No. 13-847

# In The Supreme Court of the United States

VILLAGE OF HOBART, WISCONSIN,

*Petitioner,*

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN, UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF THE INTERIOR, and SALLY JEWEL, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its Questions Presented, Petitioner Village of Hobart ("Village") ignores the complete statutory framework considered by the court below and assumes issues not in dispute or decided by the lower court. Specifically, the single provision of the Clean Water Act ("CWA") cited by the Village, which addresses federal facilities and is silent as to tribal trust land, is part of a much broader statutory scheme that includes an explicit provision governing tribal trust land. The court below relied primarily upon this explicit provision and related provisions of the CWA in reaching its judgment. In addition, the Village's reference to the "former reservation" of the Oneida Tribe of Indians of Wisconsin ("Tribe") suggests that a reservation disestablishment issue was presented and/or addressed by the court below. This is erroneous; it was neither presented nor addressed. Finally, the court below considered only whether the Village stormwater management ordinance applies to tribal trust land. The much broader question of whether tribal trust land is removed from state and local jurisdiction for all purposes was not presented or decided in the proceedings below.

The questions presented by the decision below are:

1). Whether the court of appeals correctly construed the CWA, 33 U.S.C. §1251 *et seq.*, to authorize the Environmental Protection Agency ("EPA")

## COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

or the Tribe, not the Village, to regulate stormwater runoff from tribal trust land.

2). Whether the court of appeals' alternative holding that the Village stormwater management ordinance constitutes a tax upon the Tribe's trust land, which federal law forbids, is based upon a correct construction of the particular terms of the Village ordinance.[1]

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[1] This alternative holding is not challenged by the Village in its petition for certiorari.

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[2] The appendix to this brief is cited herein as App. ___. The joint supplemental appendix in the Seventh Circuit Court of Appeals is cited herein as JSA ___. The appendix in the Village's Petition for Certiorari is cited herein as Pet. App. ___.

# TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES

## STATUTES AND REGULATIONS INVOLVED

In addition to those cited in the Petition, the following provisions are involved in this case and are set forth in an appendix to this brief in opposition:

*Village of Hobart Code of Ordinances*, ch. 4.5

33 U.S.C. §§ 1342, 1377

40 C.F.R. §§ 122.31, 123.23

## COUNTER-STATEMENT OF THE CASE

The Tribe filed this action for a declaratory judgment that the Village lacks authority to either regulate or tax the Tribe's trust land under the Village's stormwater management ordinance, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1362. The only parcels at issue are those held in trust by the United States for the Tribe. The legal issues presented relate solely to the Village's authority over those lands, not the applicability generally of the CWA to trust land or EPA authority to regulate stormwater runoff from that land, both of which have been acknowledged by the Tribe. The lower court's unremarkable judgment holds that the Village cannot regulate stormwater runoff from the Tribe's trust land and, alternatively, that the terms of the Village's particular ordinance constitute an impermissible tax upon that land.

## A. Facts giving rise to the dispute

The Tribe is federally recognized[1] and occupies a reservation established by the Treaty of February 3, 1838, 7 Stat. 566.[2] There are 148 parcels of land, totaling approximately 1400 acres, that are the subject of this matter, which parcels are located within the reservation and held in trust by the United States for the Tribe. JSA 122. All these parcels were either already held or placed into trust between 1937 and 2007. *Id.*[3]

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[1] The Tribe is one of the direct descendants of the Oneida Indian Nation, which has had treaty relations with the United States since 1784. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 230-31 (1985). The Tribe adopted a constitution in 1936 under section 16 of the IRA and a corporate charter in 1937 under section 17 of the IRA. *See* 25 U.S.C. §§ 476, 477; T. Haas, *Ten Years of Tribal Government Under I.R.A.* (U.S. Indian Service 1947), p. 26. Presumably the Village refers to the Tribe's corporate charter when it speaks of a "federal charter of recognition." *See* Petition, p. 5.

[2] The Village did not challenge the continuing existence of the Tribe's reservation in the courts below and those courts did not address the issue. To the contrary, the Village effectively acknowledged the continuing existence of the Tribe's reservation by making an application to the EPA for a stormwater permit, since EPA has residual authority to issue such a permit only because the Village is located within the reservation. JSA 59-67. As a result, this case does not present any question regarding the existence of the Tribe's reservation for review.

[3] The Village attempts to tie the Tribe's reacquisition of land within its reservation to the "dramatic increase in revenue after the enactment of the Indian Gaming Regulatory Act in 1988 . . ." Petition, p. 5. But nothing in the record indicates that the parcels at issue here were acquired with gaming proceeds.

(Continued on following page)

In 2007, the Village enacted its ordinance purporting to regulate or tax all parcels of land in the Village for the purpose of managing stormwater runoff. The ordinance created a stormwater management utility and authorized the imposition of charges upon "each and every lot or parcel within the Village." *Village of Hobart Ordinances,* ch. 4.5, § 4.505(1); App. 8. The charge at issue here is an equivalent runoff unit charge ("ERU") based upon the amount of impervious surface area on developed property. *Id.,* § 4.505(4)(b); App. 10. A flat ERU is also imposed on all undeveloped parcels at the rate of two-tenths of one unit per parcel up to 100 acres. *Id.,* § 4.507(4)(g); App. 16. Offsets against the ERU are permitted in the ordinance, based upon mitigation efforts undertaken by the property owner, but subject either to a 50% or 80% cap depending upon the property use. *Id.,* § 4.506(3); App. 12-13. As a result, every parcel in the Village, whether developed or undeveloped, is subject to some amount of the ERU charge.

Unpaid charges under the ordinance constitute "a lien upon the property served," which charges are to be collected under the state law governing municipal public utility charges. *Id.,* § 4.508(3); App. 7. This state law process requires delinquency notice; if the charges remain unpaid, the charges become a lien upon the property and "the clerk shall insert the

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Further, nothing in the record indicates that any of the parcels is related in any way to gaming or gaming activities. *See* JSA 114-20.

delinquent amount and penalty as a tax against the lot or parcel of real estate." WIS. STAT. § 66.0809(3). In that event, "[a]ll proceedings in relation to the collection of general property taxes and to the return and sale of property for delinquent taxes apply to the tax if it is not paid within the time required by law for payment of taxes upon real estate." *Id.*

Immediately after adoption of its ordinance and every year since, the Village billed the Tribe for charges allegedly due under the stormwater management ordinance. The Tribe has declined to pay those charges each year as to its trust land, resulting in accumulated charges allegedly due in excess of $230,000. JSA 122-23. As a result, the Tribe has received tax foreclosure notices as to 143 of the 148 trust parcels, advising that payment must be made in order to avoid "foreclosure costs and the publication of delinquent taxes in the newspaper . . . " JSA 116-17.

### B. Federal statutory and regulatory framework

The CWA, first enacted in 1972, directed the EPA to establish standards and administrative processes to regulate the discharge of pollutants into the Nation's waters from point sources. Pub. L. No. 92-500, 86 Stat. 816, Act of Oct. 18, 1972, codified at 33 U.S.C. § 1251 *et seq.* Pollution was to be controlled through the issuance of permits by EPA to point source polluters, which permits required compliance with water quality standards set by the EPA. States were authorized to propose their own regulatory programs to the EPA. *Id.,* § 402(b). In addition to

showing program compliance with water quality standards, such state proposals must be accompanied by a statement from the attorney general "that the laws of such state . . . provide adequate authority to carry out the described program." *Id.* Nothing in the 1972 CWA purported to expand upon underlying state authority.

In 1987, Congress amended the CWA in two pertinent respects. Pub. L. No. 100-4, 101 Stat. 7, Act of Feb. 4, 1987. First, Congress authorized the EPA to regulate broader categories of dischargers so as to more effectively capture stormwater runoff, also through a permitting system. And again, states could propose their own programs, which proposals must be accompanied by a statement from the attorney general that the state had adequate authority under state law to implement such programs. *Id.,* §§ 401-404, codified at 33 U.S.C. § 1342(b); App. 23. Second, Congress authorized the EPA to treat recognized Indian tribes as states for the administration of CWA programs pertaining to "the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation . . . " *Id.,* § 518(e), codified at 33 U.S.C. § 1377; App. 44. This is the only explicit reference in the CWA to trust or tribal lands. Neither of the 1987 amendments relating to state or tribal programs expanded the underlying authority of those governments.

From its first regulations under the CWA, the EPA has indicated that state programs do not generally apply to "Indian activities on Indian reservations under the jurisdiction of the United States." 38 Fed. Reg. 13528, May 22, 1973, codified as 40 C.F.R. § 125.2(b) (1973). The regulations promulgated by EPA to implement the 1987 amendments to the CWA reflected this same view. 40 C.F.R. § 122.31; App. 50 ["(If you [Tribe] do not have an authorized NPDES program, EPA implements the programs for discharges on your reservation as well as other Indian country, generally.)"]. The EPA required that, to the extent that a state proposes to administer programs on tribal lands, the state proposal must specifically demonstrate state authority over tribal lands. *See* 40 C.F.R. § 123.23(b) (1983); 40 C.F.R. § 123.23(b) (1988); App. 51. In its final rule on permitting authority for treatment of tribes as states, EPA noted that the transfer of permitting authority to tribes would generally be from the EPA to tribes, not from states. The EPA observed that it was unaware of any state for which it had authorized the issuance of permits on an Indian reservation. 58 Fed. Reg. 244 (Dec. 22, 1993).

In 1973, the State of Wisconsin applied for approval from the EPA to administer the CWA permitting programs in the State. The EPA approved the State's application and noted that the State's application specifically excepted permits "for Indian activities on Indian lands." JSA 78-79. Wisconsin's application did not seek approval to issue such permits because "the state was without authority to issue WPDES

permits to Indian tribes or tribal organizations operating on Indian lands in Wisconsin." 75 Wis. Op. Att'y Gen. 220, 242 (1986).

As the State of Wisconsin acknowledged, the EPA retains permitting authority under the CWA over Indian country in Wisconsin. As a consequence, both the Village and the Tribe applied to EPA for a permit to govern their respective stormwater discharges. In 2010, the EPA issued draft permits to both the Village and the Tribe. JSA 59-67, 68-76. In both permits, the EPA stated " . . . the Reservation of the Oneida Tribe of Indians of Wisconsin is part of Indian country and permits for discharges within the Reservation are the responsibility of U.S. E.P.A." JSA 62, 71. EPA has not concluded administrative proceedings over whether, and under what terms, it might issue final permits to the Village and the Tribe.

### C. Proceedings below

In the district court, the Tribe moved for summary judgment on two of the three claims made in its complaint: first, that Village authority to regulate the Tribe's trust land is pre-empted by federal law due to the absence of express authorization to do so by Congress in the CWA or otherwise; and second, that the Village's ordinance constitutes an attempted tax upon the Tribe's trust land, which is expressly prohibited by federal law. JSA 113. At the same time, the United States moved to dismiss the third-party complaint filed by the Village against it, which

complaint demanded payment of the outstanding stormwater charges allegedly due as to the Tribe's trust land under the so-called federal facilities provision[4] of the CWA, 33 U.S.C. § 1323. JSA 125-26. The Village contested both motions, asserting authority from Congress to impose its ordinance on trust land under the federal facilities provision of the CWA and disputing that its ordinance constitutes a tax. JSA 127-30.

On September 5, 2012, the district court granted the Tribe's motion for summary judgment and the United States' motion to dismiss, concluding that the Village's ordinance constitutes an impermissible tax and that the federal facilities provision does not apply to tribal trust land. 891 F. Supp. 2d 1058, Pet. App. 23-41. On appeal, the Village challenged both of the district court's conclusions. Appellant's Brief, Statement of the Issues (7th Cir.), Doc No. 11.

In an unanimous opinion by the panel, the Seventh Circuit affirmed the district court on both holdings. The court of appeals concluded that the CWA does not authorize local governments to regulate stormwater runoff from trust land, leaving regulation of such land to the EPA or the Tribe. Pet. App. 7-8. The court of appeals also identified another reason

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[4] The section is captioned "Federal facilities pollution control" and is generally triggered by allegations that a federal facility is the alleged polluter. *See City of Olmstead Falls v. U.S. E.P.A.*, 233 F. Supp. 2d 890, 897 (N.D. Ohio 2002).

why the Village must lose: federal law prohibits state and local taxation of tribal trust land and the Village's ordinance constitutes an impermissible tax. Pet. App. 10-11.

At no point in the proceedings below did the parties place into controversy the continuing existence of the Tribe's reservation, the Secretary's authority to place land into trust for the Tribe, or the Congress' constitutional authority to place tribal trust land beyond state and local jurisdiction as a general proposition. As a result, neither the district court nor the court of appeals addressed those issues.

## REASONS FOR DENYING REVIEW

The Village misrepresents the facts and the holdings of the decision below. Accurately and fully read, the decision below does not conflict with those of other circuits. Further, the court below determined that a single, local ordinance adopted by the Village cannot be imposed on the Tribe's trust land, a judgment limited to the one ordinance and the 1400 acres at issue. Finally, the court of appeals made an alternative holding, that is, that the Village's ordinance constitutes an impermissible tax, which holding is sufficient to support the judgment and is not challenged in the petition for certiorari. For these reasons, Respondent Oneida Tribe of Indians of Wisconsin respectfully requests that the petition for a writ of certiorari be denied.

## I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE POINTS OF LAW DECIDED BY THE COURT BELOW.

The Seventh Circuit decision is a straightforward application of well-settled principles of federal Indian law to determine whether the Village can impose a particular ordinance on the Tribe's trust land. The court began its analysis with the rule that "land acquired by the federal government in trust for Indians is, like original tribal land, for the most part not subject to state jurisdiction." Pet. App. 4. Citing this Court's decision in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), the court of appeals indicated that the consequence of trust acquisition of land for Indians is to reestablish the Tribe's sovereignty over that land. Pet. App. 4. Accordingly, the court inquired whether the federal government had authorized the Village to assess fees or taxes on Indian land to pay for its stormwater management program. Pet. App. 5.

The court of appeals noted the federal facilities provision of the CWA, 33 U.S.C. § 1323(a), "does waive federal immunity from local regulation of stormwater runoff [but] does not address the underlying authority of local governments to regulate that runoff from Indian lands." Pet. App. 7. As it was obliged to do, the court of appeals examined the entire statutory scheme and concluded that tribal land is not exempt from the CWA but remains subject to EPA or tribal jurisdiction to administer the permitting system. Pet. App. 8. In particular, the court of

appeals relied upon the only provision in the CWA that explicitly addresses tribal trust land, that is, the provision authorizing treatment of tribes as states for the purpose of administering programs on trust land. Pet. App. 8; *see* 33 U.S.C. § 1377. Finally, the court of appeals noted that the State of Wisconsin had itself expressly disclaimed authority to regulate storm-water runoff from tribal land. Pet. App. 9.

The court of appeals decision is wholly consistent with those of other courts of appeals with which the Village claims conflict. Indeed, one of the cases claimed by the Village to conflict with the lower court's decision confirms the correctness of the lower court's analysis. In short, the claimed conflict with the Ninth and Tenth Circuit Courts of Appeals is illusory.

The Village cites authority from those courts for the proposition that a federal law of general applicability applies to Indian tribes and their property. *See* Petition, pp. 13-16, *citing Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985); *Solis v. Matheson,* 563 F.3d 425 (9th Cir. 2009); and *Davis v. Morton,* 469 F.2d 593 (10th Cir. 1972). In each of these, the tribal party challenged the applicability of a federal statute to regulate tribal activities and/or tribal lands at all and the courts concluded that the general federal statute did, indeed, apply. *Donovan*, 751 F.2d at 1115 [holding that the Occupational Safety and Health Act applied to Indians and their property]; *Solis,* 563 F.3d at 428 [holding that the Fair Labor Standards Act applied to Indian

tribes]; and *Davis,* 469 F.2d at 597 [holding that the National Environmental Policy Act applied to Indian lands]. But this issue is not presented by the decision below.

The Tribe has never disputed the applicability of the CWA to its trust land; neither did the Seventh Circuit hold that the CWA does not apply to the Tribe's trust land. Instead, the Tribe disputed the Village's construction that the CWA authorized the Village, rather than the EPA or the Tribe, to regulate stormwater runoff from the Tribe's trust land. The court of appeals clearly applied the CWA to the Tribe's trust land and construed the CWA to leave management of stormwater runoff from trust land to the EPA or the Tribe, not the Village. In the words of the court below, "[t]he federal Environmental Protection Agency has the whip hand." Pet. App. 7. This conclusion is squarely in line with the Ninth and Tenth Circuit decisions that other general federal statutes apply to tribal land.

Another Tenth Circuit case claimed by the Village to conflict with the decision below in fact supports it. *See* Petition, p. 14, *citing Phillips Petroleum Co. v. EPA,* 803 F.2d 545 (10th Cir. 1986). In *Phillips*, the court considered whether the Safe Drinking Water Act authorized the EPA or the Bureau of Indian Affairs ("BIA") to regulate drinking water on the Osage Reservation. 803 F.2d 545. Like the Tribe here, the Osage Tribe acknowledged applicability of the act to the reservation. *Id.,* at 549. And like the State of Wisconsin, the State of Oklahoma had made no

attempt to assert jurisdiction over the Tribe's land. *Id.* The only question was which federal agency, the EPA or the BIA, had authority to implement the federal standards as to tribal land. The Tenth Circuit concluded that, in the absence of treatment as state status for the Osage Tribe, the EPA held that authority. *Id.,* at 557. In the decision below, the Seventh Circuit construed the CWA in precisely the same manner, that is, to authorize the EPA or potentially the Tribe under the treatment as state provision, rather than the Village, to regulate stormwater runoff from the Tribe's trust land.[5]

There is, then, no conflict among the circuits on these points of law. To the contrary, courts of appeals to consider the matter have all reached the same conclusion as the court below: federal environmental statutes do not authorize state or local jurisdiction

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[5] The structure of the Safe Drinking Water Act parallels that of the CWA. Both regulate the discharge of pollutants through the issuance of permits by the EPA, which permits enforce EPA standards. Both authorize the states to administer programs upon approval by the EPA and both authorize treatment as state status for Indian tribes as to their lands for the administration of programs. Finally, both have been construed to authorize the EPA to administer programs on Indian lands in the absence of treatment as state status for the Tribe. *Compare Phillips Petroleum Co. with* decision below. In these respects, the Tenth Circuit decision and the decision below are consistent with the Ninth Circuit's construction of the similarly structured federal Resource Conservation and Recovery Act. *Washington Department of Ecology v. U.S. EPA,* 752 F.2d 1465 (9th Cir. 1985) [holding that the federal statute did not authorize state jurisdiction over tribal land].

over tribal trust land and leave the administration of environmental programs to the federal government or tribes.

## II. THE DECISION BELOW HAS NO NATIONAL IMPLICATIONS WARRANTING REVIEW BY THIS COURT.

There are three tenets central to the Village's insistence that the decision below has national implications: first, the court below held that states and local governments lack jurisdiction over all tribal land, whether or not held in trust, Petition, pp. 20-22; second, the court nullified state jurisdiction in its entirety over tribal trust land, Petition, pp. 22-28; and third, the court below held that the Tribe's trust land was exempt from the CWA altogether, leaving stormwater runoff unregulated. Petition, pp. 28-33. Because all three tenets are wrong, the Village fails to identify any national implications from the court of appeals' decision that a single local ordinance is inapplicable to the 1400 acres of trust land at issue.

The Village misrepresents the classes of tribal land subject to the decision below. The Tribe challenged only the applicability of the Village's ordinance to its trust land, not its fee land. *See* JSA 42, 51-53. Further, the court below explicitly relied upon the unique status of trust land in reaching its judgment. The court noted that the United States holds only bare legal title to trust land, trust land is inalienable and non-taxable, and trust land is dedicated more than any other to tribes' sovereign authority. Pet.

App. 3-4. Indeed, the court relied upon *City of Sherrill v. Oneida Indian Nation, supra,* for the proposition that acquisition of land into trust for tribes reflects a federal determination that such lands are subject to tribal, not state or local, authority. As the court below concluded, "The government's status as trustee rather than merely donor of tribal lands is designed to preserve tribal sovereignty, not to make the federal government pay tribal debts." Pet. App. 12. Any shorthand references by the court in its opinion to tribal land, then, must be understood to refer to the Tribe's trust land, not as a *sub silentio* expansion of the holding to include fee land as well as trust land. If nothing else, the lower court's reliance on *City of Sherrill,* 544 U.S. at 221, which carefully distinguished trust land from fee land with respect to local authority, makes plain that the court's judgment was limited to the former.

Similarly, the Village wildly overstates the court's holding to nullify state jurisdiction over trust land for any purpose, a result the Village claims "could destroy the states." Petition, p. 23. The court had no occasion to make this inquiry, much less reach such an expansive conclusion. The only matter before the court was the applicability of the Village's stormwater management ordinance to the Tribe's trust land. In fact, the court noted the existence of residual state authority: "Although the authority of a state or local government over Indian territory is limited, it is not negligible, especially when Indians and non-Indians live in close proximity." Pet. App. 5. The court did not

parse the extent of state jurisdiction over trust land as a general proposition because it was unnecessary to do so. The court was presented only with the applicability of the Village's stormwater management ordinance to the Tribe's trust land and the court held nothing more than that this ordinance was pre-empted by federal law.[6]

In perhaps its most fanciful overreach, the Village claims that the court below has created "impenetrable islands" as to which stormwater regulation will be altogether missing. Petition, p. 31. This result, the Village warns, severely compromises the nationwide reach and effectiveness of the CWA to attack the "cancer" of water pollution.[7] *Id.* But the court below

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[6] Similarly, the court below did not hold that the State of Wisconsin lacks title to navigable waters of the State or the lands thereunder. *See* Petition, pp. 33-34. Had this been a concern, the State of Wisconsin would have presumably raised it when it applied to administer CWA programs and expressly excepted Indian land. In any event, the Village cannot invoke this issue now as a basis for review by this Court – the right asserted by the Village belongs to the State of Wisconsin, it has not been previously asserted by the Village, and it was not decided by the court below.

[7] The Village postulates that a nationwide and uninterrupted system of stormwater management is necessary to the effectiveness of the CWA. Petition, pp. 31-32. Were this true, it would seem that administration of the nationwide program by fifty different states would similarly undermine the effectiveness of the CWA. However, an uninterrupted physical system is not necessary since all governments that administer programs must comply with the same water quality standards set on a nationwide basis by the EPA. Further, in the particular instance of permit applications by the Village and the Tribe, the EPA may

(Continued on following page)

did *not* hold that the CWA does not apply to trust land. It merely held that the federal facilities provision of the CWA does not authorize the Village to regulate or tax trust land. Pet. App. 7. The court went on to explicitly indicate that the CWA applies to the Tribe's trust land, under regulation by the EPA or the Tribe. "Those lands are not exempt from the Clean Water Act. But it is the Indian governments of those lands, in this case the government of the Oneida tribe, rather than states, that can be delegated regulatory authority under the Act. See 33 U.S.C. § 1377(e)(2); 40 C.F.R. § 122.31(b)." Pet. App. 8.[8] Simply stated, the court below held that the Tribe's trust land is subject to the CWA, to be administered by either the EPA or the Tribe.

In the end, none of the implications the Village claims from the decision below bears up in the face of a simple reading of the actual decision. The decision does not nullify state jurisdiction over tribal fee or trust land and does not exempt such land from regulation under the CWA. Thus, the decision below lacks any national implications and does not jeopardize

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consider and impose any necessary conditions or accommodations in issuing final permits.

[8] As the lower court noted, this provision of the CWA, which authorizes tribes to administer water pollution programs on their reservation upon approval by the EPA, explicitly authorizes programs as to trust lands, unlike the federal facilities provision which is silent with regard to tribal lands. Pet. App. 8.

state authority in general or impair the effectiveness of the CWA as claimed by the Village.[9]

## III. THERE IS AN ALTERNATIVE HOLDING SUFFICIENT TO SUPPORT THE JUDGMENT BELOW WHICH THE VILLAGE DOES NOT CHALLENGE.

Throughout the proceedings below, the Tribe challenged the applicability of the Village's ordinance to its trust land on the ground, among others, that the terms of the ordinance constitute an impermissible tax upon that land. *See* JSA 51-52, *citing* 25 U.S.C. § 465 ["Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be

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[9] The Village also reads the decision below to erroneously construe the CWA to delegate authority to the EPA to make reservations the legal equivalent of states. Petition, pp. 35-38. It is not clear whether this is an argument that the court below erroneously construed the CWA or that the CWA unconstitutionally authorizes the creation of new states. In either case, the court below held merely that the CWA authorizes treatment of tribes as states, with both tribes and states required to demonstrate jurisdiction independent of the CWA to administer those programs before the EPA can approve programs by either to do so. Pet. App. 7-8; 33 U.S.C. §§ 1342, 1377. The court below did not hold that the CWA expanded the underlying jurisdiction of either states or tribes, thereby establishing new jurisdictional entities.

exempt from State and local taxation."]. The Village did not dispute the proposition that it cannot tax trust land, but it disputed the construction of its ordinance as constituting a tax. *See, e.g.,* Appellant's Brief, Argument D (7th Cir.), Doc. No. 11.

In an alternative holding to its determination that the CWA does not authorize the Village to regulate the Tribe's trust land, the court below went on to determine whether the ordinance constitutes an impermissible tax. The court made clear that this was an alternative, independent basis for its judgment: "So Hobart loses its case against the Tribe. And there is another reason it must lose. Because federal law prohibits states and local authorities to tax Indian lands, the Tribe can't be forced to pay the assessment decreed by the challenged ordinance if the assessment is a tax." Pet. App. 10. After examining the particular terms of the ordinance, the court concluded " . . . the stormwater runoff assessment is a tax rather than a fee." Pet. App. 11. As such, the IRA prohibits the imposition of the ordinance on the Tribe's trust land. Pet. App. 3, 11.

The Village does not challenge this alternative holding in its petition. The first question upon which the Village petitions is limited to its construction of the federal facilities provision of the CWA. Petition, p. i. The second question presented by the Village relates to an issue not actually decided by the court below, that is, whether Indian country is removed altogether from state jurisdiction. *Id.,* p. ii. Neither of these questions challenges the alternative holding of

the court below that the Village's ordinance constitutes an impermissible tax upon trust land.

Further, neither of these questions can be fairly read to include the lower court's alternative holding. *See* S. Ct. Rule 14(1)(a). The alternative holding depended upon an analysis of the particular terms of the Village's ordinance and a determination of whether those terms constitute a tax under federal law. *See Carpenter v. Shaw,* 280 U.S. 363, 368-69 (1930). None of those issues is relevant to the construction of the CWA and the IRA proposed by the Village in its questions presented. Indeed, the Village insists that its ordinance is authorized without regard to its particular terms. Consequently, the petition does not present this Court with an opportunity to reach the independent, alternative holding of the lower court. *See TRW Inc. v. Andrews,* 534 U.S. 19, 34 (2001); *Chandris, Inc. v. Latsis,* 515 U.S. 347, 353 (1995) [Court does not ordinarily reach issues not raised in the petition].

The Village essentially invites this Court to undertake a futile task. Were the Court to grant certiorari and reverse on one of the questions presented by the Village, the judgment below would nonetheless stand based on the alternative holding that the ordinance constitutes an impermissible tax. This is hardly a wise or useful expenditure of the Court's time and resources. Even if the questions presented by the Village warranted review by this Court (which they do not, as demonstrated above),

this case is not the appropriate vehicle with which to do so.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# VILLAGE OF HOBART ORDINANCE

## CHAPTER 4.5

## STORM WATER MANAGEMENT UTILITY



### Chapter 4.5 Storm Water Management Utility

Application: The rules, regulations and rates set forth in this section shall apply to all real property within the boundaries of the Village of Hobart.

### 4.501 FINDINGS.

(1) The Village of Hobart finds that the management of storm water and other surface water discharges within and beyond its borders is a matter that affects the public health, safety, and welfare of the Village, its citizens, businesses, and others in the surrounding area. The development of land increases impervious surfaces and results in increased

storm water runoff. Failure to effectively manage this increased storm water runoff affects the sanitary sewer utility operations of the Village Sanitary District by, among other things, increasing the likelihood of infiltration and inflow into the sanitary sewer. In addition, surface water runoff may create erosion of lands, threaten businesses and residences with water damage and create sedimentation and other environmental damage in surrounding areas such as, Ashwaubenon Creek, Duck Creek, Dutchman's Creek, Hemlock Creek, Lancaster Brook, Silver Creek, and Trout Creek. Specific requirements have been placed on the Village through the Wisconsin Department of Natural Resources' (DNR) Regulation 216 requiring the Village to improve the quality of storm water discharged to the waters of the State.

(2) The cost of operating and maintaining the Village storm water management system, ensuring regulatory compliance, and financing necessary plans, studies, repairs, replacements, improvements and extension thereof should, to the extent practicable, be allocated in relationship to the benefits enjoyed and services received there from.

## 4.502 ESTABLISHMENT OF STORM WATER MANAGEMENT UTILITY.

(1) In order to protect the health, safety, welfare of the public, Village assets, and natural resources, the Village Board is exercising its

authority to establish the Village of Hobart's Storm Water Management Utility and set the rates for storm water management services.

(2) The operation of the Storm Water Management Utility shall be under the supervision of the Village Board. The Village Administrator will be in charge of the Storm Water Management Utility.

(3) The Village is acting under the authority of the Village of Hobart Ordinance 4.2 Storm Water Runoff, Chapters 60, 61, and 66 of the Wisconsin Statutes, and particularly without limitation the following sections: §§ 60.01, 60.22, 60.23, 60.50, 60.53, 66.0621, 60.0627, 61.34, 66.066, 66.069, 66.0701, 66.0703, 66.076, 66.0809, 66.0811, 66.0813 and 66.0821.

## 4.503 POWERS AND DUTIES OF UTILITY.

(1) ***Facilities:*** The Village through the Storm Water Management Utility may acquire, construct, lease, own, operate, maintain, extend, expand, replace, clean, dredge, repair, conduct, manage and finance such facilities as are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management. These facilities may include, without limitation by enumeration, surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a storm water management system.

(2) ***Rates and Charges:*** The Village through the Storm Water Management Utility may establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance.

(3) ***Budgeting Process:*** The Village through the Storm Water Management Utility shall prepare an annual budget, which is to include all operation and maintenance costs, debt service, administrative fees and other costs related to the operation of the Storm Water Management Utility. The costs shall be spread over the rate classifications as determined by the Board. The budget is subject to the public hearing and approval process, set forth in Wis. Stat. §65.90.

(4) ***Excess Revenues:*** The Village will retain any excess of revenues over expenditures in a year in segregated Storm Water Enterprise Fund which shall used exclusively for purposes consistent with this ordinance.

(5) ***Financing Methods:*** The Village has the authority provided in §66.0821, and may exercise such authority with respect to all financing methods such as user charges and liens so stated therein.

**4.504 DEFINITIONS:** In this chapter, the following terms have the meanings set forth below:

(1) ***Administrator:*** The Village Administrator or his/her designee.

(2) ***Agricultural Land Uses:*** Means related to or used for production of food and fiber, including but not limited to, general farming, livestock and poultry enterprises, grazing, nurseries, horticulture, viticulture, truck farming, forestry, sod production, cranberry productions and wild crop harvesting and includes lands for onsite buildings and other structures necessary to carry out such activities.

(3) ***Developed Property:*** The term "developed property" means the real property that has been altered from its natural state by the addition of any improvements that may include a building, structure, impervious surface, and change in grade or landscaping.

(4) ***Detention Storage:*** Is the temporary detaining or storage of storm water in reservoirs under predetermined and controlled conditions, with the rate of discharge regulated by installed devices.

(5) ***Duplex Unit:*** A residential space containing two dwelling units.

(6) ***Dwelling Unit:*** One or more rooms that are arranged, designed or used as living quarters for one family only. Individual bathrooms and complete kitchen facilities, permanently

installed, shall always be included for each dwelling unit.

(7) ***Equivalent Runoff Unit or ERU:*** The term "ERU" means the statistical average of horizontal impervious area of "single family homes" within the Village of Hobart the date of the adoption of this Ordinance. The horizontal impervious area includes but it is not limited to, all areas covered by structures, roof extensions, patios, porches, driveways, and sidewalks.

(8) ***Farmstead Home Site:*** That portion of any agricultural property which contains one or more dwelling units, and vehicle garage regardless of whether the dwelling units are on a separate lot or parcel.

(9) ***Impervious Area or Impervious Surface:*** The term "impervious area or impervious surface" means areas that have been paved, covered or compacted to inhibit the natural infiltration of water into the soil or cause water to run off the area in greater quantities or at an increased rate of flow from the present under the natural conditions as undeveloped property. Such areas may include, but are not limited to, roofs, roof extensions, patios, porches, driveways, sidewalks, pavement, gravel, athletic courts, and compacted surfaces, private roads, and parking lots. Excluded from this definition are undisturbed land, lawn, fields and public streets.

(10) ***Lot:*** A parcel of land having a width and depth sufficient for one principal building

and its accessory building together with open spaces required by the Village of Hobart zoning ordinance and abutting a public street or access easement.

(11) ***Multifamily Unit:*** A residential space consisting of three or more dwelling units within a single building including apartments, residential condominiums, and townhouses.

(12) ***Non-residential Property:*** Any developed lot or parcel other than residential property as defined herein, including, but not limited to, transient rentals (such as hotels and motels), mobile home parks, commercial, industrial, institutional, governmental property, parking lots, and agricultural accessory buildings.

(13) ***Residential Property:*** Any lot, parcel or farmstead home site with a vehicle garage developed exclusively for residential purposes including single family homes, duplex units, multifamily units, manufactured homes and condominiums but not including transient rentals (such as hotels and motels) and mobile-home parks.

(14) ***Runoff:*** The term "runoff" means the surface water, including rain and snowmelt, which is inhibited by impervious surfaces from naturally infiltrating into soil.

(15) ***Single Family Home:*** Any residential property consisting of a single dwelling unit.

(16) ***Storm Water System:*** Any natural or man-made Storm Water conveyance facility, means

all constructed facilities or natural features used for collecting, storing, and conducting storm water to, through, and from drainage areas to a point of outlet. It may be operated or maintained by the Village including, but not limited to retention/detention ponds, ditches, storm sewer, roads and navigable and non-navigable waterways.

(17) ***Undeveloped Property:*** Property that has not been altered by the addition of any improvements such as a building, structure, change of grade or substantial landscaping; agricultural use of property; or property that has been graded for residential or commercial development but does not have buildings, structures or other improvements. A property shall be considered developed pursuant to this chapter, upon issuance of a certificate of occupancy, or upon substantial completion of construction or final inspection if no such certificate is issued or where construction is at least 50% complete and construction is halted for a period of three (3) months.

## 4.505 RATES AND CHARGES.

(1) The Village Board shall establish a uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village. It shall be the policy to establish storm water service charges in such amount in order to pay for all or a part of operation and maintenance, administrative

fees, debt service, and other costs related to the operation of the storm water management utility. The Village Board may establish and modify storm water service charges, as necessary, so as to assure that the charge generate adequate revenues to pay the costs of the storm water management program and that costs are allocated fairly and proportionately to all parcels in the Village.

(2) By this Ordinance, the Village Board is establishing the basis for the rates that will be used to calculate and impose a charge upon each developed lot and parcel within the Village for services and facilities provided by the Storm Water Management Utility consistent with this ordinance. Charges imposed under this chapter is in addition to assessments imposed by resolution of the Village of Hobart Municipal Code.

(3) The amount of the charge to be imposed, for each customer classification shall be made by resolution of the Village Board. The current rates will be set forth in a Storm Water Utility Rate Table and kept on file in the office of the Village Clerk. The rates shall be reviewed by the Village Board on an annual basis and adjusted as necessary.

(4) Charges shall be imposed to recover all or a portion of the costs for the Storm Water Management Utility set forth in paragraph (1). Such charges may include the following components:

(a) *Base Charge (BC):* The base charge may be imposed on all developed property in the Village. The base charge will be designed to reflect the fact that all developed properties benefit from the storm water management activities of the Village and that all developed properties contribute in some way to the storm water discharge that must be managed by the Village. The base charge will be designed to collect the administrative costs of the storm sewer utility and the portion of capital costs not covered by other means.

(b) *Equivalent Runoff Unit (ERU) Charge:* The ERU charge shall be imposed for all property in the Village based upon the amount of impervious area as reasonably determined by the Administrator under **Sec. 4.507**.

(c) *Special Charge (SC):* A special charge may be imposed on property that is in a specific area benefited by a particular storm water management facility. The special charge will be developed to reflect the benefits/services in a particular area that may not be appropriate to spread to property throughout the Village. The special charge shall be calculated on an ERU basis or impervious surface area.

(d) *Connection Charge (CC):* A one-time charge may be imposed when a property is converted from undeveloped to developed property or otherwise becomes connected to the Village Storm Water Management System. The charge may vary based on the size of the parcel.

(5) The Village Board may make such other classifications in accordance with **Sec. 4.507** as will be likely to provide reasonable and fair distribution of the costs of the Storm Water Management Utility. In so doing, the Board may provide credits against certain charges set for the above facilities installed and maintained by the property owner for the purpose of lessening the storm water flow from that given property.

(6) The Village of Hobart is hereby appointed as the collection agency for the Village Storm Water Utility. Bills shall be prepared by the Village, or its agent, and sent to the owner a minimum of thirty (30) days prior to such bill being due pursuant to Section 4.508 of each premise served. The Village shall allocate the actual cost of billing and collecting as a base charge.

## 4.506 CREDITS.

(1) The Village Board may provide credits against the ERU and SC Charges pursuant to the 4.506 paragraphs (2) through (9) The Village Board will not provide credits against the

base charge or connection charge, unless a scrivener error is made and it is determined that the property owner paid an erroneous charge.

(2) To be entitled to consideration for a credit, the property owner shall file an application together with a review fee with the Village Administrator that is supported by documentation from a professional engineer and demonstrates the conditions of this section has been met. The application is subject to review and approval of the Administrator. If the Administrator and property owner cannot agree on credits, then the Administrator can deny the application unless the property owner agrees to pay for the necessary engineering services.

(3) Credits may be provided under the following circumstances:

(a) A non-residential property owner may seek a credit on the ERU charge where they have installed and maintained facilities that result in an approved storm water system on site. An ERU Credit may be obtained based on the percent of a 25-year storm event that is detained on site prior to discharge.

(b) Any property owner may seek a credit on the SC charge if storm water from the property does not drain into any storm water system that is the subject of the special charge.

(4) An 80% credit for parcels used exclusively for agricultural, forest, or agricultural forest.

(5) An 80% credit for agricultural buildings being used as such on exclusively agricultural classified property.

(6) A maximum of 50% credit if the property owner can document to the Administrator that an onsite approved storm water system is treating storm water.

(7) No credit shall be considered for any "natural" features, limited to, wetlands, streams, and creeks, floodplains, or water impoundment of any kind in existence prior to the passage of this Ordinance.

(8) The Administrator may revoke the credit if the basis for the credit has materially changed. The Administrator shall provide at least 30 days advance written notice of any proposed revocation.

(9) A denial or revocation of any credit may be appealed under **Sec. 4.509**.

## 4.507 CUSTOMER CLASSIFICATIONS.

(1) For purposes of imposing the base and ERU charges, all lots and parcels within the Village shall be classified into the following (5) five customer classes:

(a) Residential – Single Family, including Farmstead Home Sites

(b) Residential – Duplex

(c) Residential – Multifamily including condominiums, townhouses, and apartments

(d) Non-residential

(e) Undeveloped

(2) The Administrator shall prepare a list of lots and parcels within the Village of Hobart and assign a customer classification of residential, non-residential, or undeveloped to each lot or parcel.

(3) The average square footage of impervious area of (1) ERU is established to be equivalent to 4000 Square Feet

(4) ERU's shall be calculated per classification as follows:

(a) Residential – Single Family including mobile homes: 1 ERU.

(b) Residential – Duplex: .75 ERU for each dwelling unit.

(c) Residential – Multifamily including condominiums, townhouses and apartments: .6 ERU times the number of dwelling units.

(d) The charges imposed for non-residential properties, as defined herein, shall be the rate for one (1) ERU, multiplied by the numerical factor obtained by dividing the total impervious area of non-residential property by the square footage of

(1) ERU. The factor shall be rounded down to the nearest 1/10th, i.e.:

$$\frac{\text{Impervious area in square feet}}{\textbf{4000} \text{ square feet}} = \underline{\quad 1 \quad} \text{ ERU Rate}$$

$$\text{e.g. } \frac{10{,}500 \text{ square feet}}{\textbf{4000} \text{ square feet}} = \textbf{2.625 ERUs} = \textbf{2.6 ERUs}$$

(e) The Administrator/Consultant shall be responsible for determining the impervious area, based upon the best available information, including, but not limited to, data supplied by the Public Works Director, aerial photography, the Property Owner, Tenant, or Developer. The Administrator/Consultant may require additional information, as necessary, to make the determination. The billing amount shall be updated by the Administrator/Consultant on any additions to the impervious area. Upon property owner's written notification and request, the Administrator/ Consultant shall review impervious area for possible reductions.

(f) All unoccupied developed lots and parcels shall be subject to the Storm Water Utility charges. Upon filing of a final plat or certified survey map, a charge of .5 ERU times the rate shall be imposed on each newly created undeveloped lot. Appropriate

ERU rate charges shall be made in accordance with the "New Construction" section at the time of building construction.

(g) All undeveloped lands and parcels, including agricultural, forest, and agricultural forest classified properties, shall be subject to the Storm Water Utility charges. The minimum charges for any non-residential parcel shall be equal to the rate of two-tenths of one ERU per parcel up to 100 acres.

**4.508 BILLING AND PENALTIES.**

(1) Storm Water Management Utility charges will be billed in advance and on an annual basis. Storm Water Management Utility 2007 charges shall begin July 1, 2007 and end December 31, 2007. Nothing in this paragraph shall be construed to preclude the Storm Water Management Utility from billing on a more frequent basis should the frequency of billing for municipal water and sanitary sewer service be increased.

(2) The property owner is held responsible for all storm water service charges on real property that he/she or it owns. All storm water bills and notices of any nature relative to the storm water management program will be addressed to the owner and delivered with reasonable care to the addressee by first class mail. A failure to receive a storm water

service charges bill shall not relieve any person of the responsibility for payment of storm water service charges within the prescribed period nor exempt any party from any penalty imposed for delinquency in payment thereof.

(3) Unpaid delinquent Storm Water Management Utility charges shall be a lien upon the property served and shall be enforced as provided in §66.0809(3). The Village shall collect delinquent charges under Wis. Stat. §§ 66.0821(4) and 66.0809(3).

(4) All delinquent charges shall be subject to a three (3%) percent penalty per quarter in addition to all other charges, including prior penalties that exist when the delinquent charge is extended upon the tax roll.

**4.509 METHOD OF APPEAL.**

(1) The Storm water Management Utility charge, a determination of ERU's, or ERU credits may be appealed by filing a written appeal with the Village Clerk prior to the utility charge due date if not paid, or within thirty (30) days of payment. The appeal shall specify all bases for the challenge and the amount of the storm water charge the appellant asserts is appropriate. Failure to file a timely appeal waives all rights to challenge such charge.

(2) The Village Administrator will determine whether the storm water charge is fair and

reasonable, or whether an adjustment or refund is due the appellant. The Administrator may act with or without a hearing, and will inform the appellant in writing of his or her decision.

(3) The appellant has thirty (30) days from the decision of the Administrator to file a written appeal to the Village Board.

(4) The Village Board shall review said written appeal and shall determine whether the storm water charge is fair and reasonable, or whether an adjustment or refund is due the appellant. The Village Clerk shall provide five (5) business days prior written notice of the time and place of the Board's consideration of the appeal to the appellant/owner at the address listed in the appeal. The appellant shall be notified in writing, by first class mail, of the Board's decision. If the Board or the Administrator determines that a refund is due the appellant, the refund will be applied as a credit on the customer's next storm water bill, or will be refunded at the discretion of the Administrator.

## 4.510 SPECIAL ASSESSMENT AND CHARGES.

In addition to any other method of charging for Storm Water Management Utility costs, the Village Board may by resolution collect special assessments on property in a limited and determinable area for special benefits conferred upon property pursuant to Wis. Stat. §66.0703. The failure to pay such special assessments may

result in a lien on the property enforced pursuant to Wis. Stat. §66.0703(13).

## 4.511 BUDGET EXCESS REVENUES

The Storm Water Utility finances shall be accounted for in a separate Storm Water Management Fund by the Village. The Utility shall prepare an annual budget, which is to include all operation and maintenance costs, administrative costs, debt served and other costs related to the operation of the Storm Water Utility. The budget is subject to the approval by the Village Board. The costs shall be spread over the rate classifications as determined by the Board. Any excess of revenues over expenditures in a year will be retained by the Storm Water Management Fund for subsequent years needs.

## 4.512 SEVERABILITY.

(1) If any provision of this Chapter 4.5, or the application thereof to any party or circumstance is, held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared severable.

(2) If any section, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent

provision, and such holding shall not affect the validity of the remainder of such ordinance.

## 33 U.S.C. § 1342

### § 1342. National pollutant discharge elimination system

#### (a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No

such permit shall issue if the Administrator objects to such issuance.

**(b) State permit programs**

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants

from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

**(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator**

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the

requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered

by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

**(d) Notification of Administrator**

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

**(e) Waiver of notification requirement**

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

**(f) Point source categories**

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of

subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

**(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants**

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

**(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works**

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced

appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

### (i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

### (j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

### (k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such

application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

**(l) Limitation on permit requirement**

**(1) Agricultural return flows**

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

**(2) Stormwater runoff from oil, gas, and mining operations**

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for

discharges of storm-water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

**(m) Additional pretreatment of conventional pollutants not required**

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations

to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

**(n) Partial permit program**

**(1) State submission**

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

**(2) Minimum coverage**

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

**(3) Approval of major category partial permit programs**

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

**(4) Approval of major component partial permit programs**

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

**(o) Anti-backsliding**

**(1) General prohibition**

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or

modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

**(2) Exceptions**

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if –

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of

pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

**(3) Limitations**

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

**(p) Municipal and industrial stormwater discharges**

**(1) General rule**

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

**(2) Exceptions**

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

**(3) Permit requirements**

**(A) Industrial discharges**

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

**(B) Municipal discharge**

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to 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 or the State determines appropriate for the control of such pollutants.

**(4) Permit application requirements**

**(A) Industrial and large municipal discharges**

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(B) Other municipal discharges**

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(5) Studies**

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

### (6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

## (q) Combined sewer overflows

### (1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and

sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

**(2) Water quality and designated use review guidance**

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

**(3) Report**

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

**(r) Discharges incidental to the normal operation of recreational vessels**

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal

operation of a vessel, if the discharge is from a recreational vessel.

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## 33 U.S.C. § 1377

### § 1377. Indian tribes

#### (a) Policy

Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

#### (b) Assessment of sewage treatment needs; report

The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans

and to construct treatment works under this chapter, and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

**(c) Reservation of funds**

The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92-203 [43 U.S.C. 1601 et seq.].

**(d) Cooperative agreements**

In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

**(e) Treatment as States**

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to

make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

**(f) Grants for nonpoint source programs**

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian

tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

**(g) Alaska Native organizations**

No provision of this chapter shall be construed to –

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of title 18, exists or does not exist in Alaska.

**(h) Definitions**

For purposes of this section, the term –

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

## 40 C.F.R. § 122.31

### § 122.31 As a Tribe, what is my role under the NPDES storm water program?

As a Tribe you may:

(a) Be authorized to operate the NPDES program including the storm water program, after EPA determines that you are eligible for treatment in the same manner as a State under §§ 123.31 through 123.34 of this chapter. (If you do not have an authorized NPDES program, EPA implements the program for discharges on your reservation as well as other Indian country, generally.);

(b) Be classified as an owner of a regulated small MS4, as defined in § 122.32. (Designation of your Tribe as an owner of a small MS4 for purposes of this part is an approach that is consistent with EPA's 1984 Indian Policy of operating on a government-to-government basis with EPA looking to Tribes as the lead governmental authorities to address environmental issues on their reservations as appropriate. If you operate a separate storm sewer system that meets the definition of a regulated small MS4, you are subject to the requirements under §§ 122.33 through 122.35. If you are not designated as a regulated small MS4, you may ask EPA to designate you as such for the purposes of this part.); or

(c) Be a discharger of storm water associated with industrial activity or small construction activity under §§ 122.26(b)(14) or (b)(15), in which case you

must meet the applicable requirements. Within Indian country, the NPDES permitting authority is generally EPA, unless you are authorized to administer the NPDES program.

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## 40 C.F.R. § 123.23

### § 123.23 Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

NOTE: EPA will supply States with an Attorney General's statement format on request.

(b) If a State (which is not an Indian Tribe) seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) The Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.28.