IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

and

CLARK COUNTY, WASHINGTON, *et al.*,

Plaintiffs,

v.

S.M.R. JEWELL, *et al.*,

Defendants,

and

COWLITZ INDIAN TRIBE,

Intervenor-Defendant.

Case No. 1:13-cv-00849-BJR

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL OPPOSITION

To excuse the failure to analyze changes regarding the standards that protect the East Fork of the Lewis River from further degradation due to stormwater run-off, the Secretary argues that the Clark County stormwater ordinances are irrelevant to the Department's review of the proposed casino because the U.S. Environmental Protection Agency ("EPA"), not the County, will regulate stormwater (Response to Order of the Court at 2, ECF No. 81). But that argument ignores two key facts: (1) when authority to regulate discharges has been delegated under federal law to a State—as it has to Washington—EPA applies that State's standards to regulate discharges from federal or tribal point sources; and (2) Clark County's stormwater ordinances, including the long-standing requirement prohibiting discharges in excess of historical levels, *are mandated by state law* to achieve water quality protection for the very water body that will be impacted by the proposed casino's stormwater run-off. The Final Environmental Impact

Statement ("FEIS") failed to address these integral considerations, and the EIS review inadequately considered, therefore, whether the proposed casino can be developed in conformance with applicable water quality standards.

Because there was no assessment of whether the project can be permitted under the state standards, the Secretary has not appropriately considered either the impacts of the proposed action or whether the preferred alternative is a viable alternative under NEPA. The Secretary has further failed to demonstrate how her decision appropriately compares alternatives given the lack of information, and has not determined whether the purpose of the proposed trust acquisition can, in fact, be achieved. Accordingly, her decision is arbitrary and capricious.

1. State-mandated Limits on Stormwater Apply to the Project, Regardless of the Status of the Land.

The Secretary argues, in response to the Court's November 12, 2014 Order, that Clark County's stormwater ordinances are not relevant to her evaluation under NEPA and to the trust decision.[1] This argument, however, ignores the structure of the Clean Water Act ("CWA" or the

[1] The Tribe also claims that Plaintiffs' arguments regarding changes to NPDES and stormwater permitting are not properly before the Court because Plaintiffs did not raise these arguments during the NEPA process. Intervenor's Supp. Resp. at 2-3. To the contrary, stormwater comments were part of the record at the public comment review period for the preliminary EIS—and the Secretary responded to those comments. *See, e.g.*, AR92012 (identification and response to comments); *see generally* AR071397 (comment on water quality). But the Secretary did not offer a comment period during remand on the Final EIS Evaluation of Adequacy, nor make the document publicly available. Plaintiffs first reviewed the Final EIS Evaluation when they received the new administrative record. Plaintiffs clearly cannot be faulted for failing to raise an argument about a document that they did not know existed. In fact, the Secretary vacated the 2010 decision and issued the new 2013 decision on the same day with no notice to any party and without any opportunity for public input. The Secretary, however, has an independent duty to consider information pertaining to stormwater and other environmental impacts and that duty continues beyond the issuance of the FEIS because the final agency action of the land transfer has not occurred. *See generally Defenders of Wildlife v. N.C. Dep't of Transportation*, 762 F.3d 374, 394 (4th Cir. 2014) ("NEPA imposes a continuing obligation on agencies to consider the environmental impacts of a proposed action, even after a Final Environmental Impact Statement has been issued."); *W. Branch Valley Flood Protection Ass'n v. Stone*, 820 F. Supp. 1, 5 (D.D.C. 1993) ("After the completion of the EIS, which in the instant case was in 1975, the agency bears a continuing obligation to update its environmental evaluation in response to substantial changes to the proposed action or significant new circumstances.").

"Act") and how the State implements the Act—factors which, when adequately considered, establish the relevance of Clark County's ordinances. Congress provided States with the primary responsibility for implementing the Act. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . and to consult with the Administrator in the exercise of his authority under this chapter."). To achieve the CWA's broad goal of protecting the nation's waters, the Act establishes a two-fold scheme: (1) setting water quality standards and (2) promulgating effluent limitations.

The CWA directs States, with federal approval and oversight, to adopt and maintain water quality standards to achieve desired quality of waters of the United States within their borders. *See* 33 U.S.C. § 1313(a)–(c). States are permitted to adopt (with EPA approval) more stringent standards for intrastate waters than required by federal law—such is the case in Washington. *Id.* § 1342(b). In addition, technology-based and other water-quality based effluent limitations are promulgated by EPA after consultation with the States to deal with the quantities, rates, and concentrations of specified substances that are discharged from point sources. *Id.* §§ 1311, 1314. Point sources are regulated by taking into account both effluent limitations and water quality standards. *Id.* § 1314.

The issuer of the permit affects what permit form applies, but whether EPA or a state agency issues the permit, the water quality standards remain the same. Both decision-makers (federal or state) must consider whether the discharge is within the allowable pollutant levels for the receiving water. If EPA permits discharges from trust land into waters of the United States located within Washington's borders, EPA must include permit conditions that are necessary to achieve Washington's water quality standards for such waters.[2] *See* 40 C.F.R. § 122.44(d)(1) ("each NPDES permit shall include conditions meeting the following requirements when

[2] Indeed, Washington has the authority to withhold certification of an EPA-issued NPDES permit for trust land in Washington if the permitted discharge will not comply with Washington's water quality standards. 33 U.S.C. § 1341.

applicable . . . any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to . . . achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."); *see, e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 104 (1992).[3] The EIS recognized this requirement. *See* Response to Comments on the Final EIS (35), AR064813 ("As indicated in Section 4.4 of the FEIS, *discharge from the wastewater treatment facility will be required to meet state water quality standards for the East Fork Lewis River*." (emphasis supplied)).

Washington has adopted a number of programs to implement its water quality standards, as required under the CWA. *See generally* RCW 90.48.260; WAC 173-200. One such program is the permit system for discharges to municipal stormwater sewers, which requires permittees—like Clark County—to create a stormwater program addressing flow conditions in order to control runoff. A purpose of these flow conditions is to avoid overloading quality-impaired waters (like the East Fork of the Lewis River) with pollutants from stormwater. *See generally Rosemere Neighborhood Ass'n v. Clark County*, 290 P.3d 142, 148 (Wash. Ct. App. 2012)*, review denied,* 297 P.3d 708 (2013).

The State identified the need for flow conditions when it instituted the permit applicable to municipal sewer systems in 2007—allowing permittees like Clark County until August 16, 2008, to adopt ordinances to address the flow conditions. During the FEIS process, counties like Clark County were then responding to and seeking to implement this new permit system. *See Rosemere Neighborhood Ass'n v. Clark Cnty.*, No. C11-5213RBL, 2011 WL 6815851 (W.D. Wash. Dec. 28, 2011). And while the EIS initially acknowledged the project's plan to construct

[3] The Cowlitz Tribe cites to *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 732 F.3d 837, 838–41 (7th Cir. 2013)*, cert denied,* 134 S. Ct. 2661 (2014) (Intervenor's Supplemental Response 3, Dkt. 82), but that case is inapposite. *Oneida Tribe* stands for the proposition that a city cannot regulate stormwater runoff and charge taxes for its stormwater management on trust land. That principle is not in dispute. What are relevant here are the applicable standards. If the proposed casino cannot meet Washington's water quality standards, no NPDES permit can issue.

stormwater facilities "in accordance with county standards," the county standards in place at that time were later found to violate the State's water quality standards. Responses to Cooperating Agency Comments Received on the March 2007 Preliminary FEIS at C03-12 (AR92000, AR92012); *see also Rosemere*, 290 P.3d at 154–157. Accordingly, because the Secretary relied on outdated and invalid county standards for stormwater analyses, the EIS was inadequate.

At bottom, any EPA-issued NPDES permit for stormwater discharges from the trust land into the East Fork of the Lewis River must contain stormwater flow conditions similar to those required of Clark County in order to achieve the state's water quality standards. See *infra* at 2–3 (discussing need for EPA-issued NPDES permits to incorporate the state water quality standards). The Secretary omitted any analysis of whether the alternatives considered in the FEIS, including the preferred alternative, could meet stormwater-related conditions under a NPDES permit in order to comply with water quality standards. Without undertaking this and other environmental impact analyses, the Secretary arbitrarily and capriciously concluded the project would adequately address stormwater impacts.

2. The Secretary Has Not Adequately Considered Stormwater Standards, As Evidenced by the Unlikelihood of Obtaining a NPDES Permit.

As Clark County Plaintiffs have argued in the record and throughout the litigation, the FEIS did not consider whether the CWA's standards—including the effect that stormwater discharges from the casino site would have on water quality and the critically important question of the proper application of those standards—would preclude the proposed development. In implementing the federal program, the State requires Clark County to control high flow stormwater runoff such that it matches pre-developed (historical) discharge. By the Secretary's own admission, the Tribe must have a NPDES permit that meets State standards. But there is nothing in the EIS to support the conclusion that the proposed casino—as currently designed—can satisfy this requirement.

The Secretary, in the EIS, expressly anticipates the project to cause high levels of discharge. She acknowledges that "[s]tormwater discharges from residential, commercial, and

industrial areas are of concern in managing surface water quality. Pollutants that accumulate in dry periods such as oil and grease, asbestos, pesticides, and herbicides, may create water quality problems due to their presence in high concentrations during the first major storm event of the season." EIS 3.3-12 AR075916. Furthermore, the Secretary recognizes that a Stormwater Pollution Prevention Plan ("SWPPP") must be developed for the proposed project in order to provide for (1) erosion prevention and sediment control; and (2) control of other potential pollutants. EIS 4.2-2 AR076072. Undeniably, the EIS acknowledges that the casino and hotel facilities (and other ancillary components) would generate increased runoff during rain events due to increased impervious surfaces. EIS 4.3-1 AR076079. The FEIS even provided that if EPA and Clark County "have different levels of mitigation requirements, the Tribe would adhere to the stricter of the two[, and b]ased on the implementation of a stormwater control plan, as outlined in DEIS Vol. I, Appendix F (Olson Engineering, 2006a) the antidegradation provisions of the Washington Administrative Code (WAC) would be met for this alternative." EIS 4.3-3 AR076081.

The Secretary has not undertaken, however, any analysis to determine whether the implementation of the stormwater control plan outlined in the EIS will allow Washington's water quality provisions to be met. The EIS dismisses stormwater impacts as negligible and simply suggests that future permits will handle compliance while refusing to evaluate the casino project or revisit her determination—despite not knowing whether her former conclusions continue to hold true.

Adequate analysis of the casino project's impacts on water quality is even more important now because the EIS's recommended mitigation of serving the site with municipal sewer service is not feasible. As a matter of state law, the City is prohibited from extending urban services to the rural site. In its amicus brief filed February 24, 2014, the City of La Center confirms that the East Fork has significant pollution problems and that " no new discharge permits can be issued at this time." *Amicus Curiae* Brief of the City of La Center, Washington (Submitted in Support of Defendants) 8, Feb. 24, 2014, Dkt. 71 (filed initially as an Appendix to

its Motion for Leave to File *Amicus Curiae* Brief, Nov. 06, 2013, Dkt. 34). The City further states that the alternative is for the casino to "send its wastewater to the City's municipal treatment facility." *Id.* at 8–9. Finally, the City admits that its 2011 sewer service agreement with the Tribe was held unlawful by the State of Washington's Growth Management Hearings Board for the Western Washington Region (the "Growth Board"). *Id.* at 10–11. The City tried to fix this flaw by amending its Comprehensive Plan governing urban and rural growth policies to provide sewer service to the site. *Id.* at 11. At the time of its amicus filing, the City was considering these amendments. *Id.*

Though the City subsequently adopted the amendments, it is prohibited from providing sewer service to the site and from entering into a sewer agreement. Like the service contract that preceded them, these amended policies are also noncompliant with the state's Growth Management Act ("GMA"), chapter 36.70A Revised Code of Washington. On October 24, 2014, the Growth Board held that the City of La Center's amended policies and plans to connect the site with and provide services from the City's municipal sewer system violated the GMA. *Dragonslayer, Inc. v. City of La Center*, Case No. 14-2-0003c (W. Wash. Growth Mgmt. Hearings Bd. Oct. 24, 2014) (Corrected Final Decision and Order), *petition for judicial review filed sub nom., City of La Center v. Growth Mgmt. Hearings Bd., W. Wash. Region,* No. 14-2-02193-1 (Thurston Cnty. Super. Ct. Nov. 18, 2014), *available at* http://www.gmhb.wa.gov/LoadDocument.aspx?did=3663. As the court held, the proposed casino site is protected as rural, agricultural land under state and local law. Even if the site were held in trust as tribal land, as a matter of state law the Growth Board found "the City of La Center is and will remain subject to the GMA and it is the City that plans to extend its sewer service." *Id.* at 31, ll. 23-25. The GMA states that it is generally inappropriate to extend or expand urban governmental services, specifically including storm and sanitary sewer systems, to rural lands. *See* RCW 36.70A.110(4); *see also* RCW 36.70A.030(18) (defining "urban governmental services"). Absent a change in state or local law, pursuant to this recent Growth Board decision,

the City is unable to extend urban municipal sewer to the site, and the Tribe has no choice other than to seek the NPDES permit, which, as the City concedes, is not available.

3. Because the Secretary Failed to Address These Issues, Her Decision Is Arbitrary and Capricious.

NEPA requires supplementation when there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR § 1502.9(c)(1)(ii). Here, the significant new circumstances are the more rigorous stormwater requirements that the EIS itself indicates must be followed. An agency must take a "hard look" at new information to assess the need for supplementation, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385, but no such "hard look" was undertaken in this case. *Cf. N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011).

Even if EPA were not required to implement state water quality standards, the EIS would have to be supplemented. Changes in state law affect the pre-project environmental baseline conditions that are assessed as part of the NEPA process. *See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Project significance is determined, in part, on the basis of inconsistency with state or local law. 40 C.F.R. § 1508.27(b)(10); BIA NEPA Guidebook, 59 IAM 3-H, at 26; *see also* CEQ, NEPA's Forty Most Asked Questions, 23a, 46 Fed. Reg. 18,026, 18,033 (1981) (stating that an EIS must "acknowledge and describe the extent of those conflicts" between a proposed action and state or local land use plans, policies and controls and "should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area").[4] Whether the current water quality standards preclude the issuance of a stormwater permit for the project or EPA will apply standards that undermine state-mandated limits, the decision has environmental

[4] NEPA requires even greater scrutiny when a federal agency exercises its sovereignty to override local environmental controls. *Maryland-Nat'l Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1036 (D.C. Cir. 1973).

consequences that must be considered.[5] Only through analyzing the alternatives, including the preferred alternative, in light of Washington's stormwater management program will the EIS have adequately considered impacts to the human environment in accord with NEPA's mandate.

CONCLUSION

For the foregoing reasons, the Court should grant Clark County's motion for summary judgment.

Dated: November 21, 2014

Respectfully submitted,

/s/ Donald C. Baur

Donald C. Baur (D.C. Bar No. 393621)
Benjamin S. Sharp (D.C. Bar No. 211623)
Jennifer A. MacLean (D.C. Bar No. 479910)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005
Phone: (202) 654-6200
Fax: (202) 654-6211
DBaur@perkinscoie.com
BSharp@perkinscoie.com
JMacLean@perkinscoie.com

[5] Although the Secretary suggests that she could not have considered the Clark County standards because they were finalized after she completed the remand, the Secretary fails to explain why she was able to address forthcoming amendments to stormwater ordinances in 2008, but was unable to do the same in 2013. The Secretary concedes that she responded to Plaintiffs' comments regarding "then-forthcoming amendments (finalized in January 2009) to the Clark County Code," those changes were finalized. Br. at 2 (citing AR065790–91; AR064851). Yet here, the Secretary argues that the changes, which were finalized two months later, "could not have led Interior to supplement its NEPA analysis because they had not yet occurred." Br. at 3. In any event, as noted in n.1, *supra*, NEPA obligates agencies to consider new information, as certainly is the case in a development as important as state-mandated stormwater requirements. The Secretary served notice on October 22, 2014, of her intent to take final action by accepting title to the land in trust by January 15, 2015, at which point the stormwater standards will be more than 18 months old. Dkt. 80. Certainly there was ample opportunity to provide the necessary NEPA analysis during this extended period of time.

Attorneys for Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer Inc., and Michels Development LLP

/s/ Brent D. Boger
Brent D. Boger (D.C. Bar No. 1005066)
Assistant City Attorney
210 E. 13th Street
Vancouver, WA 98660
Phone: (360) 487-8500
brent.boger@cityofvancouver.us

Attorney for City of Vancouver, Washington

/s/ Lawrence S. Robbins
Lawrence S. Robbins (D.C. Bar No. 420260)
Gary A. Orseck (D.C. Bar No. 433788)
Sarah R. Prins (D.C. Bar No. 999960)
Daniel N. Lerman (D.C. Bar No. 1000936)
(admitted *pro hac vice*)
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411L
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

Attorneys for The Confederated Tribes of the Grand Ronde Community of Oregon