule that plaintiffs must demonstrate both that the United States has expressly waived its sovereign immunity and that the claim unambiguously falls within the scope of that waiver. See, e.g., Lane, 518 U.S. at 192; Price v. United States, 174 U.S. 373, 375-76 (1899) ("It is an axiom of

[7]At this time, the United States need not address the question whether the stormwater charge in this case constitutes a "fee" or a "tax." The issue of immunity of Indian trust lands is dispositive in this case. Regardless of the parties' views on the "tax/fee" issue, Section 313 – both before and after the 2011 Amendment – simply contains no waiver of federal sovereign immunity as to Indian trust lands.

our jurisprudence. The government is not to be liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain meaning of the statute authorizing it."); United States v. Clarke, 33 U.S. 436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.").

A waiver of sovereign immunity must be expressed in unequivocal statutory text and cannot be implied. Dep't of the Army v. Blue Fox, 525 U.S. 255, 261 (1999); Lane, 518 U.S. at 192. The existence of "plausible" alternative interpretations of statutory language "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous.'" United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992), and therefore cannot stand. Nor can there be a waiver of sovereign immunity based on "policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1295 (10th Cir. 2008) (quoting Ute Distrib. Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1267 (10th Cir. 1998)). The strict construction rule applies not only in determining the existence of a waiver, but also in determining its "scope." Blue Fox, 525 U.S. at 261; Lane, 518 U.S. at 192. Accordingly, the United States may be sued for the Village's stormwater charge on tribal trust lands only if Congress has unambiguously waived sovereign immunity for such a charge on tribal trust lands.

C. The established law on sovereign immunity waivers requires a narrow construction of the waiver in Section 313.

Section 313 expressly requires federal facilities to comply with the specified state and local water pollution control requirements and therefore is a waiver of sovereign immunity from

suit in specific instances. However, Section 313 is a limited waiver, and the Supreme Court has consistently construed it narrowly. Courts may read into a sovereign immunity waiver no more than has been expressly stated by Congress. In the present case, therefore, it is of paramount significance that nothing in Section 313 itself refers to tribal trust lands. Nothing in the legislative history refers to such lands. No court has previously held that tribal trust lands fall within the scope of the waiver. And the Supreme Court's rule that courts not read the waiver broadly, as well as the general rule that States and local governments lack authority over trust lands, counsels against a conclusion that Congress meant to include tribal trust lands within Section 313's ambit.

The Supreme Court first addressed the scope of Section 313's sovereign immunity waiver when California and Washington contended that Section 313 provided that federal facilities were subject to state NPDES permitting processes. In two companion cases, Hancock v. Train, 426 U.S. 167 (1976), which dealt with the Clean Air Act, and Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976), which dealt with the CWA, the Supreme Court narrowly interpreted the federal facility compliance provisions in those statutes. In the CWA case, the Court declared that "[f]ederal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." 426 U.S. at 212. The Court emphasized that Section 313

> states only to what extent the same as any person federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control and abatement of pollution."

Id. at 212-13. Without such express statutory language, the Court held, federal facilities could

not be required to obtain state permits. Examining the claim that the term "reasonable service charge" should be interpreted to apply to state NPDES permit application processing fees (and thus require federal facilities to apply for and obtain such permits), the Court disagreed, concluding that

> the term "service charges" might as well be taken to refer to recurring charges for performing a service such as treating sewage, as to fees for accepting and processing a permit application. . . . At the very least, the "service charges" language hardly satisfies the rule that federal agencies are subject to state regulation only when and to the extent Congress has clearly expressed such a purpose.

Id. at 215-17. Because the language in question could plausibly bear a narrower interpretation as well as a broader one, the Court adopted the narrower reading. Id.

After this decision, the CWA was amended to expressly provide that federal facilities had to comply with state "procedural requirements." 33 U.S.C. §1323(a) (1977). Thereafter, the Supreme Court and lower courts continued to read the waiver of sovereign immunity in Section 313 narrowly. In Department of Energy v. Ohio, for example, the Supreme Court ruled that Section 313 did not authorize the imposition of "civil fines imposed by a State for past violations of the Clean Water Act." 503 U.S. at 611. According to the Court, Section 313 did not contain express language that clearly subjected federal facilities to punitive fines. The Court recognized that the provision used the "seemingly expansive phrase" of "civil penalties arising under Federal law." Id. at 626. It concluded, however, that this waiver language was not sufficiently specific to encompass punitive fines, and instead reached only to coercive penalties (e.g., fines for contempt of court). Id. at 626-27. Once again, broadly phrased language was insufficient to waive sovereign immunity for a type of fine that was not specifically mentioned.

Department of Energy v. Ohio also directly refutes the Village's assertion that previous amendments to Section 313 made federal facilities thereafter subject to all provisions of State and local water pollution laws without exception. Dkt. No. 58, at 3,9. The Court's narrow approach to construing Section 313's waiver, like its narrow interpretation of other waivers of sovereign immunity, remains binding law.[8] This Court must apply this standard of strict construction to the waiver in Section 313 when addressing the Village's contention that the waiver extends to Indian trust lands.

D. Applying the Supreme Court's strict standard shows that Congress has not waived sovereign immunity for local stormwater charges on Indian trust lands.

As noted above, the Supreme Court's strict construction rule requires that waivers of sovereign immunity be unequivocal, and that they be "construed strictly in favor of the sovereign." Department of Energy v. Ohio, 503 U.S. at 615 (citation omitted). This being the case, the Village's argument that Section 313 applies to tribal trust lands falls under its own weight. Such lands, of course, are not mentioned in any version of the legislation or referenced in the legislative history.[9] Congress, in enacting Section 313 as amended, was surely aware that tribal trust lands are generally exempt from state regulation. The Village asserts that the United

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[8]See also Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976) (Corps of Engineers' dredging of the Mississippi River was not subject to state water quality standards because Section 313 did not expressly mandate such compliance); McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 604 (E.D. Cal. 1986) (finding Section 313(a) to be a "compilation of ambiguity" and, therefore, insufficient to constitute a waiver of sovereign immunity with respect to civil fines and penalties), vacated on other grounds by 47 F.3d 325 (9th Cir. 1995).

[9]Since waivers of sovereign immunity must appear clearly in the statutory text, legislative history should not be used to clarify an ambiguity. Nordic Village, 503 U.S. at 37.

States is obliged to pay stormwater assessments on tribal trust lands by virtue of the first clause in subsection (a), which waives sovereign immunity for, inter alia, "[e]ach . . . department . . . of the Federal Government (1) having jurisdiction over any property[.]" 33 U.S.C. § 1323(a). Dkt. No. 58, at 3 (quoting 33 U.S.C. § 1323(a)). This reading of the law presumes that the phrase "jurisdiction over any property" necessarily includes Indian trust lands. Yet, as shown above, the Supreme Court has emphatically and consistently refused to find the existence of a waiver based on "implicit" readings of the law. Dep't of Energy v. Ohio, 503 U.S. at 626-27; California, 426 U.S. at 215. Following the Court's rule of strict interpretation requires the conclusion that the waiver of sovereign immunity in Section 313 is insufficiently specific to encompass tribal trust lands, regardless of what may appear to be its seeming breadth of scope.

At best, Section 313 is ambiguous as to whether tribal trust lands fall within its limited waiver of immunity. Such ambiguity, in and of itself, answers the question of whether such lands are subject to the Village's assessments.

> Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.

FAA v. Cooper, __ U.S.___, No. 10-1024, 2012 U.S. LEXIS 2539, at *12-13 (2012) (citations omitted). "For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign." Id. at *13 (citing Lane, 518 U.S. at 192). Section 313's general phrasing, "jurisdiction over any property," does not waive the United States's immunity in the specific case of Indian trust lands.

E. Even if Section 313 provides a waiver as to Indian trust lands, Congress did not waive sovereign immunity for local stormwater charges on any federal property until the 2011 Amendment.

Finally, even if this Court finds that the language of Section 313(a) ("[e]ach department . . . of the Federal Government . . . having jurisdiction over any property") unambiguously applies to Indian trust lands, Congress did not expressly waive sovereign immunity for local government stormwater charges on any federal property until it enacted the 2011 Amendment. The Village implicitly recognizes this fact, noting that the 2011 Amendment "eliminate[s] any uncertainty" in the previous version of Section 313. Dkt. No. 58, at 4. In pertinent part, the 2011 Amendment altered the federal facilities compliance provision by providing that:

> For purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is –
>
> (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
>
> (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

P.L. 111-378, § 1, 124 Stat. 4128 (Jan. 4, 2011) (codified at 33 U.S.C. § 1323(c) (2011).

The 2011 Amendment explains in great detail precisely which local stormwater charges qualify as "reasonable service charges" for which immunity is waived. The great specificity of this amendment – specificity that was previously absent – supports the conclusion that no

unambiguous waiver for stormwater charges existed before 2011. Therefore, even if this Court finds the waiver language in Section 313 to cover Indian trust lands, which it does not, the Village cannot assess stormwater charges on those lands predating January 4, 2011.[10]

CONCLUSION

For the reasons stated above and in the United States's Motion to Dismiss, the Court should dismiss the Third-Party Complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted this 13th day of April, 2012.

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[10]In support of its argument, the Village cites floor statements from members of the current Congress who urged the passage of the 2011 Amendment to "remove all ambiguity" about the federal government's responsibility to pay "normal and customary stormwater fees." E.g., Dkt. 58, at 11 (citing statement of Sen. Cardin). As noted above, waivers of sovereign immunity cannot be based on ambiguous statutory language, and legislative history may not be used as a basis for finding a statute "unambiguous." Nordic Village, 503 U.S. at 37. In interpreting the reach of newly-enacted waivers of sovereign immunity, the strict construction rule again applies with full force. "A waiver of sovereign immunity must be strictly construed; it may not be applied retroactively unless the Congress clearly so intended." Brown v. Sec'y of the Army, 78 F.3d 647, 649-50 (D.C. Cir. 1996). In enacting the 2011 Amendment, the current Congress expanded the reach of the sovereign immunity waiver going forward, but it did not abrogate the breadth of the waiver contained in prior versions of the law. Nothing in the plain language of the 2011 Amendment applies to pre-existing stormwater assessments, and nothing in the 2011 Amendment contains explicit language applying the new sovereign immunity waiver for stormwater assessments to tribal trust lands.

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