INTRODUCTION

Within the last decade, the Cayuga Indian Nation of New York (CIN, or the Nation) has acquired fee title to approximately 130± acres of real property in the Counties of Cayuga and Seneca. While this newly acquired property is located within the area that was once occupied by the Cayuga people before the nineteenth century, it is not property over which the present CIN can assert sovereignty. Rather, this property is within the sovereign jurisdiction of the State of New York. The location of these parcels is shown in Appendix A, Figure 1.

The CIN seeks to obtain the right to exercise sovereignty over these newly acquired lands by transferring its fee title to the federal government, which would hold these lands in trust for the benefit of the CIN. The CIN has applied to the Bureau of Indian Affairs (BIA) for such transfer under 25 U.S.C. § 465 and 25 CFR Part 151. A request was made for such transfer by letters dated April 14, 2005 and May 25, 2005 from a CIN Representative, Clint Halftown, to the Director of the Eastern Regional Office, BIA, United States Department of the Interior (DOI). The parcels are located in Cayuga and Seneca Counties. Comments relating to the parcels are to be received by the BIA by February 10, 2006. This document addresses the issues associated with the parcels identified in the above referenced application letters.

The implications of placing land in trust, potentially in perpetuity, are complex and require review among many federal, State, regional and local cross-cutting jurisdictions. Historically, this procedure has been used by the BIA with considerable restraint. Thus, the BIA has stated that its policy is not to take additional land in trust from tribal groups that "have the ability to manage their own affairs" and who "have been highly successful through their own efforts" (Memorandum from Commissioner, DOI BIA to All Directors and Superintendents dated April 21, 1959). BIA policy has also steered away from placing land into trust when it was evident that the trust status would place an Indian tribe in a position where the trust status is being used as a "tax dodge" by a "big operator" (Memorandum from Commissioner, DOI BIA to All Area Directors dated August 3, 1960). BIA policy is certainly relevant to the significant implications that would arise by placing the requested parcels of land into trust.

A transfer of this kind would be unprecedented and would result in significant adverse impacts to the State of New York, its political subdivisions, citizens, and residents. These impacts will be far-reaching and long-term. Illustrative of the specific issues of concern identified by the BIA, *impacts from the removal of the land from the tax rolls* (25 CFR Part 151.10(e)) and *jurisdictional problems and potential conflicts of land use that may arise* (25 CFR Part 151.10(f)), the resulting patchwork of cross-cutting jurisdictions and potential lack of regulatory coordination and supervision created by the "land in trust" would place an undue hardship on and unduly interfere with the ability of the State and local governments ability to protect and preserve the safety and welfare of its citizenry and the environment in which they work and reside. A sampling of these issues and hardships is summarized in this document.

In its April 14, 2005 application to the BIA, the CIN advises "… there are no immediate plans for expansion." and in the May 25, 2005 application it is asserted that "…there are no current plans for development of these parcels." However, the CIN also provides statements that contradict these assertions by indicating that the need for placing lands in trust is, in part, "to return to its aboriginal homelands and re-establish its presence in this

area". Although the amount of land included in the present applications totals approximately 130 acres, there is a specific reference in each of the applications stating that "The transfer of the Property in trust will enable the Nation to …purchase additional lands…" The CIN states in its April 14 and May 25, 2005 applications that the properties identified "…will form a nucleus around which the Nation would like to reestablish its presence in its former reservation territory"; depending upon the BIA's decision regarding the trust applications, the State may have a limited opportunity to review and evaluate potential impacts based on reasonably foreseeable future development (*i.e.*, consistent with the explicitly stated CIN intention to purchase additional lands), regardless of present land uses.

Based on the CIN's past development practices and current objectives, it is reasonably foreseeable that such lands acquired by the CIN, whether or not placed into trust, will continue to be utilized by the CIN to advance its economic development and diversification agenda. Furthermore, it is recognized that placing such lands in trust represents to the CIN a more appealing economic, financial and marketing alternative to achieving its goals than by complying with financial and regulatory processes required by State and local laws and regulations. However, the CIN's applications fail to demonstrate that fee to trust is necessary to achieve CIN goals.

Consequently, comments regarding the applications provided herein take into account current land use, and the recognition of the CIN's stated goals for lands as described above, as well as reasonably foreseeable future land uses and associated short-term, long-term and cumulative impacts. The parcels included in the current CIN applications represent a "snap-shot" of the CIN's land holdings at a specific time. It is reasonable to assume, based on the CIN's statements in the applications indicating that it intends to purchase additional lands, that the CIN's land acquisition efforts will continue and that whatever the outcome of the current applications, efforts to place lands into trust will continue resulting in additional direct impacts, as well as greater cumulative impacts. Thus, the BIA must consider the potential cumulative implications in its review of this and future applications.

O'Brien & Gere was retained by the State of New York to assist in the preparation of these comments relating to the CIN's petition. O'Brien & Gere has prepared these comments on behalf of the State to address the specific criteria for evaluating such requests as contained in 25 CFR Part 151.10; notwithstanding the legal question of whether these criteria, which define "On-reservation acquisitions" or similar criteria in 25 CFR Part 151.11 which define "Off-reservation acquisitions" instead apply.

Substantive comments contained herein focus on parcels identified in the Counties of Cayuga and Seneca, New York. As referenced herein, additional materials are appended to the report to support conclusions and/or provide additional information.

DESCRIPTION OF PARCELS

The CIN's applications include 9 parcels (130± acres) of land located within the jurisdictional boundaries of Cayuga and Seneca Counties. Table 1 summarizes the acreage of the parcels and location among towns and villages of these counties. The parcels in Cayuga County, located on the east side of Cayuga Lake, are approximately 12 miles apart, north to south. The parcels in Seneca County are on the west side of Cayuga Lake, approximately 4 miles by road from the closest parcel in Cayuga County. These dispersed locations reflect the lack of contiguity - the patchwork nature - of the parcels in these applications. In addition, the parcels are located within various water, sewer, fire, and school districts serving the areas of the parcels.

Table 1 *Summary of CIN parcels in Cayuga and Seneca Counties.*

City (C), Town (T), Village (V) or Hamlet (H)	Number of Parcels	Total Acreage
Cayuga County		
Union Springs (V)	4	111.46±
Springport (T)	1	3.70±
Montezuma (T)	1	0.01±
Seneca County		
Seneca Falls (T)	3	13.98±
Total	9	129.15±

The municipalities within which the parcels included in the current CIN applications are located, as well as those that may be purchased in the future, are comprised of people who live and work in long established communities. These people are the local electorate who chose representatives to guide community planning processes, provide services, and protect its citizens, public health, finite resources and the environment. These communities are comprised of; schools, parks, places of worship, community groups, hamlets, neighborhoods, and businesses. The area has seen its farmland diminish, replaced by industry, businesses, services, and housing or simply abandoned. Agriculture, however, remains an important institution throughout the area and still dominates the community character.

Many of the area's citizens are also employed in nearby Auburn, Seneca Falls, Waterloo, Ithaca, Rochester, and Syracuse illustrating the interwoven nature of communities. The complexity of infrastructure is reflected in municipal reliance on the many existing special districts that provide basic services such as fire and utilities (water, sewer, lighting), libraries, and public schools. The local highways interconnect these communities, neighborhoods and municipalities.

Governance of the general area established more than 200 years ago includes town, village and city boards; the Cayuga County Legislature and Seneca County Board of Supervisors; planning boards, zoning boards of appeal; and school boards, as well as the many departments which provide specific services to the local citizenry. The settled expectations of citizens in the area are that governance will be by open government, including notice of decisions that will affect their lives, public hearings and access to government officials, the ability to get information (through the Freedom of Information Law; FOIL), and the availability of judicial review of government decisions. These settled expectations would be disrupted by taking lands into trust.

In addition to not providing for the contiguity of CIN lands, acceptance of these applications would create patches of tribal trust lands within the fabric of multiple communities impacting their character and ability to govern.

Appendix B represents a tabular summary of the parcels including tax map number, street address, acreage, zoning designation and current land use. Summary descriptions of each parcel (including photographs) are provided in Appendix C. The locations of the parcels are illustrated on a map included as Figure 1 in Appendix A.

In addition, the land use and operation of the existing facilities [*i.e.*, gasoline stations, car wash, and the gaming facilities (currently closed)] on the parcels have supported the CIN's objectives of producing income to allow the CIN to purchase additional properties and include the following CIN-developed facilities and operations:

- 2 gas stations and convenience stores;
- a car wash;
- gaming facilities; and
- a campground.

However, if the change in use of some of the parcels is an indication of the intent of the CIN to expand its businesses and operations, it can reasonably be foreseen that similar development of those parcels that may be purchased in the future will occur, especially given that the CIN has indicated that it will continue to purchase blocks of land, and can be expected to seek to place them into federal trust.

The further claim by the CIN in its application letter of April 14, 2005 "…that there are no immediate plans for expansion" and in the May 25, 2005 application letter that "…there are no current plans for development of these parcels…" cannot be accepted as credible on its face. The development of the future acquisitions of properties consistent with other uses and intentions will continue unabated. Assuming past practices were to continue, CIN will resist State and local regulation and monitoring for the protection of the environment and the health and safety of the public by local communities and the State of New York. Change in use of the lands included in the current applications, as well as on lands that may be purchased in the future, is likely and must also be reviewed.

The CIN has raised the issue of the economic impact associated with the continued operation of the existing commercial operations on the parcels. Although not in trust with the federal government, these lands have been changed in use or operated under unfair advantage by the CIN without review by local jurisdictions, without applicable permits from federal and State agencies, and without payment of property and other taxes that maintain the public infrastructure that supports such development. It can reasonably be assumed that future development/redevelopment of the parcels, as well as others that may be purchased in the future, will occur.

The CIN commercial successes on the parcels have been obtained at the expense of non-CIN businesses that are required to conduct environmental reviews, obtain permits, and pay taxes on lands located within the same community. In a competitive market, the ability for a non-CIN business to be marketable and sustainable on this "unlevel playing field" is significantly and adversely impacted.

In addition to the "unlevel playing field", regulatory jurisdiction is a critical issue. It must be asked "who is minding the store" when it comes to regulatory reviews and potential impacts on the environment and public health. The CIN applications fail to identify appropriate CIN programs that would operate in place of State and local programs to protect the environment and public health. While it may not be known what level of environmental detriment (short- and long-term) occurred as a result of past CIN-sponsored parcel operation, it is for that very reason that government at all levels has established reviews and regulatory procedures to understand the implications of such projects before they are initiated. Future development of the parcels that are the subject of the current applications, as well as lands that may be purchased in the future by the CIN, will also occur without the regulatory review and permitting or payment of taxes required for parcels not in trust. Federal, State and local governments also have procedures that allow jurisdictional authorities to monitor sensitive activities and operations so that public health and the environment continue to be protected.

Consequently, the discussion of impacts associated with the parcels covers a variety of economic and jurisdictional issues highlighting the following general themes:

- Inability for non-CIN businesses to compete on an equitable basis with CIN businesses due to "unlevel playing field".
- No formal and conventional mechanism to obtain financial support for maintenance and operation of public infrastructure (*i.e.*, taxes and special assessments).
- Ability for the CIN to expand its operations onto these properties without the ability of local governments to review CIN-proposed development to ascertain compatibility with local zoning and building code requirements and master plans (including compatibility with surrounding land uses).
- No review of potential adverse environmental and socio-economic impacts associated with CIN-development including short- and long-term, construction and operation phase, and cumulative impacts (*i.e.*, State Environmental Quality Review Act or SEQRA).
- No acquisition of permits for regulated activities resulting in loss of resources (*i.e.*, wetlands, threats to Cayuga Lake quality, or regionally important aquifers) and adverse impacts to the environment.
- No review of development or monitoring of operations to document compliance with design and operating standards (*i.e.*, buildings, storm water management facilities, driveways on State and local roads, etc.).

In consideration of the CIN applications (existing and future), it is imperative that the BIA balance the benefits stated by the CIN with the diverse adverse implications to the State, counties, and municipalities, as well as to the environment. As the CIN continues its efforts to diversify its operation and future development portfolio, it must continue to be asked – at what and whose expense. The remaining sections of this document provide information on the economic and jurisdictional implications of the CIN's applications, as well as other considerations pertinent to the review process.

IMPACTS ON REGULATORY JURISDICTION

Summary. This section of the report presents comments requested by the BIA relevant to 25 CFR Part 151.10(f) (*jurisdictional problems and potential conflicts of land use that may arise*). The proposed placement of the parcels in federal trust raises many significant issues relating to the jurisdiction of the State of New York, the Counties of Cayuga and Seneca, and the cities, villages, towns and hamlets contained therein, with regard to environmental planning, compliance, monitoring, reporting, and management. To date, in the use of the CIN properties including two gas stations, a car wash, gaming facilities, and a campground, the CIN has largely ignored applicable environmental laws, regulations, standards, guidance and policies, the objectives of which are the protection of public health and the environment. These environmental laws, regulations, standards, guidance and policies would have applied to the planning and change in use efforts of existing CIN business operations on the subject properties, as well as to the on-going operation of facilities. Should the applications to place the current CIN parcels into trust be accepted by the BIA, the State of New York and its political subdivisions may lose or have severely curtailed jurisdiction over the parcels. Therefore, existing use and potential future CIN-sponsored development may grow, without the regulatory oversight, verification and controls critical to the protection of the environment and public health.

Table 2 represents a summary of State and local jurisdictional authority impacted by activities on the current CIN parcels and those that may be purchased in the future. This list is representative of the types of jurisdictions, but is not meant to be all-inclusive. The list is provided to illustrate the established governance and potential disruption of settled expectations and services, which governance (and the related regulatory jurisdiction) provides to the affected communities. Any loss of these jurisdictions could result in a significant on- and off-site threat to the environment and public health and safety. Such loss will hinder State and local governments' protection of residents, employees and visitors alike from impacts to the environment, public health and safety. For purposes of this table, "ability" or "loss" includes actual or potential loss or diminishment of jurisdiction or ability to regulate.

Table 2 *State and local jurisdictions.*

Jurisdiction	*Implication*
State	
Article 15 of the Environmental Conservation Law (ECL) (Protection of Waters) (6 NYCRR Part 608)	Inability to track and regulate activities in protected waters of the State. Additional impacts to riparian rights.
Article 24 of the ECL (Protection of Wetlands) (6 NYCRR Parts 663-664)	Inability to track, regulate and restrict (as necessary) encroachments on State freshwater wetlands. Impacts include wetland habitats and functions.
Section 401 of the Clean Water Act (Water Quality Certification)	Loss of ability to review activities within federally-regulated waterbodies to ensure there is no contravention of State water quality standards.
Article 8 of the ECL (State Environmental Quality Review Act) (6 NYCRR Part 617)	Loss of ability to review potential significant adverse environmental and socio-economic impacts from activities developed on CIN-owned lands. Implications are far-reaching

Jurisdiction	***Implication***
	including on- and off-site impacts, short- and long-term impacts, and cumulative impacts.
Article 19 of the ECL (Permit to Construct an Air Emission Source) (6 NYCRR Part 201)	Inability to review and approve air emission, mitigation measures and potential off-site impacts (including worker and community impacts typically reviewed under the USEPA's Risk Management and OSHA's Process Safety Management programs).
Article 27, Title 9 of the ECL (Hazardous Waste Management Regulations) (6 NYCRR Parts 361, 370-374 and 376)	Loss of ability to review, permit and track the handling, transportation, disposal and manifesting of hazardous waste.
Articles 17, 37 and 40 of the ECL (Hazardous Substance and Petroleum Bulk Storage Requirements) (6 NYCRR Parts 595-599, 610, and 612-614) (Environmental Priorities and Procedures in Petroleum Clean-up and Removal) (6 NYCRR Part 611)	Loss of ability to review, approve and inventory hazardous substance (chemical) and petroleum bulk storage tanks (above and underground). Potential loss of jurisdiction impacts the ability to ensure compliance with federal and State tank and secondary containment design standards, as well as spill clean-up standards.
Article 27 of the ECL, Titles 13 and 14 (Inactive Hazardous Waste Disposal Site Remedial Program) (6 NYCRR Part 375)	Inability to review and approve remedial programs associated with the investigation and clean-up of brownfields and inactive hazardous waste disposal sites that could be sources of significant threats to public health or the environment.
Article 27 of the ECL (Solid Waste Disposal Facilities) (6 NYCRR Part 360)	Inability to regulate the design, permitting, construction, operation and closure of solid waste management facilities.
Article 27, Titles 3 & 7 of the ECL (Waste Transporter Permits) (6 NYCRR Part 364)	Inability to regulate the transportation of solid waste on public roads and to point of disposal.
Article 17 of the ECL (State Pollutant Discharge Elimination System) (6 NYCRR Part 750)	Inability to review, approve and monitor point source discharges to waters of the State (including process and storm water discharges, and runoff from Concentrated Animal Feeding Operations).
Article 15, Title 15 of the ECL (Water Supply Permits) (6 NYCRR Part 601)	Inability to review, approve and monitor public water supplies including quantity and quality, consumptive use, and public health issues.
Article 17 of the ECL (Approval of Plans for a Wastewater Disposal System)	Inability to review, approve and monitor waste water disposal/treatment facilities (including wastewater treatment facilities and septic systems).
Section 225 of NYS Public Health Law (New York State Sanitary Code) (10 NYCRR)	The New York State Sanitary Code covers a wide variety of public and environmental health related topics including: communicable diseases; drinking water supplies; swimming pools, bathing beaches and recreational spray grounds; temporary residences, mass gatherings, childrens' camps and agricultural fairgrounds; life and health nuisances; barber shops and beauty parlors; qualifications of public health personnel; maternal and child healthcare; transportation and handling of dead bodies; food service establishments; migrant farm worker housing; radiation; mobile home parks; public functions; laboratories; environmental and sexually transmitted diseases; AIDS; vital records.

Jurisdiction	***Implication***
Section 52 of the NYS Highway Law (Highway Work Permits)	Inability to regulate, review and approve work within State public highway rights-of-way (including utility and road work, driveway cuts, etc.). Potential maintenance and protection of traffic issues.
Articles 16 and 36 of the ECL (Floodplain Development Permits, Flood Control) (6 NYCRR Parts 500 *et seq.*)	Inability for the State and local floodplain administrators to restrict and regulate development within floodplains and floodways including review of flood-proofing and compensatory storage issues.
Articles 14 of the New York State Parks, Recreation and Historic Preservation Law (9 NYCRR Part 428)	Inability to protect cultural, historic, archaeological, and architecturally significant resources; including potential viewshed impacts from CIN activities on resources in the vicinity.
Article 25-AA of the New York State Agriculture and Markets Law (Agricultural Districts and Prime Farmland) (1 NYCRR Part 371)	Loss of oversight related to the review of potential impacts of non-farm development activities on the continued viability of agricultural operations in New York State.
Article 23 of the ECL (Oil, Gas and Solution Mining Law, and Mined Land Reclamation Law) (6 NYCRR Part 420 *et seq*)	Loss of ability to review and permit the environmentally sound, economic development of New York's mineral resources and the return of affected land to productive use for current and future generations.
Article 33 of the ECL (Pesticide Registration, Certification, Storage and Application) (6 NYCRR Parts 325 – 329)	Inability to regulate the application of pesticides and enforcement of State pesticide laws.
Article 11 of the ECL (Fish and Wildlife Law) (6 NYCRR Chapter I)	Inability to manage and protect fish and wildlife populations (including monitoring of chronic wasting disease among resident deer population), and their habitats, or to license hunters, anglers, and trappers.
Section 9-1303 of the ECL (Forest Insects and Other Tree Diseases)	Inability for the State to exercise broad authority in regard to forest insects and other tree diseases to: (1) enter into cooperative agreements with other State and federal agencies for the purposes of controlling forest insects (*i.e.*, wood wasps) and other tree diseases; (2) conduct investigations; (3) by order, enter upon any lands to determine if the property is infested with forest insects or forest tree diseases; (4) to establish quarantine districts to prohibit the movement of materials which may be harboring forest insects; (5) treat infected forest areas; and (6) establish barrier or protective zones for the purpose of preventing the spread of forest insects and disease pests, and in so doing, have the authority to enter on private lands to treat and destroy infected vegetation.
Article 12 of the New York State Navigation Law	Inability to ensure that petroleum discharges are cleaned up.
New York State Finance Law	Inability to levy special assessment fees and regulatory program fees on regulated facilities in New York State. Fees are used to fund remedial efforts and other environmental program needs.
Article 16 of the Agriculture and Markets Law	Loss of ability for a State certified agency to

Jurisdiction	***Implication***
(Weights and Measures)	monitor the accuracy of any weighing and or measuring device (*i.e.*, gas stations). Equipment is inspected and calibrated to the New York State standards in Albany, NY.
Local (County, City, Town, Village)	
Community Planning and Development	Loss of ability to review and approve zoning-related issues, site plans, area and use variances, special permits, subdivisions, NYS General Municipal Law § 239 reviews, building permits, demolition permits, consistency with building codes, etc. Has far-reaching implications on economic development (*i.e.*, "level regulatory playing field"), local master planning, land use compatibility, and cumulative impacts.
Section 136 of the NYS Highway Law (Highway Work Permits)	Inability to regulate, review and approve work within local public highway rights-of-way (including utility and road work, driveway cuts, etc.). Potential maintenance and protection of traffic issues.
New York State Sanitary Code (Wells and Septic Systems)	Loss of ability to review and approve public and private wells and septic systems.
Industrial Wastewater Discharge Permits	Oversight of pretreatment, conveyance and discharge of wastewaters to publicly owned treatment works.
Governance Issues	Impacts on State and local ability to provide open government services such as: public participation, open meetings, public access to information, judicial review, etc.
Public Health Laws	Inability to inspect facilities to ensure compliance with local and State public health and safety laws (*i.e.*, hotel and restaurant inspections, storage and preparation of food, smoking ban pursuant to Clean Indoor Air Act, communicable disease reporting, water quality, campgrounds, subdivisions, swimming pools).
Building and Energy Codes Article 18 New York State Executive Law, 19 NYCRR Parts 1220-1226 Article 11 New York State Energy Law 19 NYCRR Part 1240	Loss of ability to review building plans and specifications and to conduct inspections during the construction process in order to ensure compliance with building codes and related codes.

Source: O'Brien & Gere Engineers, Inc.

Additional information regarding some of these programs is provided in the ensuing subsections and appendices.

Moreover, reliance on federal law alone provides inadequate coverage and protection to the environment and public health and safety. In many aspects of regulatory jurisdictions the laws of the State of New York are more stringent than federal law.

Compounding the uncertainty as to the State's ability to enforce such laws where lands have been taken into trust status, it is also unclear whether the CIN will implement surrogate regulations or whether such regulations or practices would be as comprehensive as State and local requirements. In addition, under the claim of sovereignty, it is unclear

whether federal regulations have been adhered to by the CIN or enforced by the jurisdictional federal agencies, although it is clear in many instances that federal statutes require such compliance and allow enforcement. Furthermore, the decision to place lands into trust must take into consideration the BIA's ability (units and resources) to oversee these lands as a replacement to State and local public health and safety and environmental oversight.

To fully comprehend the areal extent of potential impacts, it is important to understand that environmental impacts do not recognize property boundaries. Activities on CIN-owned properties do not just have the potential to impact resources within the parcel boundaries, but the impacts may extend beyond property limits onto non-CIN lands. This also holds true for non-CIN activities, although such activities are required to undergo environmental reviews and obtain permits so that impacts are eliminated or reduced to protect public health and the environment. Figure 3 in Appendix A illustrates one-quarter mile buffers around the parcels. The area within these buffers represents approximately 1,070± acres of land. This acreage represents an immediate impact area that is an additional 823% of the area of the properties that are the subject of this application. Based on regulatory and land use experience, construction and operational activities may impact properties within at least a one-quarter mile radius, more or less depending on the type and magnitude of operations (including future uses) and resource impacted. Impacts may be related to a variety of environmental and socio-economic issues including land-related (soils, flora/fauna, habitats, utilities, traffic), water-related (wetlands, streams, groundwater), air-related (dust, exhaust, emissions), and cultural-related (viewshed, land-use compatibility, historic-archaeological-architectural resources) and a variety of other issues. To support the comments provided herein, the state, working with the local jurisdictions, has compiled Geographic Information System (GIS) data to illustrate the overlap and potential conflicts of parcels with resources and regulatory programs pertinent to the area. GIS data presented in Appendix A consist of:

- Figure 1 Parcels
- Figure 2 Land Claim Boundary
- Figure 3 Buffer Zones
- Figure 4 New York State Freshwater Wetlands
- Figure 5 Hydric Soils
- Figure 5A Hydric Soils Detail
- Figure 6 Natural Heritage Program
- Figure 7 Streams
- Figure 8 Water & Sewer Districts
- Figure 9 Flood Zones
- Figure 10 National Register Sites
- Figure 11 Archaeological Sensitivity
- Figure 12 Solid Waste Facilities
- Figure 13 Regulated Facilities
- Figure 14 Petroleum Bulk Storage Facilities
- Figure 15 Gas Stations
- Figure 16 Oil and Gas Well Permits
- Figure 17 Chemical Bulk Storage Facilities
- Figure 18 Zoning
- Figure 19 Schools & Hospitals

- Figure 20 New York State Parks
- Figure 21 Landmarks (Census 2000 Data)
- Figure 22 School Districts
- Figure 23 Fire Districts
- Figure 24 Agricultural Districts
- Figure 25 Prime Farmland
- Figure 25A Prime Farmland Detail
- Figure 26 Environmental Justice

Further, through the mandated environmental review required by New York's State Environmental Quality Review Act (SEQRA), New York Environmental Conservation Law (ECL), the permitting and other authorizing decisions of any New York governmental body are required to take into account the environmental impacts that may be created by the action requiring a permit or other approval. SEQRA's fundamental policy is to inject environmental consideration directly into governmental decision making; thus the statute mandates that economic and environmental factors are to be considered together in reaching the decision on proposed activities. Unlike federal law, SEQRA also imposes an obligation on the regulating state agency to minimize or avoid adverse impacts to the maximum extent practicable. In contrast, the National Environmental Policy Act (NEPA), essentially is procedural and places no obligation on a federal agency to mitigate the environmental impacts of an action it approves or permits. Further, environmental reviews are much more likely to occur under SEQRA than under NEPA, in part because, unlike under NEPA, the possibility of a significant adverse impact is sufficient to trigger full SEQRA review. In short, SEQRA clearly provides for more stringent environmental review than NEPA.

Wetlands. Wetlands perform numerous functions which provide benefits to the environment and the citizens of the state. Wetland functions and benefits that are important in New York State include: flood protection and abatement, erosion and sedimentation control, water quality maintenance, fish and wildlife habitats, nutrient production and cycling, recreation, open space, educational and scientific research, and biological diversity.

New York State Freshwater Wetlands are under the regulatory jurisdiction of the New York State Department of Environmental Conservation (NYSDEC), while federal wetlands are under the purview of the United States Army Corps of Engineers (ACOE).

State law protects wetlands 12.4 acres in size or greater and smaller wetlands of local importance. While the federal Clean Water Act (CWA) protects wetlands smaller than 12.4 acres, the ACOE, which administers CWA § 404 regarding wetland filling and dredging, nonetheless allows clearing of vegetation and converting a wetland to open water, which reduces or eliminates the filtration and cleaning function that wetlands perform. In addition, under New York law, activities within a 100 foot buffer area surrounding a wetland are forbidden absent a permit. There is no similar restriction under federal law. Finally, under state law, SEQRA review must be performed, and if there *may* be a significant impact from any activity affecting the wetland, an EIS must be performed and adverse impacts mitigated or avoided. in contrast, under federal law, it is the unusual case that requires and EOS under NEPA because the ACOE has issued many nationwide permits that allow considerable dredging and filling of small wetlands and in

general, only the impacts of dredging and filling on the wetland are evaluated rather than other environmental impacts stemming from an applicant's activities.

Consequently, without the ability to apply regulatory law to tribal property, state and local authorities would be unable to protect the property and health of residents in the surrounding community or the surrounding environment.

- New York State Freshwater Wetlands. Freshwater wetlands are protected in New York State pursuant to Article 24 of the ECL, which has been in effect since 1975: "It is declared to be the public policy of the State to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the State" (§ 24-0103 of the ECL).

  Activities which may impact freshwater wetlands are subject to a state permitting process: "All persons proposing to conduct, on wetlands or adjacent areas, activities that have not been specifically exempted…must obtain either a permit or a letter of permission" (6 NYCRR Part 663.4). These regulations require that freshwater wetlands greater than 12.4 acres in size and wetlands of any size that are deemed to be of significant local importance be mapped. Under these regulations, the NYSDEC also regulates the 100-foot area adjacent to wetlands as a buffer zone. The buffer zone may be extended beyond the 100-foot adjacent area by formal order of the NYSDEC commissioner where deemed appropriate to protect the wetland area.

  The NYSDEC classifies each wetland shown on its wetlands maps according to the classification system set forth in 6 NYCRR Part 664. Four separate classes are established that rank wetlands according to their ability to perform wetland functions and provide wetland benefits. Class I wetlands have the highest rank, descending through Class II, III, and IV.

  The areal extent of NYSDEC Freshwater Wetlands in the vicinity of the parcels is illustrated on Figure 4 of Appendix A. The wetland-boundaries indicate areas where development activities for those parcels included in the CIN applications have or may encroach and permanently replace State jurisdictional wetlands, if allowed to occur without regulatory review. The placement of the parcels, as well as parcels purchased in the future by the CIN, into trust may permanently remove remaining State wetlands on these parcels from the jurisdictional protection of the NYSDEC and eliminate independent oversight to ensure that wetlands on these properties and their associated functions are not impaired.

  As shown on Figure 4 of Appendix A, additional State-jurisdictional wetlands are present on lands located throughout the area. There are a total of 200± acres of State-jurisdictional wetland areas within one mile of the parcels included in the current applications. Placement of the parcels into federal trust may hinder the State's ability to control potential direct and

indirect impacts to these wetlands from continued CIN development and operational activities. Existing and future CIN development and operational activities on the parcels have the potential to impact these adjacent areas due to:

- altered hydrology;
- degraded fish and wildlife habitat;
- uncontrolled contaminants in runoff, such as fertilizers, herbicides and pesticides used on CIN's lands;
- petroleum contaminants and heavy metals in runoff from paved surfaces, such as parking lots, driveways and roadways;
- dispersion of litter from CIN facilities; and
- excavation and other changes in hydrology which can cause draining or flooding of off-site wetlands.

Should the current applications to the BIA be accepted, the properties may not be subject to the jurisdiction of the NYSDEC and the protection of the State. Similarly, future development of the parcels, as well as parcels purchased in the future by the CIN, may occur without consideration of the regulatory requirements to protect the State's wetland resources.

If the parcels are accepted into trust, remaining wetlands will be impacted, without the oversight and protection afforded by New York State law and regulation. For example, unmonitored, uncontrolled and unmitigated, chemical fertilizers, herbicides and pesticides used for CIN landscaping maintenance activities will find their way into runoff and alter and/or inhibit the natural process that otherwise contribute to the quality of a wetland; they impact the sensitive balance that provides the unique nature and quality of a wetland. Excavation, draining, clearing and regrading of the land associated with development of the infrastructure (water, sewage, drainage) and structures impact the flow of surface waters and the hydrologic dynamics that support the wetlands.

To the extent that surfaces have been or may be paved or otherwise altered from their former greenfield farmlands by the construction of structures and paved parking areas associated with CIN development of the parcels, wetland hydrology may also have been modified, if not impaired. Impermeable surfaces, including structures and paved areas, increase the amount and velocity of overland runoff flow, which can overwhelm a wetland's ability to temporarily retain storm water runoff and provide filtration. The lack of this natural retention and filtration of runoff increases the potential for contaminants reaching the ground or surface waters. In addition, the loss of wetland acreage and increased velocity of surface water flow is likely to increase the scouring of stream banks, lead to increased downstream sedimentation, and the flooding of upstream or downstream properties, both within the parcels and those areas outside of the CIN properties.

Additionally, the quality of the groundwaters and surface waters has been and will continue to be negatively impacted by flow over roads, parking lots, and other developed areas. The impact of this deterioration in the water

quality that is reaching the remaining wetlands has not been subject to oversight by the NYSDEC on behalf of the people of New York. Additionally, the impacts noted here will only increase should the parcels be developed further and with the purchase of additional lands by the CIN.

Many species of fish and wildlife depend on wetlands for critical parts of their life cycle. By providing breeding, nesting, and feeding grounds and cover, wetlands are recognized as one of the most valuable habitats for wildlife. Young fish find food and shelter in the protective vegetation. Many species of endangered, threatened, or special concern fish and wildlife depend on wetlands. In addition, wetlands are habitat for thousands of species of the plants of New York. One half of New York's protected native plants, many of which are endangered or threatened, are wetlands species.

Finally, wetlands do not recognize property boundaries. Many wetlands are continuous and hydrologically interconnected. Effective wetland protection cannot end at a property boundary. Since the parcels (and potentially parcels purchased in the future by the CIN) for which trust status is being sought are scattered throughout the region, the impact on the non-tribal landowners of these non-regulated parcels may be far greater than the parcels' acreage would suggest. Although the current CIN applications for lands to be placed in trust are for a total of 130± acres, the CIN's potential claim extends to over 64,000 acres. The cumulative effect of unregulated development of the CIN's parcels, both of those parcels in the current applications as well as those lands that may be purchased in the future, may have widespread impacts off-site including damage to wetland complexes, destruction and degradation of fish and wildlife habitats, increased flooding, and impairment of ground and surface water quality. Any loss of jurisdiction resulting from an acceptance of these applications places at risk the integrity of wetland ecosystems throughout the region.

- Federal Wetlands. Section 404 of the Clean Water Act of 1977 requires a permit from the ACOE before dredge or fill materials can be discharged into waters of the United States, which includes wetlands. The ACOE is required to issue permits in accordance with guidelines developed by the USEPA [404 (b)(1) Guidelines]. The involvement of the USEPA is for the protection of municipal water supplies, shellfish and fishery areas, wildlife, and recreational areas. In addition, the ACOE is required to give "full consideration" to comments by the U.S. Fish and Wildlife Service (USFWS) and the U.S. National Marine Fisheries Service when reviewing permit applications.

  The ACOE also has some wetlands authority under Section 10 of the Rivers and Harbors Act of 1899. Any activity in navigable waters below the ordinary high water mark of rivers and lakes (or mean high water in tidal areas) requires a permit from the ACOE. These activities include filling, dredging, structures, underwater cables, and similar activities. Navigable waters are defined in 33 CFR Part 329.4 as those "subject to ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce".

The ACOE and USEPA jointly define wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" [33 CFR Part 328.3(b) and 40 CFR Part 230.3(t)]. Human actions in ACOE and USEPA defined wetlands are subject to regulatory scrutiny.

The current method for identifying and delineating federally regulated wetlands are set forth in the United States Department of the Army Technical Report Y-87-1, Corps of Engineers Wetland Delineation Manual, January 1987 (ACOE, 1987). According to the ACOE (1987), wetlands are characterized based on a triad approach consisting of the study of hydrology, soil, and vegetation. The three parameters are evaluated for wetland indicators such as hydric soils, periodic flooding or soil saturation, and presence of hydrophytic (water tolerant) vegetation. Evidence for a minimum of one wetland indicator for each of the parameters must be found to make a positive wetland determination. A site is classified as a federal wetland if: the prevalent vegetation is hydrophytic; and the soils present have been classified as hydric or possess reducing soil characteristics; and the area is either permanently or periodically at mean water depths less than 6.6 feet, or the soil is saturated to the surface at some time during the growing season. The USFWS, in response to the increasing national recognition of the value of wetland resources, initiated an ongoing national inventory of wetlands in 1979 using the U.S. wetland taxonomic scheme, Classification of Wetlands and Deepwater Habitats of the United States (USFWS, 1979). The National Wetlands Inventory (NWI) was developed to provide comparable information on the status and extent of wetland resources. NWI maps provide an indication of the potential presence of federally regulated wetlands.

NWI maps published by the USFWS are not available in GIS format for the parcels. However, locations of hydric soils (source: United States Department of Agriculture), a prime indicator of wetlands, are illustrated on Figures 5 and 5A in Appendix A. Hydric soils, and soils with hydric inclusions, are present throughout the area. These characteristics indicate that under federal criteria for wetlands, portions of the parcels (constituting approximately 226 acres, or 16.9% of the total acreage of the subject parcels) are (or were prior to development) likely jurisdictional wetlands. Therefore, plans for the potential future development of these parcels should be subject to the jurisdiction and approval of the ACOE; restrictions may be placed on development of portions of these parcels by the ACOE if appropriate notification of these wetlands and a permit application were to be filed prior to construction; and mitigation may be required, the nature of which would have depended on the type of wetland and the wetland values. Mitigation options may include wetland protection, on-site wetland enhancement, on-site creation of new wetlands, enhancement of off-site wetlands, and/or creation of new wetlands off-site. The mitigation options required by the ACOE are highly dependent on the values of the specific wetlands, and their uniqueness nationally and regionally. Mitigation may extend from a 2:1 ratio (for example, acres created versus acres lost) to as high as a 5:1 ratio.

Additionally, areas of hydric soils within one mile of the parcels in the CIN applications constitute approximately 2,3506 acres, or 18 times the acreage of the parcels themselves. This acreage demonstrates the (conservatively low) amount of potential federal jurisdictional wetlands that could be impacted by activities on the CIN properties.

In New York State, the NYSDEC works closely with the ACOE to protect wetlands resources. A single Joint Application for Permit, submitted to the NYSDEC, fulfills the application requirements of both the NYSDEC and the ACOE for activities impacting wetlands. The joint application process relies on materials submitted by applicants that typically include a completed wetland delineation map and report, a project description with plans or engineering drawings showing the location and extent of work which may disturb or impact the wetlands, and, in some instances, a wetland mitigation plan which details activities to be completed to mitigate for losses of wetland habitat.

As indicated above, protection of environmental resources such as wetlands is a partnership among regulatory agencies. Often these partnerships are formalized in "Memorandum of Agreements" (MOAs) between respective parties. One example of a MOA that has merit in BIA's review of the CIN application is between the ACOE and USEPA [concerning the determination of mitigation under the Clean Water Act Section 404(b)(1) guidelines].

The CIN's applications represent a substantial amount of land, and a BIA decision on the applications will contribute to the setting of a significant precedent (*i.e.*, national policy) that may be relied upon when weighing future, similar applications.

During past development of parcels, it is unknown whether the required pre-construction (during project planning) notification and consultation with the ACOE occurred, or if the process to obtain appropriate permits and approvals was conducted. Therefore, jurisdictional federal wetlands may have been destroyed without notification to or approval by any agency before the fact. In addition, any remaining jurisdictional federal wetlands on the parcels, and adjacent non-CIN properties, as well as parcels purchased in the future by the CIN, remain directly at risk, since the CIN may not be required to comply with the jurisdictional processes dealing with regulated federal wetlands. Regardless of the position of the CIN with respect to regulated federal wetlands on the parcels, and as was the case for State jurisdictional wetlands, regulated federal wetlands on adjacent properties are also at risk from the impacts of the continued existing and potential future development and operational activities of the parcels. Identical to the impacts on State wetlands, these impacts to off-site federal wetlands include, but are not limited to, uncontrolled contaminants in runoff courses; petroleum contaminants and heavy metals in runoff from paved surfaces, and dispersion of litter. It is reasonable to assume that placement of lands in trust will, to the detriment of the environment and public good, allow the CIN to develop lands without the benefit of regulatory review.

Clean Air. Air resources and quality are protected in New York State pursuant to Article 19 of the ECL and its implementing regulations (6 NYCRR Part 200 *et seq.*). The NYSDEC has maintained a strong air pollution control program since at least the early 1980s. In fact, the State had established a program to control toxic air pollutants before the federal program initiated by Congress' passage of the "Clean Air Act Amendments of 1990." The goal of the State's clean air program is to "maintain a reasonable degree of purity of the air resources of the State, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the State, the propagation and protection of flora and fauna, and the protection of physical property and other resources, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution."

A State Implementation Plan (SIP) is the federally approved and enforceable plan by which each state identifies how it will attain and/or maintain the health-related primary and welfare-related secondary National Ambient Air Quality Standards (NAAQS) described in Section 109 of the Clean Air Act (CAA) and 40 CFR Part 50.4 through 50.12. SIP documents contain a wide variety of information, including air quality goals, measurements of air quality, emission inventories, modeling demonstrations, control strategies, evidence of public participation, and more. The SIP serves as the plan by which the monitoring and control of air emissions throughout the state are coordinated, since emissions in an area of the state may be incremental, but their impacts may be additive and synergistic.

Thus, the framework for the improvement and maintenance of clean air in New York State consists of the federal Clean Air Act and its implementing regulations, the federally enforceable State SIP, and the State's own clean air laws and regulations, which are more protective than those of the federal program.

Examples of State regulatory provisions routinely anticipated to apply to parcels and to the continuing development activities include:

- air emission sources, which require facility owners and/or operators of air contamination sources to obtain a permit or registration certificate from the NYSDEC for the operation of such sources;
- installation, maintenance and operation of emission control equipment; and
- documentation of emission operations.

Specific state air emissions regulations that may apply to such facilities include:

- Part 201 Permits and Certificates
- Part 202 Emissions Verification
- Part 208 Landfill Gas Collection and Control Systems for Certain Municipal Solid Waste Landfills
- Part 211 General Prohibitions
- Part 215 Open Fires
- Part 217 Motor Vehicle Emissions
- Part 218 Emission Standards for Motor Vehicles and Motor Vehicle Engines
- Part 225 Fuel Composition and Use
- Part 227 Stationary Combustion Installations

- Part 229 Petroleum and Volatile Organic Liquid Storage and Transfer
- Part 230 Gasoline Dispensing Sites and Transport Vehicles
- Part 231 New Source Review in Non-Attainment Areas and Ozone Transport Areas
- Part 234 Graphic Arts
- Part 238 Acid Deposition SO_2 Budget Trading Program

Under the Clean Air Act, activities on trust lands are subject to federal jurisdiction. Therefore, the acceptance of these applications may exempt the parcels, as well as parcels that may be purchased in the future by the CIN, from the State's air emission regulatory programs. Existing regulated facilities (including facilities with air permits/registrations) are illustrated on Figure 13 in Appendix A. No facilities are evident on the parcels, not because of the absence of facilities that emit air contaminants, but due to the refusal by CIN to comply with State requirements. As a practical matter, this is a highly significant environmental and public health issue. Air emissions are not limited to property boundaries. Therefore, the impacts of air emissions are not restricted to the boundaries of the parcels on which the emissions sources are located, but rather, have impacts to the properties around them. Downwind receptors (residences, schools, hospitals, and similar sensitive land uses) are subject to the environmental and health impacts of the operations of any sources and sensitive receptors (*e.g.*, the Union Springs Central School is located less than 0.1 miles from one of the CIN parcels) are present in proximity to CIN parcels and operations. Therefore, clean air regulations and policy acknowledge and incorporate the important concept that impacts may extend far beyond the boundaries of a property.

There are several important aspects to the potential loss of jurisdiction by the State of New York:

- <u>New air emission sources.</u> The CIN will continue to develop the parcels consistent with the CIN's prior development practices under the contention that its activities on these properties are not subject to state jurisdiction. Acceptance of this trust application may place such development beyond the environmental and public health jurisdiction of the State of New York. As a result, considerations for the protection of the environment and of the public health from the construction of new air emission sources through State jurisdiction will not be applied to such projects. New sources of air pollution in New York State must undergo permitting review to ensure there will be no adverse air quality impacts, and that appropriate air pollution controls are installed. Existing facilities located upon CIN parcels did not undergo this type of review, and future activities will potentially avoid this review resulting in air quality impacts to New York State.

- <u>Existing emission sources.</u> A loss of State jurisdiction to monitor and control air pollution from existing air emissions would be to the detriment of the environment and the public health. The CIN would not be obligated or accountable for the operations of equipment on its properties, making clean air policy as applied by the NYSDEC to this region of the State difficult to implement. The context of interaction and impacts of emissions from the parcels with other sources in the region, and the reverse, is a clean air

protection policy that might lie outside the jurisdiction of the State to implement.

- Mobile source program. The State's mobile source program is based on the California program rather than the less stringent federal program. If the applications for placing CIN parcels into trust were approved, provisions of that regulation would be nullified and the State could lose the ability to enforce the more stringent regulations relating to vehicle emission limits and vehicle inspections among other provisions. As part of its mobile source emission reduction strategies, New York State has promulgated and enforced regulations stating that "no person shall sell or supply gasoline to a retailer or wholesale purchaser-consumer, having a Reid vapor pressure greater than 9.0 pounds per square inch as sampled and tested by methods acceptable to the Commissioner of the NYSDEC, during the period May 1st through September 15th of each year" (6 NYCRR Part 225-3.3).

- Loss of contiguity. The patchwork pattern of the CIN's requests makes effective management of the clean air by the State particularly difficult, if not impossible. As a practical matter, this lack of contiguity effectively hinders the State's jurisdiction for the protection of clean air in a significantly larger area than just the parcels since new air emission sources and the operations of existing sources may be conducted without the oversight normally performed pursuant to State regulations.

- Sensitive receptors. One of the parcels is located near the Union Springs Central School (see Figure 19 in Appendix A). The potential loss of jurisdiction by the state with respect to clean air places the State in a position of being unable to protect and maintain the clean air and protect the health of the student population at the school.

Threatened and Endangered Animal Species. Threatened and endangered species and species of special concern are protected in New York State pursuant to Article 11 of the ECL and its implementing regulations (6 NYCRR Part 182). Article 11 also includes provisions regulating hunting, fishing, trapping, the collection and possession of wildlife species, and the control of dangerous diseases in wildlife. Based on data obtained from New York State's Natural Heritage Program, known occurrences of threatened and endangered species, species of special concern, and habitats are illustrated on Figure 6 (Natural Heritage Program) in Appendix A. Known occurrences include such species as: Brindled Madtom (*Noturus miurus*), Lake Sturgeon (*Acipenser fulvescens*), Northern Harrier (*Circus cyaneus*), Spiny Softshell Turtle (*Trionyx spiniferus*), Pied-billed Grebe (*Podilymbus podiceps*), Upland Sandpiper (*Bartramia longicauda*), and Short-eared Owl (*Asio flammeus*). Also, there is the potential presence of habitat in the area for a federally listed endangered species of bat, the Indiana bat (*Myotis sodalis).* The NYSDEC provides oversight on these critical New York State resources, including assistance in evaluating impacts during SEQRA and NEPA reviews. The NYSDEC's federal counterpart is the USFWS. The potential loss of State jurisdictional oversight may have significant impacts on these resources, including direct impacts on species and habitats (*i.e.*, loss and segmentation), and indirect impacts on adjacent (non-CIN) parcels.

New York State has a mature program to protect threatened and endangered species, with the objective "to perpetuate and restore native animal life within New York State for the use and benefit of current and future generations, based upon sound scientific practices and in consideration of social values, so as not to foreclose these opportunities to future generations".

The key definitions in the State regulations, which have been in place since 1979, are:

- Threatened species. (6 NYCRR Part 182.2[h]) Defined as any species which meet one of the following criteria: (1) are native species likely to become an endangered species within the foreseeable future in New York; or (2) are species listed as threatened by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17 revised as of October 1, 1998, pages 95-177).

- Endangered species. (6 NYCRR Part 182.2[g]) Defined as any species which meet one of the following criteria: (1) are native species in imminent danger of extirpation or extinction in New York; or (2) are species listed as endangered by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17 revised as of October 1, 1998, pages 95-177).

- Species of special concern. (6 NYCRR Part 182.2[i])Defined as species of fish and wildlife found by the NYSDEC to be at risk of becoming either endangered or threatened in New York. Species of special concern do not qualify as either endangered or threatened.

It is not known whether the CIN has performed a habitat survey to identify the presence or absence of threatened or endangered animal species, or species of special concern, as defined by both federal and State regulations, on the parcels. While past CIN operation of the parcels may have impacted existing species, including potentially significant resources, the acceptance of the trust applications may adversely impact the jurisdiction of the NYSDEC to monitor and protect remaining species that may be present on the parcels, as well as parcels purchased in the future by the CIN as these parcels continue to be developed.

Additionally, absent the jurisdictional authority of the NYSDEC, the continuing development of the parcels will impact threatened and endangered species and species of special concern on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat). The patchwork pattern of the current CIN request, and potential future land purchases, makes effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the parcels. As a practical matter, this impact is far greater than just the parcels included in the current applications.

Threatened and Endangered Plant Species. The Protected Native Plants Program was created in 1989 as a result of the adoption of the protected native plants regulation (6 NYCRR Part 193.3). This regulation established four lists of protected plants:

- endangered;

- threatened;
- rare; and
- exploitably vulnerable.

Consistent with statutory authority (ECL § 9-1503), the NYSDEC's implementing regulations state that "It is a violation for any person, anywhere in the State, to pick, pluck, sever, remove, damage by the application of herbicides or defoliants, or carry away, without the consent of the owner, any protected plant" (6 NYCRR Part 193.3). The regulation gives landowners additional rights to prosecute people who collect plants without permission.

The list of rare, threatened, or endangered (RTE) plant species (as contained on federal, State or Natural Heritage Program lists) that are or may be present in Cayuga and Seneca Counties and potentially on (or formerly on) the parcels is provided in Appendix D. Implications resulting from the potential loss of state jurisdictional authority to protect remaining resources are identical to impacts identified above for protected animal species; impacts which are unacceptable given the stated importance of these resources to the people of New York and their responsibility to preserve these resources for future generations.

Forest Management. The NYSDEC is also responsible for the protection of the forest resources of the State. With invasive forest insects spreading, the NYSDEC needs to act quickly to minimize damage to forests. New York State has over 18 million acres of forest land that support a wide array of plants and animals. In addition, the forest produce industry is robust in the State and would be negatively impacted if forest insects went unchecked.

Under Section 9-1303 of the ECL, the NYSDEC has broad authority in regard to forest insects and other tree diseases to: (1) enter into cooperative agreements with other State and federal agencies for the purposes of controlling forest insects (*e.g.*, wood wasps) and other tree diseases; (2) conduct investigations; (3) by order, enter upon any lands to determine if the property is infested with forest insects or forest tree diseases; (4) establish quarantine districts to prohibit the movement of materials which may be harboring forest insects; (5) treat infected forest areas; and (6) establish barrier or protective zones for the purpose of preventing the spread of forest insects and disease pests, and in so doing, have the authority to enter on private lands to treat and destroy infected vegetation.

Water Protection. New York State enforces several regulatory programs aimed at protecting New York State's waters. Some of these programs are State-enacted, while others are activities where a specific State primacy agency has delegated enforcement responsibility to administer federal requirements. The breadth of topics covered by these programs is extensive, but the goal of all is to promote the safety and well-being of the State's residents, as well as protection of our shared environment.

The State's laws and regulations governing subsurface discharges of pollutants further underscore the difference between state and federal law. Contamination of groundwater occurs through discharges of wastewater from sewage treatment plants and other operations, and spills of toxic chemicals and petroleum products which can have far-reaching impacts through migration in the underlying aquifer, affecting wells and even

surface waters miles away from the initial contamination source. Before discharges of even sanitary wastewater from water treatment facility, for instance, to a holding pond or the ground may occur, a person seeking to discharge must apply for a NYSDEC permit before construction begins. The permit review will include not only technical issues and direct impacts to the environment, but would require mitigation of any adverse effects found, including those that do not relate directly to the discharge of wastewater. In contrast, while any project undertaken on CIN land arguably would be subject to federal law, the federal CWA only addresses surface waters, not discharges to groundwater. Moreover, federal permits relating to all discharges are exempt from NEPA review. Similarly, petroleum spills that contaminate land but do not flow into navigable surface waters are not subject to federal control under the CWA or the federal Oil Pollution Act, but are subject to State environmental laws such as the State's Navigation Law.

These water protection programs include:

- Protection of Waters (Article 15 of the ECL; 6 NYCRR Part 608) administered by the NYSDEC;

- Dam Safety (Article 15 of the ECL; 6 NYCRR Part 673);

- Flood Control (Articles 16 and 36 of the ECL; 6 NYCRR Parts 500 *et seq.*);

- Water Supply (Article 17 of the ECL; 6 NYCRR Part 601; State Sanitary Code; 10 NYCRR Part 5) administered by the NYSDEC and NYSDOH;

- State Pollutant Discharge Elimination System (Article 17 of the ECL; 6 NYCRR Part 750) administered by the NYSDEC;

- Approval of Plans for a Wastewater Disposal System (Article 17 of the ECL) administered by the NYSDEC;

- Approval of Realty Subdivisions (Article 11, Title II of the Public Health Law; Article 17, Title 15 of the Environmental Conservation Law) administered by the NYSDOH; and

- Wellhead Protection Program (1986 Amendments to the Safe Drinking Water Act) administered by the NYSDOH.

Potential loss of State jurisdictional oversight of these programs on the parcels would have implications ranging from direct impacts on CIN-owned lands (*i.e.*, future CIN economic diversification efforts, as well as indirect impacts on non-CIN lands) due to lack of oversight and review and the resultant environmental harm.

- <u>Protection of Waters.</u> As illustrated on Figure 7 in Appendix A, parcels are located within the Cayuga Lake drainage basin. Drainage within this system is conveyed through a complex network of interconnected rivers, streams and ponds. The quality and aesthetics of the waters of Cayuga Lake and its tributaries are critical not only for their ecological value, but also their economic value. This area and the Finger Lakes region of New York State as a whole are internationally known for their recreational opportunities – direct

contact, and fishing and other non-contact recreational activities – and drive a strong, year round economic tourist engine. These environmental attractions also serve the recreational needs of the regional resident population themselves.

It is noted that all of the parcels included in the CIN's current applications are located within 1/4 mile of the shores of Cayuga Lake or the Cayuga & Seneca Canal. Surface runoff or potentially leaking gasoline tanks from these parcels have a relatively direct pathway to the lake's waters. The lake and canal resources are necessary for drinking and bathing, agricultural, commercial and industrial uses, and fish and wildlife habitat. In addition, these waterways provide opportunities for recreation, education and research, and aesthetic appreciation.

Certain human activities can adversely affect, even destroy the delicate ecological balance of these important areas, impairing the uses of these waters. The policy of New York State, set forth in Title 5 of Article 15 of the ECL, is to preserve and protect these lakes, rivers, streams and ponds. To implement this policy, the NYSDEC created the Protection of Waters Regulatory Program to prevent undesirable activities on water bodies by establishing and enforcing regulations that:

- are compatible with the preservation, protection and enhancement of the present and potential values of the water resources;
- protect the public health and welfare; and
- are consistent with the reasonable economic and social development of the State.

All waters of the State are provided a class and standard designation based on existing or expected best usage of each water or waterway segment.

- The classification AA or A is assigned to waters used as a source of drinking water.
- Classification B indicates a best usage for swimming and other contact recreation, but not for drinking water.
- Classification C is for waters supporting fisheries and suitable for non-contact activities.
- The lowest classification and standard is D.

Waters with classifications A, B, and C may also have a standard of (T), indicating that it may support a trout population, or (TS), indicating that it may support trout spawning. Special requirements apply to sustain these waters that support these valuable and sensitive fisheries resources. Small ponds and lakes with a surface area of 10-acres or less, located within the course of a stream, are considered to be part of a stream and are subject to regulation under the stream protection category of Protection of Waters.

Certain waters of the State are protected on the basis of their classification. Streams and small water bodies located in the course of a stream that are designated as C(T) or higher (*i.e.*, C(TS), B, or A) are collectively referred to as "protected streams," and are subject to the stream protection provisions of

the Protection of Waters regulations (6 NYCRR Part 608). Protected streams are illustrated on Figure 7 in Appendix A. No person, local public corporation, interstate or interstate authority may excavate from or place fill, either directly or indirectly, in any of the protected waters of the State or in wetlands that are adjacent (typically 50-feet horizontally from the mean high water line) to and contiguous at any point to any of the navigable waters of the State, and that are inundated at mean high water level or tide, without a permit issued by the NYSDEC.

These State-protected streams, as well as other streams (*i.e.*, not meeting the State's definition of "protected stream") also may be regulated by the ACOE under Section 404 of the Clean Water Act.

Any loss of jurisdiction to regulate these resources on CIN lands may have serious deleterious downstream impacts to water quality, stream stability, and habitat; potential upstream impacts include erosion and flooding.

- Water Supply. The NYSDEC exercises jurisdiction over the State's public water supply program. This program protects and conserves available water supplies by ensuring equitable and wise use of these supplies by those who distribute potable (drinkable) water to the public for domestic, municipal, and other purposes. The State's waters must satisfy domestic, municipal, agricultural, commercial, industrial, power and recreational needs and other beneficial public purposes.

  The program's implementing regulations (6 NYCRR Part 601) apply to any person or public corporation who is authorized and engaged in, or proposing to engage in, the acquisition, conservation, development, use or distribution of water for potable purposes, or who proposes to transport or carry water from this State to any location outside the State for use therein. A permit from the NYSDEC is required before a person or public corporation may take any of the following actions:

  - install a new water supply system;
  - acquire, take or develop any source of water supply in connection with a new water supply system;
  - acquire, take or develop any new or additional source of water supply in connection with an existing water supply system;
  - take or condemn lands for any new or additional sources of water supply or for the utilization of such supplies;
  - commence or undertake the construction of any works or projects in connection with proposed plans for a water supply system;
  - extend supply or distribution mains into a municipality, water district, water supply district, or other civil division of the State wherein it has not heretofore legally supplied water;
  - construct any extension of its supply mains, except within a service area approved by the department;
  - extend the boundaries of a water district;
  - supply water in or for use in any other municipality or civil division of the State which owns and operates a water supply system therein,

or in any duly organized water supply or fire district supplied with water by another person or public corporation;

- enter into a contract or other agreement for a supply of water;
- purchase or condemn any existing water supply system;
- sink or drill additional wells in connection with an existing water supply system;
- increase the amount of water diversion from a source of water supply already in use, by enlargement of the conduits, increased storage or by any other means;
- exercise any franchise hereafter granted to supply water to any inhabitants of the State; or
- transport or carry water through pipes, conduits, ditches or canals from any freshwater lake, pond, brook, river, stream or creek of this State or any groundwater of this State to any location outside the State for use therein.

The NYSDEC also issues permits associated with water districts (see Figure 8 in Appendix A), as well as to the regional water purveyors in the Village of Union Springs in Cayuga County and the Village of Seneca Falls in Seneca County which serve the parcels included in the current CIN applications. Depending on their locations, lands that may be purchased in the future by the CIN may be served by these water districts, other water districts, or by private wells. Approval of private wells remains the purview of the local and or state health departments.

In Cayuga County, the Village of Union Springs relies on two wells to supply water to the village as well as to significant portions of the Town of Springport. Testing has revealed that there is a contaminated groundwater plume extending from an unknown source in the City of Auburn, northeast of the village. The village is now using an air-stripping system to treat the contaminated groundwater. The Village of Union Springs and the Town of Springport have worked with the New York Rural Water Association (NYRWA) to develop a "Wellhead Protection Plan".

The Wellhead Protection Plan includes the designation of Wellhead Protection Areas and identifies land uses, potential sources of contamination, and safety measures meant to meet the objective of securing a continued safe, reliable, and affordable water supply for residents. The Wellhead Protection Areas include Zone 1 (the inner protection zone) and Zone 2 (the direct contribution area).

Zone 1 is a circular area, approximately 1/2 mile in diameter, surrounding the two water supply wells, located entirely within the Village of Union Springs, and is considered to be the most critical area for protection of the wellheads. Zone 2, located primarily in the Town of Springport, is an area where groundwater flow is towards Zone 1.
The parcel included in the current CIN applications which contains the Cayuga County gaming facility is within the critical Zone 1 Wellhead Protection Area.

Among the safety measures that have been identified to protect the water supply are controls on animal feeding operations; gas well operations which may generate a brine that is managed as a solid waste; and future development of lands for commercial, industrial, or residential uses.

Should the current CIN application to place lands in trust be accepted, it is the stated intention of the CIN to purchase additional lands to further re-establish its presence in the area. It is reasonable to assume that such lands will be developed by the CIN. The State and local regulatory agencies to date have not had reasonable opportunity to plan, monitor, and control development and operations on the CIN parcels with respect to the critical local potable water sources (as well as other resource issues noted herein). The State and local regulatory agencies also might lose the ability to review proposed projects that could affect the water supply should the CIN's applications be accepted.

In Seneca County, the parcels included in the current application are served by the Village of Seneca Falls that withdraws water from Cayuga Lake. Future land purchases and potential development by the CIN in Seneca County may or may not continue to rely on the Village of Seneca Falls for water supply. Should other sources of water be required, the State and local government agencies would not have the ability to review those projects and their potential impact on water supply sources.

- State Pollutant Discharge Elimination System. Article 17 of the ECL entitled "Water Pollution Control" was enacted to protect and maintain surface and groundwater resources. Article 17 authorized creation of the State Pollutant Discharge Elimination System (SPDES) program to maintain New York's waters with reasonable standards of purity. The SPDES program is designed to eliminate the pollution of New York waters and to maintain the highest quality of water possible, consistent with:

  - public health;
  - public enjoyment of the resource;
  - protection and propagation of fish and wildlife; and
  - industrial development in the State.

  The NYSDEC issues permits associated with private, commercial and institutional discharges for the following activities:

  - constructing or using an outlet or discharge pipe (referred to as a "point source") that discharges wastewater into the surface waters or groundwaters of the State;
  - constructing or operating a disposal system such as a sewage treatment plant; and
  - storm water discharges associated with industrial activity from a point source.

  In addition, the NYSDEC is working with the USEPA to implement a federal regulation, commonly known as Storm Water Phase II, which requires permits for storm water discharges from Municipal Separate Storm Sewer Systems (MS4s) in urbanized areas and for construction activities disturbing

one or more acres. To implement the law, the NYSDEC has issued two general permits, one for MS4s in urbanized areas and one for construction activities. The permits are part of the SPDES program.

Under the storm water SPDES program, permittees are required to prepare, implement and maintain Storm Water Pollution Prevention Plans (SWPPPs) that describe activities, mitigation (including an erosion and sedimentation control plan), and storm water management features aimed at controlling storm water quality and flows. Developing a SWPPP that complies with the requirements of the State's SPDES program does not relieve developers and contractors from the obligation of complying with storm water management requirements of the local government having jurisdiction over the project. Additional reviews by the local government may be necessary during the local right-to-build processes (*i.e.*, site plan review, subdivision review, etc.).

- Approval of Plans for a Wastewater Disposal Systems and Public Water Supply Improvements. Pursuant to Article 17 of the ECL, as well as the State's sanitary code, the NYSDEC and NYSDOH working with county health departments have regulatory responsibility to review and approve wastewater disposal systems (*i.e.*, conveyance and treatment facilities including septic systems) and public water supply improvements. While existing CIN operations currently rely on public infrastructure, many of the more rural parcels rely on on-site water (wells) and wastewater (septic) systems (see Sections on Real Property Taxes and Special Assessments). Future plans may entail the development of CIN-operated potable water and wastewater treatment systems. Furthermore, it is reasonable to assume that future development of parcels where such public infrastructure remains unavailable, will require the CIN to implement additional on-site measures (*i.e.*, wells and septic systems). The CIN parcels are used for the CIN's commercial and gaming operations, which are intended to attract non-CIN visitors. Since 9/ll, it is imperative that local, state and federal governments have the ability to review and approve of the design, capacity, reliability, and security issues associated with such facilities to ensure protection of public health, as well the environment.

- Realty Subdivisions. Under a Memorandum of Understanding with the NYSDEC, the NYSDOH has statewide responsibility for approval of all realty subdivisions, including the review and approval of plans for individual sewage treatment systems. NYSDEC retains responsibility only for the review and approval of plans for public or community sewerage. With the CIN's stated objective of reestablishing its presence on lands in the area, the proposed placement of the parcels, as well as parcels purchased in the future by the CIN, into trust highlights the need for continued local and State oversight of such projects.

- Wellhead Protection. The Wellhead Protection Program was created by the 1986 Amendments to the Safe Drinking Water Act. The NYSDEC developed New York's Wellhead Protection Program, which was approved by the USEPA in 1990. In 1998, administration of the Wellhead Protection Program was transferred from the NYSDEC to the NYSDOH and integrated into the

NYSDOH's Source Water Assessment Program. The goal of the Wellhead Protection Program is to protect the groundwater sources, aquifers, and wellhead areas that supply public drinking water systems from contamination. New York's approach to wellhead protection recognizes and includes the existing federal, State and county programs that protect groundwater and complements these programs through a combination of activities and efforts using existing public and private agencies and organizations at all levels. As discussed above, the Village of Union Springs and the Town of Springport have worked with the NYRWA to develop a "Wellhead Protection Plan" with respect to the Village of Union Springs water supply wells.

The ability of State and local governments to protect groundwater and public and private well supplies would be significantly hindered if access to CIN-related parcels is eliminated. The ability of State and local governments to protect the local watershed is vital to ensuring that groundwater resources, which supply local private and public well supplies, is protected.

- Floodplain Development Permits. The NYSDEC has statutory authority under Articles 16 and 36 of the ECL and its implementing regulations (6 NYCRR Part 500 *et seq.*) to regulate flood control issues in New York State. Local floodplain development coordinators work with the NYSDEC and Federal Emergency Management Administration (FEMA) to restrict and regulate development within floodplains and floodways (see Figure 9 in Appendix A) including review of flood-proofing and compensatory storage issues. Development that includes diverting streams, increasing impervious surfaces, or developing in floodplains has the potential to raise flood elevations that would impact both CIN and non-CIN properties. The inability for local and State planners to review development applications has severe ramifications relating to health, the environment and liability including:

  - loss of life from flooding, dam breaks and erosion;
  - economic loss to new and existing development; and
  - inability to exercise appropriate planning and decisions.

  Acceptance of the applications to place the parcels in trust would mean that future development of these parcels, as well as parcels purchased in the future by the CIN, would not be subject to any review and evaluation by State or local governments to ensure that flood control measures are included, where appropriate, to protect public health and property. While such reviews are critical (and required) in all flood regulated areas, land proximate to Cayuga Lake is especially sensitive to changes resulting from development activities.

Cultural Resources. The protection of historic and archaeological properties collectively known as cultural resources is mandated by the National Historic Preservation Act (NHPA) (16 U.S.C. 470) and the New York State Historic Preservation Act (SHPA) (Article 14 of the New York State Parks, Recreation and Historic Preservation Law). Oversight and guidance to State and federal agencies in implementing the applicable

statutes in New York State is provided by the Office of Parks Recreation and Historic Preservation (OPRHP) which is also the designated State Historic Preservation Officer under NHPA. Both statutes require agencies to identify, evaluate and avoid or mitigate impacts to buildings, structures, objects or sites that are listed in or eligible for listing in the State and/or National Registers of Historic Places (see Figure 10 in Appendix A). Projects involving State or federal agencies are required to comply with SHPA and NHPA, respectively, and generally incorporate consideration of cultural resources as a component of SEQRA or NEPA compliance during project planning, review and approval. As illustrated on Figure 11 in Appendix A, there are several areas of overlap between the CIN parcels and areas identified by OPRHP as being archaeologically sensitive. It is the policy of New York State that sponsors of activities, which are funded, permitted or approved by any State agency, perform appropriate cultural resource investigations within such sensitive areas. Any significant loss of jurisdiction over these areas under SEQRA and SHPA, including the ability to provide oversight, would have a significant detrimental impact on the people of the State of New York.

Solid Waste Management, Transport and Disposal. The management and land disposal of wastes is regulated by the State of New York pursuant to 6 NYCRR Part 360. These regulations have been in effect since 1973, with substantive changes occurring in 1988 and subsequent years. Solid waste management facilities, including municipal solid waste landfills, industrial and commercial waste landfills, construction and demolition (C&D) debris landfills, transfer stations, waste-to-energy facilities, C&D processing facilities, regulated medical waste facilities, composting facilities, land application facilities, and recyclables handling and recovery facilities, must be designed, located, constructed, operated and monitored in compliance with a Part 360 permit. In addition to the requirement of a permit, financial assurance may be required to cover the costs of properly closing the facility if the owner fails to do so. The objective of the State's jurisdiction in these matters is to protect the environment and the public health from the exposure to, and the impacts of, improper waste management.

The highway transport of regulated waste requires a permit pursuant to 6 NYCRR Part 364. There are annual fees associated with a Part 364 permit, with the amount being determined by the type of waste being transported and the number of permitted vehicles. Regulated waste includes, but is not limited to, hazardous waste, waste tires, used oil, medical waste and residential septage. A Part 364 transporter has certain responsibilities associated with the permit, which includes: sufficient tracking of certain wastes, namely hazardous waste; ensuring that the waste is delivered to an authorized facility; maintaining proper records on the amount of waste transported; and containing waste to prevent leaking, blowing and other discharges.

Hazardous Waste Management, Transport and Disposal. Under the statutory authority of Article 27, Title 9 of the ECL, the NYSDEC regulates the management, transport and disposal of hazardous wastes in New York State. New York State has a strong commitment to protect its citizens and the environment from potentially devastating exposure to hazardous wastes. Working cooperatively with the USEPA, the NYSDEC's Resource Conservation and Recovery Act (RCRA) Subtitle C program establishes the regulatory framework for managing the generation, transportation, treatment, storage and disposal of hazardous waste. The program covers the following topics with relevance to the CIN trust application:

- Authorization. The NYSDEC received initial USEPA authorization to implement and enforce the federal RCRA-C program on May 29, 1986.

- Manifest. New York State enforces a manifest program to track hazardous waste from the time it leaves the generator facility to the place of ultimate disposal ("cradle-to-grave") to ensure that wastes are transported from the generator to a regulated disposal facility without being tampered with or illegally disposed. Unlike the federal manifest program, the New York State manifest program requires both the generator and the receiving facility to submit copies of manifest forms to the NYSDEC. The NYSDEC then uses a computerized data system to ensure that all hazardous waste shipments in fact make it to an approved receiving facility.

- Fees. Through the Hazardous Waste Special Assessment taxes and Regulatory Fees a portion of the public debt service associated with the 1986 Environmental Quality Bond Act is repaid, as well as the funding of other environmental programs, including clean-up of hazardous waste sites.

- Reduction. The NYSDEC has statutory requirements for hazardous waste reduction efforts.

- Permits. Through Part 373 permits (6 NYCRR Part 373), the NYSDEC ensures the environmentally-protective standards in design, operation and performance of hazardous waste treatment, storage and disposal facilities (TSDFs).

- Financial Assurance. All permitted TSDFs have financial assurance mechanisms to ensure that owners/operators have the funding to provide closure and post-closure activities necessary to protect human health and the environment upon ceasing operation.

- Corrective Action. The NYSDEC provides oversight on the implementation of corrective actions required to remediate existing impacts to the environment (*i.e.*, soil, surface and groundwater contamination).

- Inspections. The NYSDEC performs inspections to monitor compliance with RCRA-C regulations. Through routine inspections of hazardous waste generators, transporters and treatment, and storage and disposal facilities, inspectors uncover serious offenses – violations that, left undetected, could result in extreme, adverse consequences to human health and the environment.

Figure 13 in Appendix A illustrates the locations of regulated facilities in the area inclusive of the parcels. Regulated facilities include Part 373 and RCRA facilities [*i.e.*, TSDFs, Small Quantity Generators (SQG) of hazardous wastes, and Large Quantity Generators (LQG) of hazardous wastes]. Not included are Conditionally Exempt SQGs.
It is not known whether hazardous waste is being safely managed or was disposed at these locations; there is potential for groundwater contamination, whereby such contamination could be transported to off site properties, exposing other landowners to potential health risk by several exposure pathways. In addition, this practice by the CIN

at other properties can impair the groundwater resource through the deterioration in groundwater quality, with the potential for the loss of this important resource in a region where many private landowners subsist on residential potable groundwater sources. Also, if surface waters are affected, it could impact aquatic resources and habitat. In addition to groundwater concerns, there are other issues that can arise from the unregulated disposal of waste, such as odor, noise, blowing waste, and vermin.

Petroleum Bulk Storage. The State of New York is authorized to regulate petroleum bulk storage facilities. Pursuant to Article 10 of the ECL, the State adopted Petroleum Bulk Storage (PBS) regulations in 1985 that established requirements aimed at preventing petroleum spills from contaminating the lands and waters of the State (6 NYCRR Parts 612-614). Those regulations include requirements for: registration of facilities (tanks and connecting piping) having a combined storage capacity of more than 1,100 gallons; storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; reporting of spills; and construction, design and installation requirements for new or substantially modified facilities. It is known that the CIN have facilities that are likely subject to the PBS regulations. Gasoline station tanks and facilities with fuel tanks typically exceed the threshold storage capacities that would make those facilities subject to the design, construction, and registration requirements of the PBS regulations. As illustrated on Figure 14 in Appendix A, it is unknown how many facilities within the parcels are subject to the State's PBS regulations. A comparison of known (registered) PBS facilities (Figure 14) with known gas stations in the area (Figure 15 in Appendix A) again illustrates the regulatory "black hole" that persists due to the CIN's lack of compliance with State PBS tank registration procedures. The inability to identify, track, regulate and monitor these facilities may ultimately lead to impacts on CIN and non-CIN lands due to unreported and uncontained spills or leaks, improper designs, and/or inadequate best management practices.

Facilities that store 400,000 gallons or more of petroleum (commonly known as major oil storage facilities or "MOSFs") pose a heightened risk of damaging spills, due to their capacity and throughput. Pursuant to Section 174 of the State's Navigation Law, a facility operator must obtain a license from the State to operate such facilities. MOSFs also are subject to the PBS storage and handling requirements, and construction, design, and installation requirements for new or substantially modified facilities. Although presently there are no known MOSFs subject to the State's licensing authority within the parcels, future development for that purpose cannot be precluded.

Petroleum spills pose a significant threat to the lands, natural resources, and waters (including groundwater) of the State. There are approximately 16,000 spills reported annually in the State. It has been estimated that a single quart of gasoline can render 100,000 gallons of water unfit for drinking water purposes. Accordingly, Navigation Law Article 12 prohibits the discharge of petroleum, requires persons responsible for a discharge to notify the NYSDEC within two hours, and imposes strict liability on the discharger. Pursuant to Article 12, the NYSDEC has exclusive responsibility to clean up discharges of petroleum, either through State-standby contractors or by the responsible party under careful NYSDEC oversight. Consistent with that responsibility, Article 12 expressly grants the NYSDEC authority to enter property to investigate suspected or actual spills and to clean up petroleum contamination. Absent notice of a spill, the NYSDEC will be unable to ensure that the petroleum is contained and cleaned up to meet standards.

Oil and Gas Regulation. The NYSDEC oversees permitting, compliance and enforcement of all regulated oil and gas wells in New York State. Specific responsibilities include:

- development, implementation and enforcement of regulations, policies and procedures to ensure that oil, gas, gas storage, solution mining, brine disposal, stratigraphic, geothermal and waterflood wells are drilled, operated and plugged so that the environment, correlative rights and public health and safety are fully protected;
- development, implementation and enforcement of regulations, policies and procedures to ensure that wastes generated during the drilling and operation of regulated wells are handled so that the environment and public health and safety are fully protected;
- management of a full regulatory permit program for underground storage of natural gas and liquefied petroleum gas;
- establishment of well spacing requirements in new and existing fields and review requests for variances;
- investigation and resolution of citizen complaints and non-routine incidents;
- provision of technical assistance and information to the regulated community, local governments, the public, other State agencies and other units within NYSDEC; and
- performance of technical review of solution mining well proposals and coordination with other involved State and federal agencies regarding solution mining and brine disposal wells.

Existing, permitted oil and gas wells are identified on Figure 16 of Appendix A. While non-CIN contractors have applied for applicable reviews and permits, no known applications have been made by the CIN. Based on past experiences it is expected that the CIN will seek on-site natural gas sources.

The 108-acre parcel owned by CIN has an existing natural gas well that has been operating since January 1982. The gas well currently serves the Union Springs School District by supplying natural gas to heat the District's buildings. The prior owner of the subject property entered into a lease with Pioneer Resources to allow the company to explore and produce oil and gas. By agreement with the successor to Pioneer, Devonian Energy, the School District was granted the right to an assignment of the oil and gas lease for 120 acres. The deed by which the CIN took title specifically excepts from the property the oil and gas lease granted to Pioneer from the prior owner of the property. It remains uncertain how the trust acquisition will affect the rights of the School District to continue to utilize the existing lease rights.

Chemical Bulk Storage. Articles 37 and 40 of the ECL prohibit releases of hazardous substances and authorize the State to regulate the storage and handling of hazardous substances. Pursuant to that authority, the State adopted chemical bulk storage (CBS) regulations in 1994 designed to prevent releases in the first instance (6 NYCRR Parts 595-599). Those regulations establish reporting requirements for releases of hazardous substances; over 1,000 substances are currently listed in the regulations as hazardous substances. The CBS regulations also include requirements for: registration of tanks (aboveground tanks with a capacity of 185-gallons or more, and any underground tank);

storage and handling, including requirements relating to inventory monitoring, periodic testing and inspection of equipment; tank closures; and construction, design and installation requirements for new or substantially modified facilities. Facilities that may have storage tanks subject to the CBS regulations are, for example, water and wastewater treatment plants and those with swimming pools that may store chlorine, as well as manufacturing facilities that may store various solvents. As illustrated on Figure 17 in Appendix A, the number of CBS facilities within the parcels that may be subject to the CBS regulations is unknown due to the afore-mentioned "black hole" effect (see Petroleum Bulk Storage). Similar to the PBS discussion, any lack of CBS oversight by the State would result in the potential for similar impacts to public health and the environment.

Petroleum and Hazardous Material Emergency Spill Response. The NYSDEC maintains a Spill Response Program with trained response personnel assigned to regional offices throughout New York State. The program operates a Spill Hotline for receiving notification of incidents. The program staff promptly respond to known and suspected releases, and ensure that containment, clean-up and disposal are completed to minimize environmental damage. Regional spill response staff are available to respond to releases of petroleum and other hazardous materials 7 days-a-week, 24 hours-a-day. The potential loss of jurisdiction in the area of emergency spill response would impair the ability of the State and local municipalities to protect the environment and of the public health in accordance with the requirements of the Environmental Conservation Law, the Navigation Law, and associated regulations.

After receiving notification of actual or suspected releases, NYSDEC spill responders evaluate the situation to determine what actions are required to protect public health and the environment, and to identify the spiller, or responsible party. When NYSDEC spill responders arrive at the site of an incident, they have the authority to:

- enter property to investigate actual and suspected releases;
- give responsible parties direction on actions to be taken and the type of environmental clean-up contractors they will need;
- answer questions concerning notification requirements;
- provide information on technical questions;
- advise responsible parties when clean-up goals are being properly met;
- in cooperation with the NYSDOH, arrange for the evacuation of structures where contaminated vapors from spills present a threat to the health of the occupants; and
- arrange for containment and clean-up by a State-funded contractor when the responsible party is unknown, unable, unwilling or doing inadequate clean up, or if local public safety agencies need emergency assistance.

Clean-ups, particularly those in which spills have contaminated groundwater, take time. Extensive drilling and laboratory sampling may be required, and remediating the groundwater may take several years. Responsible party requirements will vary with type of release, site characteristics, disposal requirements, and clean-up goals for soil and water.

The State's Navigation Law and the Environmental Conservation Law and associated regulations require at least the following actions at a site:

- removal of all free product from the surface and underground;
- remediation of the affected surface environment;
- treatment of drinking water or provision of alternative water supplies during groundwater remediation;
- remediation of contaminated soil;
- treatment of contaminated groundwater;
- rescue and rehabilitation of affected wildlife; and
- restoration/replacement of affected natural resources.

Article 12 of the Navigation Law establishes the New York State Environmental Protection and Spill Compensation Fund (Fund) as a non-lapsing, revolving fund administered by the Office of the State Comptroller. The Comptroller:

- disburses Fund money for administrative, clean-up and removal expenses incurred by NYSDEC;
- arranges for settlement of damage claims from releases; and
- collects reimbursement and penalties from dischargers, and establishes the license fees.

The New York State Attorney General's Office also supports the program through legal actions to obtain reimbursement from responsible parties. Other public agencies may respond if a release creates immediate hazards to life and health. The first trained personnel to arrive at a release site are usually from local emergency service agencies such as the police or fire department. Local agencies will lead the response to protect the public from fires, explosions, or toxic gases, and sometimes to divert traffic or evacuate residents. Other State and federal agencies, such as the NYSDOH, the USEPA and the U.S. Coast Guard, may also respond.

Under New York State's Navigation and Environmental Conservation Laws, the responsible party (usually the owner or operator of equipment or a facility that has a release) is responsible for notification of appropriate agencies, and for containment, clean-up and removal of spilled and contaminated materials. The responsible party is liable for all costs associated with a release, including relocation costs and third party damages. If NYSDEC conducts a clean-up, the responsible party must pay not only for the direct clean-up costs, but also for NYSDEC's administrative costs and for any interest and penalty charges. Reimbursement is sought either by NYSDEC, the Spill Fund Administrator or the Attorney General's Office.

It is not likely that the CIN would be able to adequately undertake the roles and responsibilities currently filled by the NYSDEC and other State, local, and federal agencies regarding emergency spill response. A lack of proper response would lead to increased threats to public health and the environment.

Spill Prevention, Control, and Countermeasure Plans. Under authority of Section 311 of the Federal Clean Water Act, regulations have been adopted which set forth the requirements for the prevention of, preparedness for, and response to oil discharges at specific non-transportation related facilities (40 CFR Part 112). Facilities that have aboveground storage capacity of greater than 1,320 gallons or underground storage capacity of greater than 42,000 of non-transportation related oil storage that could

reasonably be expected to discharge oil to navigable waters or shorelines in the event of a spill or leak are subject to these regulations. These regulations require that facilities subject to the regulations develop and implement Spill Prevention, Control, and Countermeasure (SPCC) plans that identify site-specific measures to prevent oil from reaching navigable waters and adjoining shorelines, and to contain discharges of oil. The SPCC regulations are designed to protect public health, welfare, and the environment from potential harmful effects of oil discharges. The SPCC plan for a given facility must establish procedures, methods, and equipment requirements to achieve these requirements. The number of facilities within the parcels that may be subject to the SPCC regulations, either now or in the future, is unknown due to the lack of information from the CIN.

Inactive Hazardous Waste Sites and Brownfields. Articles 3, 27 (Titles 9, 11, 13, 14), 56, and 71 of the ECL and selected sections of the New York State Finance and the New York Public Health Laws, provide the State with extensive programs to remediate hazardous substances that constitute a significant threat to health, safety and the environment (the State's hazardous waste, hazardous substance and superfund programs). In addition, these laws provide means for enforcement and sanctions against parties responsible for releasing pollution as well as the funding mechanisms for the clean-up of abandoned polluted sites. The law also provides for a broad "brownfields" clean-up program whereby interested parties can clean-up otherwise neglected, but polluted sites in exchange for liability releases from the State.

In two related authorities, the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act of 1990 (OPA) provide that the Commissioner of the NYSDEC is the appointed Natural Resource Trustee for the State. The Commissioner is given the appropriate authority and power to represent the State where injuries to natural resources and the damages from those injuries are assessed and funds recovered to be used to restore those resources injured from releases of hazardous substances and petroleum products at federal superfund sites, State superfund sites, or oil spill sites.

Due to a lack of information from the CIN, it is not known what, if any, programs the CIN has implemented to clean-up and remediate any existing inactive hazardous waste disposal sites located within the parcels. The potential existence of such disposal sites and the absence of oversight by the State of any clean up or remediation actions by the CIN places not only tribal lands within the parcels, but properties outside of the CIN lands, at risk for contamination of soils, ground and surface waters, both now and in the future.

The Pesticide Sales and Use Database and Record Keeping and Reporting Law (Pesticide Regulation). The NYSDEC regulates the application of pesticides in New York State and is responsible for compliance assistance and public outreach activities to ensure enforcement of State pesticide laws, Article 33 and parts of Article 15 of the ECL and 6 NYCRR Parts 320-329. As part of the Pesticide Reporting Law, pesticide applicators are required to maintain records of pesticide applications and report certain information to the NYSDEC annually. The following information must be reported to NYSDEC for each application: the product's USEPA registration number, product name, quantity used, date applied, and location of application by address. In addition, for each application, records must be kept regarding dosage rate, application method, target organism and/or crop treated.

It is unknown to what extent the CIN makes use of pesticides in the maintenance of the parcels. Any CIN activities potentially subject to these requirements, including: the proper storage and application of pesticides, registration of pesticide user facilities, as well as certification of individuals who apply the pesticides, have not been reported to the State. All of the parcels included in the CIN's current application are located within 1/4 mile of the shores of Cayuga Lake. Development of parcels in the future may include projects where the use of pesticides is needed. Should the applications of the CIN to place the parcels, as well as parcels purchased in the future by the CIN, in trust be accepted, the permanent removal or substantial impairment of State jurisdiction from these properties may place the environment and public health at risk from pesticide management practices.

Zoning Districts. Local right-to-build requirements such as zoning are established under the home-rule provisions of the New York State Constitution and laws to allow municipalities to provide for the well-being of their communities (*i.e.*, public health, safety, morals, or general welfare). Within each community, the local electorate chooses representatives who determine zoning and other local planning processes and controls. These local planning processes provide a means to review the short- and long-term implications of land development activities. Under zoning-related reviews, development applications are reviewed for consistency with master/comprehensive plans, local zoning requirements and potential impacts on the health and safety of residents. Regional impacts are evaluated by the county under General Municipal Law Section 239. Towns and villages have adopted local zoning ordinances to provide for regulating, controlling and restricting the use and development of land and buildings to promote and protect, to the fullest extent permissible, the environment and its public health, safety and general welfare in accordance with purposes outlined in applicable sections of New York State Town and Village Law. The towns and villages have established zones consistent with master or comprehensive plans for the entire jurisdiction and with associated allowable uses, as well as overlay districts, which impose additional regulations for specific purposes such as historic preservation, flooding, parking or other concerns. General zoning district information is presented on Figure 18 in Appendix A. Zoning regulations are an aid in the effectuation of a comprehensive plan for sound community development. Placement of significant and isolated parcels in trust bypasses the zoning review processes (*i.e.*, allowable land uses, site plan review, subdivision, special permit, and use and area variances) and significantly impacts ability to provide for cohesive and consistent community planning. Placement of lands into trust makes it impossible for communities to implement their vision and comprehensive plan for zoning and land use regulations when the community can not exercise community planning and zoning functions over large tracts within their planning areas. CIN's lack of adherence to such principals may cause impacts to surrounding neighborhoods and make it impossible for community planning to mitigate such impacts.

Case Study – As illustrated on Figure 19 of Appendix A, one of the CIN parcels included in the current applications is located near the Union Springs Central School in Cayuga County. Local right-to-build reviews allow community representatives the ability to review development applications, with discretion to approve, deny or modify proposals based on consistency with master plans and the need to protect public health and the environment. Local reviews, including a review of environmental impacts under SEQRA, and regional impact reviews under General Municipal Law Section 239, look at the potential for development

to impact a wide range of issues (*i.e.*, land use compatibility, traffic, viewshed, wetlands, storm water runoff, utility capacities, nuisances, etc.), that might otherwise be neglected absent the requirements. Construction and operation phase, short-term and long-term, as well as cumulative impacts are reviewed in order to make an informed decision on whether or not the type and magnitude of the project is consistent with the public good. At the State and local levels, those reviews were not accomplished for the existing CIN facilities, nor has the CIN presented a comprehensive plan of its development objectives that typically forms the basis for New York State local zoning laws. Future reviews of new CIN development proposals should be required to undergo these reviews. Impacts on schools, hospitals and other sensitive receptors should be evaluated.

Case Study - Two of the parcels currently under application and purchased by the Nation in the Town of Seneca Falls (Tax Map Nos. 36-1-49 and 36-1-48.2) are zoned R-1 residential. Because they were used as a gas station, commercial office space and retail sales prior to the adoption of the Seneca Falls Town Zoning Law, these uses are permitted on these parcels as pre-existing, non-conforming uses. A proposed change in use from the grandfathered uses or R-1, however, requires a variance from the Town of Seneca Falls Zoning Board of Appeals. (*See* Town of Seneca Fall Zoning 103-59B). In developing its gaming facilities on these parcels, the Nation failed to request any variance for the new non-conforming use or for the expansion of the facility. Thus, the Nation violated the Town's Zoning Code.

Building Codes. The Building Code of New York State is based on the 2000 International Building Code (IBC). The Code references and requires adherence to the following:

- Fuel Gas Code of New York State;
- Mechanical Code of New York State;
- Plumbing Code of New York State;
- Property Maintenance Code of New York State;
- Fire Code of New York State; and
- Energy Conservation Construction Code of New York State.

In addition, one- and two-family dwellings are subject to the Residential Code of New York State. The stated purpose of the Codes is "to provide minimum requirements to safeguard public safety, health and general welfare, through affordability, structural strength, means of egress facilities, stability, sanitation, light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built environment" (Building Code of New York State § 101-3; Residential Code of New York State § 101-3).

The Building Code and Residential Code are necessary to protect the health and safety of the building occupants and the general public, including the many non-CIN citizens that visit the CIN's facilities. Codes are based on requirements designed to eliminate health and safety hazards, including but not limited to fire, earthquake, collapse, flooding, wind and storm, communicable disease and so forth. The Code requires the issuance of building permits before construction can begin. Such permits can only be issued upon review and acceptance, by the authority having jurisdiction, of building plans and

specifications prepared, signed and sealed by Licensed Design Professionals. Design Professionals, by law and common practice, are required to comply or exceed such codes as a condition of such licensure. Regardless of the Code jurisdiction under which a building is to be constructed and whether or not the owner agrees with such code or jurisdiction, any Design Professional would be expected to comply or to seek a variance before construction.

IMPACTS ON REAL PROPERTY TAXES

In accordance with the statutory review obligations under 25 CFR Part 151.10(e) (*i.e.*, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls), Appendix E consists of a tabular summary of parcel-specific taxes and special assessments including:

- sale price;
- assessed value at sale;
- current assessed value (2005);
- town/village tax;
- county tax;
- school tax; and
- special district taxes (see discussion on special assessments below).

As noted for the values listed in Appendix E, in some cases, include taxes for prior years and penalties.

Based on this information provided by the affected towns and counties, the removal of these parcels from the tax rolls would result in an annual reduction of over $80,000 in tax and special assessment dollars available to local and State governments, with no significant reduction in the provision of services. Moreover, the development and expansion of these parcels and operations continues the expectation for services from local and State governments. The future purchase of other lands by the CIN would remove even greater amounts of revenues collected through taxes and special assessments from being available to pay for services. Non-payment of real property taxes by the CIN has contributed to the following financial issues:

- inability to reduce local tax levies;
- reduction in investment grade credit rating; and
- reluctance to undertake significant and necessary capital improvements.

The counties, under statute and pursuant to generally accepted accounting principles, are required to reserve the total amount of the unpaid tax bills. The obvious impact of the delinquency results in higher county taxes in all towns and for all taxpayers across the county as the reserve is raised countywide for the delinquency and obvious cash flow considerations.

In its *City of Sherrill* decision, the U.S. Supreme Court decided that the lands at issue (property interests purchased by the Oneida Indian Nation of New York on the open market) are subject to real property taxes. It may be assumed that this ruling would also apply to the CIN. The placement of CIN-owned lands into federal trust will have a significant adverse impact on the ability of the State, local governments and special assessment districts to provide services to the community - services paid for by tax dollars. If the CIN is successful in its application to the BIA, it is their explicitly stated intention that they will continue to purchase lands and apply for trust status resulting in a long-term cumulative drain on the financial resources of the surrounding jurisdictions. This financial drain is also impacted to the extent that the CIN will continue to benefit from the public infrastructure, social services and amenities [*i.e.*, use of public roads,

parks and other landmarks (see Figures 20 and 21 in Appendix A), libraries, schools, solid waste management facilities, etc.] of the State and local communities.

IMPACTS ON SPECIAL ASSESSMENTS

As illustrated on Figures 8 and 22 in Appendix A, some of the parcels are located in special assessment district areas established pursuant to New York State Town Law and including water/sewer districts, and school districts. The tabular summary provided in Appendix E identifies the parcels impacted, the special districts in which they are located, and special assessments levied. These special districts were created such that properties in the district are taxed in proportion to the benefits derived from the proposed facilities. District maintenance fees are derived from a combination of taxes on assessed value and frontage, or per parcel taxes on various types of properties, or through some other formula. In a benefit district, extensions of facilities within the district beyond those in the original proposal are paid for by those benefiting from the additional facilities, unless the additional facilities benefit the entire district.

The State of New York and local municipalities have historically assumed the burden of establishing and maintaining infrastructure and support services for its residents. Some of the parcels presently receive municipal sewer, water and emergency services. Placement of special district lands in trust will result in fewer users (than originally proposed) financially supporting the district facilities, who then will share the burden of the district's operation and management. This scenario will result in diminished funds to maintain districts, and a need to increase district revenues through user fees/taxes on the remaining parcels in the district.

While the CIN trust applications indicate that it is the CIN's goal of purchasing additional lands, it is unclear what impact this will have on the need for the CIN to continue to rely on State and local services or for future operations on lands included in the CIN application. Continued reliance on such services would seemingly necessitate enforcement and taxation on the same basis as provided other State citizens who benefit from these services. Unfortunately, in the absence of fair compensation for services the State and local jurisdictions will have to address the loss of such compensation on the provision of services.

Case Study – Emergency Management . The parcels are serviced, in part, by the Montezuma, Springport, and Bridgeport Fire Districts (see Figure 23 in Appendix A). In correspondence dated January 30, 2006, Charles McCann, Director, Seneca County Emergency Services, stated concerns regarding first responders to various emergency situations not being allowed to enter CIN properties. Emergency situations may include, but not be limited to: fires, spills of hazardous substances such as gasoline, personal injury incidents resulting from motor vehicle accidents or other incidents. In correspondence dated February 2, 2006, Brian Dahl, Director, Cayuga County Emergency Services, noted that the lack of information regarding the existing and, particularly, potential future development of CIN parcels, makes it difficult, if not impossible, to determine the impacts to local fire and other emergency response services. In addition, Mr. Dahl notes that the legal liabilities that may be incurred by emergency service organizations can not be determined given the uncertainties surrounding the ability of such organizations to respond to fires or other emergency situations.

Case Study – Agricultural Districts. New York State Agriculture and Markets Law (Article 25-AA) authorizes the creation of local agricultural districts

pursuant to landowner initiative, preliminary county review, State certification, and county adoption. As illustrated on Figure 24 in Appendix A, the CIN parcels are not located in areas previously adopted by Cayuga or Seneca County as Agricultural District lands. However, when additional lands are purchased, as is the stated intention of the CIN should the applications be accepted by the BIA, such lands may well fall within designated agricultural district boundaries. The purpose of agricultural districting is to encourage the continued use of farmland for agricultural production, maintaining the character of the region. The program is based on a combination of landowner incentives and protections, all of which are designed to prevent the conversion of farmland to non-agricultural uses, and preserving the valuable State resource of prime farmland. These lands are often characterized by prime farmland (see Figures 25 and 25A in Appendix A) as defined by the United States Department of Agriculture – Natural Resources Conservation Service.

- <u>Incentives Program.</u> Included in the incentives program are preferential real property tax treatment (agricultural assessment and special benefit assessment), which provide farmland owners with real property assessments based on the value of their land for agricultural production (*i.e.*, based on agricultural soils) rather than on its development value.

- <u>Protection Program.</u> Included in the protection program are procedures that safeguard farmland owners against overly restrictive local laws, government funded acquisition or construction projects, and private nuisance suits involving agricultural practices. The New York State Department of Agriculture and Markets (NYSDAM) requires State agencies, local governments and public benefit corporations to avoid or minimize adverse impacts to farm operations from projects within an agricultural district, which involve either the acquisition of farmland or the advance of public funds for certain construction activities. These entities which may undertake an action within an Agricultural District are required to submit detailed "Notice of Intents" (NOI) to the Department for review, evaluation and recommendation of mitigative measures. Such projects cannot proceed until the notice process is complete.

  For private developer/landowner actions, Section 305-a of New York State's Agricultural and Markets Law provides for the preparation of an "Agricultural Data Statement" if the proposed action involves a special use permit, site plan application, use variance, or subdivision application on a property within an agricultural district containing a farm operation or on property with boundaries within 500-feet of a farm operation located in an agricultural district.

  Both the NOI and Agricultural Data Statement processes recognize the importance of protecting and preserving the viability of farm and agricultural operations in New York State.

Prior to any transfer of lands into trust, now or in the future, potential financial and agricultural impacts (based on existing and future development) should be assessed relative to:

- value of land based on development potential;
- impact on existing agricultural practices;
- impact on adjacent agricultural practices;
- potential lands in conservation easements; and
- identification if any of the CIN parcels benefit from State assistance payments to municipalities for the purchase of development rights.

In addition, as a federal action, the placement of land into trust by the BIA would be required to comply with the federal Farmlands Protection Policy Act of 1984. The purpose of the federal Farmland Protection Policy Act is to minimize the extent to which federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that federal programs are administered in a manner that, to the extent practicable, will be compatible with State and local government, and private property programs and policies to protect farmland.

As part of the consideration of these applications, the BIA must perform a substantive review of the potential impacts on local farmland and related issues, such as the impacts of development of the parcels on adjacent and area farmland. Such an evaluation was not completed for the CIN's existing facilities.

OTHER CONSIDERATIONS

In correspondence dated October 26, 2005, relating to the Oneida Indian Nation of New York's application to have lands placed in trust, the BIA indicated that "the Counties will have additional opportunities to comment on other aspects of the proposed acquisition during the NEPA [National Environmental Policy Act] process." In correspondence dated November 22, 2005 from the Associate Deputy Secretary of the Interior to the Honorable John McHugh, also in relation to the Oneida Indian Nation's application, it was stated that "the Department and the OIN have agreed that the most comprehensive level of analysis, an Environmental Impact Statement (EIS), will be conducted for the proposed acquisition." It may be assumed that the statements contained in the above referenced correspondence will have applicability to the CIN and its applications to have lands placed in trust. Regardless of the assertions stated by the BIA and the DOI in the above referenced correspondence, additional information is provided herein under this category of "Other Considerations". The State reserves the right to continue to expand on these issues, as well as to identify new issues, during the on-going NEPA review process.

Need. It is imperative that the CIN provides detailed analysis on why particular parcels of land need to be held in trust. Information should include financial, marketing and development plans that document the current standing of the CIN, and its future objectives. While it is understood that the CIN wishes to preserve and protect its unique cultural heritage, it needs to justify why placement of these lands is necessary to accomplish that objective.

The CIN clearly may use the land that it owns and which are included in the current applications, as well as lands that may be purchased in the future, in an economically productive way without having it held in trust. Consequently, there is no reason why the CIN needs to, or should, enjoy the significant economic advantage over surrounding non-CIN businesses that comes along with having its land exempt from State and local taxes and regulatory requirements.

Future Development. The BIA must accept the statement of the CIN that it intends to purchase additional lands in the future should the applications be accepted. It must also then be recognized that the CIN will likely develop those lands to further the economic base for reestablishing the CIN's presence in the area. Under NEPA, the BIA is obligated to evaluate this statement in the perspective of the cumulative impacts of these applications along with the stated future objectives. It is inconceivable that there will not be changes to the lands either included in the applications or that may be purchased in the future. Past use of the parcels demonstrates that the CIN is likely to develop lands, change land uses, and continue to expand its current operations. Such a track record supports a conclusion that development of the parcels is a "reasonably foreseeable future action".

Future development will have direct, indirect, short- and long-term, and cumulative impacts on these and adjacent properties. If these lands are placed in trust, the ability of current jurisdictions (local, State and federal) to evaluate potential impacts, review right-to-build applications, and provide for the safety and well-being of all residents in the community, may be significantly diminished, if not altogether eliminated.

Additional Consultation. The DOI must make a final determination on the applications based on the criteria set forth at 25 CFR Part 151.10(a) through (c) and (e) through (h), and any additional information or justification that it considers necessary to reach a decision. Part 516, Chapter 2 of the DOI's manual on "Initiating the NEPA Process" indicates that the BIA "shall initiate early consultation and coordination with other bureaus and any federal agency having jurisdiction by law or special expertise with respect to any environmental issues that should be addressed, and with appropriate federal, State, local and Indian tribal governments authorized to develop and enforce environmental standards or to manage and protect natural resources." Due to the broader and precedent-setting implications of this important decision, several other jurisdictions have been identified that the BIA should consult with prior to making a final determination. Jurisdictions of these agencies are identified in the text of this document.

- Other tribal governments that may also intend, or have already, sought trust status in New York State (*i.e.*, the Oneida Tribe of Indians of Wisconsin, the Oneida Indian Nation of New York, the Saint Regis Mohawk Tribal Council, the Stockbridge-Munsee Community, the Seneca-Cayuga Tribe of Oklahoma, the Mohawk Council of Akwesasne, Mohawk Nation Council of Chiefs, etc.).

- Office of Indian Gaming Management pursuant to gaming and gaming-related acquisitions and the Indian Gaming Regulatory Act of 1988 Section 20 Determinations (25 U.S.C. §§ 2701-2721).

- National Indian Gaming Commission.

- United States Department of Agriculture pursuant to the Farmlands Protection Policy Act of 1984.

- Other federal agencies with jurisdiction over resources and activities, including the National Labor Relations Board, USEPA, USFWS, and ACOE.

Environmental Protection. As discussed above, both the federal and State government share stewardship responsibilities in protecting by statute and regulations various resources (*e.g.*, land, air, water, flora/fauna, historic/cultural/archaeological/architectural resources, community services, and other critical resources). Under federal jurisdiction, wetlands and other waters of the United States are regulated under the Clean Water Act and Rivers & Harbors Act of 1899. State jurisdiction is promulgated under New York State's Environmental Conservation Law and various implementing regulations covering land, air and water related issues. These regulations were established to protect resources, including direct impacts on resources, as well as indirect, cumulative and off-site impacts (*e.g.*, viewshed impacts on a protected cultural/historic resource or migration of pollutants). Placement of land in trust undermines the requirement for the existing local, State and federal jurisdictions to be involved in the planning process, to ensure the protection of jurisdictional resources, and be involved in the evaluation and mitigation of potential impacts to resources on and proximal to lands identified in the CIN applications. In addition, the BIA process does not identify a surrogate process by which these resources will continue under the same level of protection as provided under current statutes and regulations and by current jurisdictions.

Contiguity. In its *City of Sherrill* decision, the U.S. Supreme Court refused to disrupt the longstanding governance of the State and local governments. Similarly, the patchwork pattern of the CIN request makes effective use of the State's jurisdictional authority with respect to the intervening properties and those properties adjacent and in proximity to the parcels difficult, if not impossible. As a practical matter, this lack of contiguity of the parcels (*i.e.*, "checkerboard sovereignty") may substantially impair the State's jurisdiction in a significantly larger area than just the parcels subject to the current applications. In addition, the impacts of any loss of the State and local governmental jurisdiction with respect to the parcels would significantly and negatively impact other properties in the region. The discontinuity of the relationships of these properties, combined with the jurisdictional losses, will be particularly detrimental to the environment; components of the environment are interrelated, making it impossible to disassociate the ecosystem simply by introducing artificial barriers by inserting property lines on a map.

The impacts resulting from the unusual lack of contiguity of the parcels in the CIN applications, as well as lands that may be purchased in the future, include, but will not be limited to, the following issues:

- <u>Emergency services</u>. Emergency services for the parcels included in the current applications are provided by the Montezuma, Union Springs, and Bridgeport Fire Districts at a significant negative financial impact to the fire districts (see Appendix F). The fire districts have the obligation of providing services to these properties. The Cayuga County and Seneca County emergency services officials have serious concern for the public safety on and off the parcels should the loss or substantial impairment of local jurisdiction result in the acceptance of these applications. With the existing operations on the parcels and the potential for future development on properties that may be purchased, the acceptance of these applications will result in a significant risk to the public safety through the loss of local jurisdiction.

- <u>Transportation corridors.</u> The maintenance of roads under State, county, or local jurisdiction which extend past and through the parcels should the applications for the placement of the parcels in trust be accepted is questionable. Both residents of the parcels, as well as non-residents, make use of these roads. The taxes paid for road maintenance ensure that the area roads are repaired as needed, and plowed in the winter, and that traffic control measures are provided and maintained to ensure safe and efficient flow of vehicles.

- <u>Wetlands.</u> Effective wetland protection cannot end at a property boundary. Any loss of jurisdiction resulting from an acceptance of these applications would place at risk the integrity of wetland ecosystems in the region, which are subject to protection by the NYSDEC and also the federal jurisdiction of the ACOE.

- <u>Rare, Threatened and Endangered Species.</u> Additionally, with any loss of jurisdictional authority of the NYSDEC, the development of the parcels will impact RTE habitat and species on adjacent properties, including direct impacts on species and habitats (*i.e.*, loss of and segmentation of habitat).

The patchwork pattern of the CIN applications would make effective management of the sensitive habitats of these species difficult, if not impossible, even with respect to the properties adjacent to the parcels. As a practical matter, this lack of contiguity would effectively impair the State's jurisdiction in these matters in a significantly larger area than just the parcels.

- Clean Air. The patchwork pattern of the CIN request would make effective management of the clean air by the State particularly difficult, if not impossible. As a practical matter, this lack of contiguity would effectively impair the State's jurisdiction for the protection of clean air in a significantly larger area than just the parcels since new air emission sources and the operations of existing sources might be conducted without the oversight normally performed pursuant to State regulations.

Environmental Justice. *Executive Order (EO) 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* requires federal agencies to identify and address, as appropriate, any disproportionately adverse human health or environmental impact that federal programs, policies, and activities may have on minority populations and low-income populations. Pursuant to this EO, the BIA should evaluate potential environmental justice impacts that may arise from the transfer of land into trust, including the economic impact of CIN business operations (existing and future) on non-CIN businesses, and the impact on non-CIN residents with fixed or low income (*i.e.*, senior citizens). Potential Environmental Justice areas in the vicinity of the parcels are identified on Figure 26 in Appendix A.

Economic Development ("Level Playing Field"). Placing a significant amount of land in trust would establish or continue an unfair competitive operational and development advantage to CIN-owned lands over non-CIN lands, the latter of which is required to comply with local right-to-build requirements (*i.e.*, site plan review, etc.), obtain environmental permits, and pay taxes. As the CIN continues to operate and potentially develop parcels and diversify its economic base, this "unlevel playing field" will continue to push non-CIN businesses out, as well as to decrease the marketability and developability of non-CIN owned lands (including areas where the State has invested capital such as in Empire Zones) thereby creating a monopolistic or "big operator" business environment controlled by the CIN. The beginnings of such an environment are evident in the CIN-owned gas stations in the area versus non-CIN owned gas stations and mini-marts, as well as marine gasoline sales along the shores of Cayuga Lake (see Figure 15 in Appendix A). New York State has a longstanding and comprehensive program for regulating the water supply, which integrates with other State and local institutions (municipal governments, local and regional planning boards) to help assure rational growth and use of resources. Granting CIN's applications into the midst of these longstanding, developed communities is inappropriate, and is illustrative of "Jurisdictional problems and potential conflicts of land use that may arise…" (25 CFR Part 151.10(f)).

CUMULATIVE IMPACTS

Summary. The BIA has an obligation pursuant to NEPA to ensure that cumulative effects from the proposed trust applications are evaluated. The Council on Environmental Quality's (CEQ) regulations (40 CFR Parts 1500 to 1508) implementing the procedural provisions of the NEPA define cumulative effects as:

> *"the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."*

Consistent with this definition, any review under NEPA (including alternatives) must account for the incremental effects of:

1. Each of the parcels *individually* and then *collectively* and *cumulatively*, taking into account, as stated by the U.S. Supreme Court in its decision in *Sherrill*, the justifiable expectations of the people living in the area "grounded in two centuries of New York's exercise of regulatory jurisdiction" (*Sherrill v. Oneida Indian Nation of New York*).

2. All the parcels, rather than taken individually. Pursuant to NEPA, an analysis and assessment of the potential cumulative impacts of all of the parcels is required. While the parcels are generally developed, the individual properties have the potential to be developed further; it is neither reasonable nor prudent to disregard this prospect or discount the magnitude of potential impacts. Additionally, the impacts of the operations of existing development, as well as potential further future development, collectively raise substantive negative issues for the local communities, and for the State.

3. The parcels taken collectively. The CIN has applied collectively for the parcels to be placed into trust. Any segmentation of these parcels and consideration of them in that manner represents an artificial construct that begs the regional proximity of the properties and the parcels to each other, the potential uses to which the properties will be placed, the collective impacts that their potential removal from State and local jurisdiction will have on the surrounding communities, and the impacts that this "patchwork or checkerboard sovereignty" will have on the fabric of the region.

4. Future land-in-trust applications (by the CIN or other Indian tribes). Other tribes or purported tribes have filed claims or expressed potential interest in similar land-into-trust applications in the region and the State. The BIA has an obligation to assess the impact(s) of the application for these CIN parcels in the context of other claims and applications. Given that there has not been a land-into-trust application accepted elsewhere in the State, there is an obligation for the BIA to perform a rigorous assessment of the cumulative impacts of the CIN applications with other Indian claims and potential trust applications.

To conduct an adequate assessment of cumulative impacts as described above, the BIA has an obligation to perform the following:

1. A regional assessment to examine the interrelationships of all types of development expected in the geographical area encompassed by the parcels. Such development would include, but not be limited to, those similar to potential land development and present land uses associated with the CIN properties, such as retail stores, gas stations and associated stores, restaurants, gaming facilities (currently closed), and entertainment venues. Environmental, jurisdictional, land use, and economic impacts as described in this document must be addressed as part of this assessment.

2. A programmatic assessment to study the impacts of related or similar projects expected to occur as part of the ongoing and future activities of the CIN. In addition to the cumulative environmental and jurisdictional impacts of such projects and ongoing operations, this assessment must include non-competitive economic and market control in certain businesses where the CIN operations are not subject to land use, environmental, economic, or jurisdictional factors that non-CIN businesses must face.

A lesser level of assessment would present an incomplete evaluation of the potential impacts, as well as an impermissible segmentation of the project.

Cumulative impacts on regulatory jurisdiction. As discussed throughout this document, the placement of CIN lands into trust may significantly impair the ability of State and local governments to regulate activities on specific trust parcels. A CIN development project on one or more contiguous parcels has the potential to impact environmental and socio-economic resources that extend beyond those parcel boundaries. A development project combined with other CIN or non-CIN projects has a greater cumulative potential to impact resources and regulatory jurisdictions than the singular project alone.

Simply stated, the non-contiguous characteristics of the CIN-owned lands would in and of itself create a significant impact that otherwise might be overlooked if the focus was solely on specific parcels. Impacts of placing these properties into trust occur across a variety of natural environments, each under the jurisdiction of separate governmental entities. It is not uncommon that several governmental entities control an environmental media, or an economic or other public function (*e.g.*, taxation, public safety). The cumulative impacts associated with the "checkerboard sovereignty" that would ensue if all the non-contiguous CIN lands were placed into trust would represent a worst case scenario, leaving an absence of social and environmental responsibility or accountability. Such a scenario would create multiple resource and jurisdictional impact zones ("black holes") with long-term effects; limit the effectiveness of government conduct, resource planning and environmental protection; and restrict the ability of the State and the localities to effectively protect the safety and social welfare of the public, and the quality of the environment. In its decision, the BIA must account for the spatial and life cycle impacts associated with the loss of regulatory jurisdiction including:

- past, present and future actions (parcel and cumulative impacts);
- focusing on each affected resource, ecosystem and human community;
- addressing additive, countervailing and synergistic effects;
- looking beyond the life of the action (*i.e.*, fully understanding the implications of placing the land into trust); and

- addressing the sustainability of resources, ecosystems and human communities.

Cumulative impacts on real property taxes and special assessments. Based on information provided by the affected towns and counties, the cumulative removal of the parcels from the tax rolls would result in an estimated annual reduction of over $80,000 in tax dollars and special assessments available to local and State governments. Appendix E consists of a tabular summary of the parcel-specific taxes and special assessments that includes, in some cases, taxes from prior years and penalties for non-payment. This data represents a snap-shot in time. Placement of CIN-lands into trust would have the cumulative long-term impact associated with non-payment of taxes in perpetuity and the associated impacts discussed herein.

Cumulative impacts on the environment. A review of environmental resource information for the parcels has been presented herein. It provides a clear perspective on the potential magnitude of the cumulative environmental impacts of the land-into-trust applications. Impacts to on site resources have been and continue to be serious in themselves. Ongoing operations and future development conducted without oversight and control continue to place at risk those environmental resources that are integrated with off-site properties. Wetlands are hydrologically and biologically connected and do not recognize property boundaries; other habitats similarly are not constrained by local jurisdictional definitions. Stream beds and flows that are modified impact the riparian lands formerly nourished, and modified drainage channels result in erosion, siltation, loss of topsoil, alterations in groundwater recharge patterns in a region where wells are used for water supplies, and a deterioration of surface water quality. As a result, the State's jurisdiction has been developed to provide an umbrella of environmental protection that supercedes local jurisdictional lines, as does the environment itself.

The BIA must accept the statement of the CIN that it intends to purchase additional lands in the future should the applications be accepted. It must also then be recognized that the CIN will likely develop those lands to further the economic base for reestablishing the CIN's presence in the area. Under NEPA, the BIA is obligated to evaluate this statement in the perspective of the cumulative impacts of the current applications along with the stated objective to purchase additional lands in the future.

As is evident from the analysis provided in Figure 3, the environmental impact area of the properties is significant when assessed collectively, and likely is larger than depicted in the figure for purposes of this document. The loss or significant impairment of an active State and local jurisdictional structure and function that is responsible for the protection of the environment and of the public health will not be replaced in whole or in part. It is not credible to assume that the cumulative environmental impacts of taking these properties into trust can otherwise be regulated, monitored or controlled. Therefore, the region's environmental resources and the public health will be severely and irreparably impacted over time.