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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1010

DENISE M. SHEEHAN
COMMISSIONER

JAN 23 2006

Mr. Franklin Keel
Regional Director, Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive
Suite 700
Nashville, Tennessee 37214

VIA FACSIMILE (615-564-6701) AND REGULAR SERVICE MAIL

Dear Mr. Keel:

On behalf of the New York State Department of Environmental Conservation (Department), please accept these comments regarding the proposed scope for the environmental review of the Oneida Indian Nation of New York Trust Acquisition project. I request the Bureau of Indian Affairs (BIA) to fully describe and analyze the issues raised herein within the National Environmental Policy Act (NEPA) review for this application.

The issues identified by the State below are in addition to the key issues identified for analysis by BIA as listed in the Notice of Intent for this project (70 F.R. 76325, December 23, 2005). BIA has so far identified infrastructure (including schools), socioeconomics (including taxes, employment, income, population and housing) and cumulative effects as key issues for analysis in the Environmental Impact Statement (EIS).

As an initial premise, the EIS should be mindful of the *City of Sherrill v. Oneida Indian Nation of New York* United States Supreme Court decision wherein the court held that a "checker-board of alternating state and tribal jurisdiction in New York State ... would seriously burden the administration of state and local governments" and would "adversely affect landowners neighboring tribal patches." (125 S. Ct. 1478 [2005]). In addition to impacting many aspects of State jurisdictions, the impacts from the subject application would affect 13 towns, 3 villages, 2 cities, and 2 counties of New York State, and at least 2 other federally recognized Tribes. Accordingly, the EIS should evaluate "... all pertinent environmental, social and economic attributes of the affected environment and potential environmental consequences of taking the lands into trust" to include an analysis of the cumulative impacts (Notice of Intent, 70 F.R. 76325).

The Council on Environmental Quality (CEQ) regulations define scoping as the process of determining the scope of issues to be addressed in federal environmental review and identifying the significant issues related to a proposed action (40 CFR 1501.7). The BIA NEPA Handbook further provides that the purpose of scoping is to: (1) identify significant issues, (2) identify and eliminate those issues that are not significant, and (3) determine alternatives to the proposed action (BIA NEPA Handbook, 30 BIAM Supp. 1, § 6.4[B][2]). In accordance with the CEQ regulations and the BIA NEPA Handbook, the State submits the following comments on scoping for the Oneida Indian Nation of New York's (OIN) Trust Acquisition Project (Project).

I. SIGNIFICANT ISSUES

The following are the significant issues the State believes should be described and fully analyzed in the EIS.

A. Environmental Consequences

(BIA NEPA Handbook, 30 BIAM Supp.1, §§6.4[E][8] & 4.4[F]; and 40 C.F.R. §1502.16)

The BIA NEPA Handbook lists 4 potential classes of effects from the proposed action: (1) direct, (2) indirect, (3) cumulative, and (4) disproportionate effects. Each potential effect should be analyzed in terms of whether they are short term, long term, irreversible and irretrievable. As part of the environmental review process, each parcel should undergo an analysis under NEPA individually, collectively, and cumulatively.

Impacts to State and Local Jurisdictional Authority

The EIS should analyze the potential environmental impacts of placing the OIN parcels into trust where the OIN has or may claim in the future that its activities on said properties are not subject to State and local environmental regulatory programs. The purpose of environmental laws are to protect human health and the environment through uniform and systematic requirements designed to ensure that certain activities (e.g., disposal of solid and hazardous wastes, discharge of pollutants, storage of petroleum and chemicals, filling in of wetlands) are controlled in terms of location, design, construction, operation, maintenance and monitoring. These State environmental laws require permits to authorize, among other things, construction and operation of landfills, air emission sources, water discharge points, mining activity, and oil well drilling. State laws also regulate the design, installation and maintenance of underground storage tanks, and the dredging and filling of wetlands. The State of New York and its municipalities

enforce environmental laws to prevent a detriment to all who share the same environment.

The OIN claims that it was not subject to State or local environmental regulations and, therefore, never needed environmental approvals from the State or local municipalities, and is not required to comply with State and local standards designed to protect human health and the environment. As such, the potential for environmental harm from unregulated activities - such as leaking underground storage tanks, filling in of wetlands, harmful air emissions and polluting wastewater discharges - exists and extends beyond the subject properties due to the complex interrelationships in the natural environment.

Impacts to the Local Community

Indian sovereignty over the subject parcels would result in a patchwork of jurisdiction and could potentially undermine the sense of community for which people living in the community have justifiable expectations. The OIN parcels are a part of a fabric of a larger community - woven together with the rest of the community by water, sewer, school and other community services, characteristics and resources. The EIS should analyze the effects of having the parcels separated by jurisdiction from the rest of the community.

Impacts on Easements and Rights-of-way

The taking of the subject parcels into trust may adversely impact the rights of parties who own or have rights in an easement or rights-of-way (e.g., electrical power lines and utilities) by impairing the usefulness or value of such easements due to the practical obstacles to enforcement of the easement. Aside from the BIA requirement for lands taken into trust to be free of encumbrances, the impact on easements and right of ways should be addressed in the EIS.

Office of Indian Gaming Management - Checklist of Environmental Issues for NEPA Review of Proposed Gaming-related Actions

The checklist identifies those common environmental issues that must be analyzed in any EIS for a proposed gaming-related action, including: air quality; archaeology, historical and cultural resources; biota and threatened & endangered species; past, current, and reasonably foreseeable cumulative impacts; demographic trends; energy resource use and change; floodplain; rivers, streams, lakes and wetlands; geology, seismic and mining; hazardous substances and wastes; Indian religious issues; solid wastes; prime and unique farm lands;

protected, sensitive and special management areas; spills or releases; socioeconomic issues; stormwater discharges; traffic and pedestrian issues; wastewater treatment and disposal; water quality; and water quantity. This checklist should be incorporated into the OIN's land to trust review.

Impacts to Natural and Community Resources

In addition to those environmental issues discussed above concerning the effects from a gaming-related proposed action, the EIS for this project should identify, describe and analyze the potential effects on the region's natural resources from those continuous activities undertaken on the subject parcels. These on-going activities include, among others, the operation of a co-generation plant emitting non-permitted air emissions; operation and maintenance of the OIN golf courses; operation of numerous SavOn gas stations and convenience stores; and the operation of the Turning Stone Casino and Resort. The potential significant environmental issues include diminution in the ability to provide: effective fish and wildlife management; invasive species management; proper brownfield remediation; spill containment and clean-up; management of pesticides including herbicides and insecticides; oil and gas regulation; watershed management; weights and measures; environmental impact assessments; protected and navigable waterways; open space management; and protection of public health.

Growth and Development

The EIS should examine the potential effects from reasonably foreseeable future growth and development that would result from accepting the subject parcels into trust. Specifically the OIN's Mission Statement in their 2004 Annual Report states that the OIN intends to "[A]cquire, develop, and secure resources to achieve economic and social empowerment and self-sufficiency for the Oneida Indian Nation." That same goal is the foundation of the instant land to trust application.

Aesthetics and Visual Effects

The EIS should analyze the potential effects on identified local, regional and state-wide sensitive receptors. This analysis can be carried out in accordance with the Visual Policy established by the New York State Department of Environmental Conservation (NYSDEC) and comparable federal regulatory guidance.

Beneficial Effects

NEPA requires the examination of reasonably foreseeable beneficial effects of the

proposed action and the identified alternatives. One such beneficial effect this EIS should examine is the potential for the reduction in taxes for members of the local community offset by the potential receipt of tax payments from the OIN which currently does not make such tax payments.

B. Purpose of and Need for Action

(BIA NEPA Handbook, 30 BIAM Supp.1, §§6.4[E][5] & 4.4[C]; and 40 C.F.R. §1502.13)

The Notice of Intent states that the purpose of the proposed action is to help ensure the cultural preservation, self-determination, self-sufficiency and economic independence of the OIN as a federally recognized Indian tribe by securing the properties into its trust base. The EIS should examine the purpose of the Project, considering whether such purpose is already being met by the economic successes the OIN has achieved to date with their casino, resort, golf courses and other related facilities. The analysis should study the current capabilities of the OIN operations and include financial information to support the premise that the OIN requires the subject parcels to be free from State and local taxation in order to meet the stated purpose of the trust application. Clearly, strengthening tribal governments and supporting tribal self-determination is an essential role of the BIA, but there should be no assumption during the NEPA review of the current OIN application that those goals have not already been attained by the OIN. For this reason the EIS should also describe and analyze current OIN programs and plans for economic development and growth.

Some past BIA policy statements (see, generally, Memorandum from Commissioner, DOI BIA to all Directors and Superintendents, dated April 21, 1959, and Memorandum from Commissioner, DOI BIA to All Area Directors, dated August 3, 1960) have set forth guidelines for the BIA to not take land into trust from Indian tribes which have "the ability to manage their own affairs" and who "have been highly successful through their own efforts." The EIS should address that agency guidance to analyze whether the acceptance or denial of the Project would support a similar conclusion. The BIA's NEPA Handbook asks the drafters of an EIS to address the need for the proposed action by asking the questions "Why here?" and "Why now?" (30 BIAM, Supp.1, 4.4[C]). If the need for the land to be taken into trust is to preserve the Tribe's culture, ensure their self-sufficiency, and ensure economic independence, then the analysis must include an answer to the questions posed, and the analysis should illustrate whether the OIN has not already accomplished these goals based on their demonstrated economic successes with the employment of more than 4,500 employees at their current facilities, and their plans for continued growth and development.

C. *Description of the Affected Environment*

(BIA NEPA Handbook, 30 BIAM Supp.1, §§ 6.4[E][7] & 4.4[E]; and 40 C.F.R. §1502.15)

The EIS should include a detailed description of each of the numbered parcels proposed for the Project, and each district, hamlet, village, town and county which would be affected. The description of each parcel should include: past use prior to OIN ownership; current use; adjacent land uses; identification of easements and rights of way (to include the identification of the encumbered area and the holder of the easement or right of way); existing contamination of soils, structures and facilities; special assessment districts; agricultural districts; the range of possible reasonably foreseeable uses if the land is, and is not, accepted into trust. The description of the subject parcels should also describe any environmental conditions that may be migrating off-site to affect non-trusted lands and resources.

Additionally, the description of the affected environment should be done in the context of past, current and expected demographic trends of affected OIN and non-OIN communities. This analysis should specify a time frame for the projection of trends, and define the base time for comparison.

II. ALTERNATIVES

NEPA requires the lead agency to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” (42 U.S.C. §4332[2][E]). In fact, the CEQ regulations pronounce the examination of alternatives to the proposed action to be the “...heart of the environmental impact statement.” (40 C.F.R. §1502.14). Alternatives include the no action alternative, all reasonably foreseeable alternatives, and mitigation measures not in the proposed action. (40 C.F.R. §1508.25; *see also* 42 U.S.C. §4332 [sec.102(2)(C)(iii)]).

Alternative A - Proposed Action

The EIS should describe in full the proposed action, and analyze the potential direct, indirect, cumulative and disproportionate (including all reasonably foreseeable short term, long term, irreversible and irretrievable) effects from the possible implementation of same. (40 C.F.R. §1502.14[e]).

Alternatives B thru D - Reduced Intensity and Other Reasonably Foreseeable

Alternatives

The EIS should identify and analyze, in a detail comparable to the discussion of the proposed action, one or more alternatives that are much smaller in scale than the proposed action (B). One such potential alternative is accepting into trust the lands currently occupied by the Turning Stone Casino (C). A second smaller scale alternative which should be analyzed is the acceptance into trust of only the Group 1 parcels (D).

Alternative E - No Action

The no action alternative should be analyzed in a level of detail comparable to the analysis of the proposed action. (40 C.F.R. §1502.14[d]).

Mitigation Measures

The EIS should identify the State's federal regulatory counterpart and their review and permitting processes, and should describe and analyze the effectiveness of these programs as they were applied to other trust applications. The EIS should also identify where mitigation would not occur.

Similarly, the EIS should identify and fully describe any OIN environmental, public health, and public safety regulatory programs established to provide for the well-being and safety of tribal and non-tribal members at or on OIN properties and facilities. This review should include an examination of the review and permitting processes for environmental protection, public participation, judicial review, and provisions for public access to information.

Specific mitigation measures should be drafted by the lead agency, and then analyzed for possible implementation to address the direct, indirect, cumulative and disproportionate effects of this proposed action.

Thank you for the opportunity to comment on the proposed action. The Department looks forward to receiving your response and a copy of the scoping report. If you have any questions or comments concerning the substance of this letter, please contact the Department's Deputy Commissioner and General Counsel, Mr. James H. Ferreira, at (518) 402-2794.

Sincerely,

A handwritten signature in black ink, appearing to read "Denise M. Sheehan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Denise M. Sheehan