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June 6, 2014

Ms. Tinka G. Hyde, Director
Water Division, W-15J
U.S. Environmental Protection Agency Region V
77 West Jackson Blvd
Chicago, Illinois 60604

Subject: State of Wisconsin's Comments Regarding the Forest County Potawatomi Community's Application For Treatment as a State Authority Under Sections 303(c), 401, and 518(e) of the Clean Water Act, 33 U.S.C. §§ 1313, 1341, and 1377

Dear Ms. Hyde:

Thank you for the opportunity to comment on the Forest County Potawatomi Community's (FCPC or the Tribe) application for Treatment as a State (TAS) under the Clean Water Act. The FCPC is seeking authorization to administer a water quality standards program under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c). The Tribe is also seeking authority to issue certifications under section 401 of the Clean Water Act, 33 U.S.C. § 1341, for federal licenses and permits. On behalf of Governor Walker, I am submitting the comments of the State of Wisconsin (Wisconsin or State).

Though Wisconsin commends the FCPC's interest in preserving or enhancing water quality, Wisconsin respectfully submits that FCPC's application for TAS status should be denied. Wisconsin does not contest that FCPC is a federally-recognized Indian tribe with a governing body carrying out substantial governmental duties and powers. However, the FCPC application fails to demonstrate all of the requirements necessary for TAS authority to establish water quality standards over the State's surface waters. If granted, FCPC's application for TAS authority would not result in an effective or practical water quality standards program consistent with the Clean Water Act because of the checkerboard ownership of tribal lands. Instead, FCPC's TAS status could result in a confusing and potentially conflicting regulatory patchwork of water quality standards that would disproportionately affect Wisconsin residents and businesses on non-tribal lands without any demonstrated environmental need or benefit.

I. The FCPC trust lands are not an Indian reservation with borders as contemplated by Section 518(e)(2) of the Clean Water Act and 40 C.F.R. § 131.8(a)(3).

As the FCPC explains in its application, the lands that constitute what the FCPC describes as "FCPC Reservation in Forest County" (FCPC Lands) were not lands that the Potawatomi people occupied and controlled at the time of first contact by the Europeans. Application Ex. 4 at 2. Instead, these lands were originally claimed and later ceded by the Lake Superior Chippewa. The Potawatomi lived on lands to the south, which were also ceded to the United States.

Beginning in the 1890's, Wisconsin opened the area of the current FCPC Lands for homesteading. The FCPC moved into the area and, in 1913, Congress purchased some cut-over timber land for the Potawatomi. Legal title to the land was held by the government in trust for the Tribe.¹ As the FCPC explains, its trust lands were not FCPC lands reserved for the Tribe, but rather a checkerboard assortment of parcels purchased by the federal government "in an attempt to assimilate and 'civilize' the Indians," with "a stipulation that the lands be no larger than a section and that no sections adjoin." Application Ex. 4 at 2. Although Congress declared these lands to be "the Reservation of the Forest County Potawatomi Community of Wisconsin" in 1988, this declaration does not make these lands reserved lands. *Id.*²

Treating these scattered parcels, along with later-acquired trust lands and homestead lands, as a state-like "reservation" for the purposes of the Clean Water Act is inconsistent with both the history and purpose of the federal land acquisition for the Potawatomi and the concept of a state as a defined geographic land area with borders. Nothing in the legislative history of section 518 of the Clean Water Act suggests that by authorizing EPA to treat an Indian tribe as a State to the degree necessary to carry out the objectives of section 518, Congress intended to expand TAS authority for water quality standards and certifications to a Tribe with lands of the type involved in this application.³

EPA has consistently interpreted the Clean Water Act to authorize treatment as a State status only for water resources within the borders of a reservation.⁴ In fact, EPA has explicitly rejected comments that urged TAS status be granted for waters outside of reservation borders, stating:

Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality.

56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (codified as 40 CFR pt. 131). EPA rejected the comment that TAS status be accorded to all Indian country and "all water resources within the territorial jurisdiction of the Tribe that lie outside of reservation borders." *Id.* EPA reiterated that "it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation." *Id.*

There is no border or boundary around the FPCP trust lands. There is no line dividing "within" from "without." The only borders are the legal descriptions of various property boundaries which, according to FCPC, could include its casino lands in Milwaukee as well as the proposed designated parcels of

¹ See the Act of June 30, 1913, 38 Stat. 77, 102.

² See Pub. Law 100-581, Title VI, Sec. 601(a). The FCPC Lands are dissimilar to the large western Indian reservations established before statehood in which some portion of a tribe's aboriginal lands were reserved for the future use of the tribe and also unlike Wisconsin's Chippewa reservations which were established after statehood on former aboriginal lands retroceded by the federal government to the Chippewa. In both situations the land did not enter the public domain and did not pass into private ownership before the establishment of the reservations. As one author has noted: "The historical pattern of Indian reservations being created before non-Indian settlement ... is far from coincidental." Thomas H. Pacheco, *Indian Bedlands Claims: A Need To Clear The Waters*, 15 Harv. Envtl. L. Rev. 1, 11 n.51 (1991) (citations omitted). The FCPC Lands contradict this historical pattern.

³ See 131 Cong. Rec. 19233-19234 (1985), 131 Cong. Rec. 19997 (1985), and 132 Cong. Rec. 32403 (1985).

⁴ See 56 Fed. Reg. at 64,881.

Forest County lands if the Tribe had chosen to include those lands. While trust lands can be considered “within a reservation,” EPA has previously recognized that the status and use of the land matters. *Id.* Here, the FCPC lands have trust status; their use is unclear. Without a border or boundary, these scattered parcels do not function like a state. The FCPC should not be granted TAS status for a “reservation” without borders.

II. The FCPC has not demonstrated that it possesses authority to regulate water quality.

Section 518(e)(2) of the Clean Water Act authorizes TAS status only where a tribe can demonstrate that it has “inherent Tribal civil regulatory authority” over the “reservation” waters at issue. 56 Fed. Reg. at 64,880. The FCPC asserts that it has “at least” four sources of authority to regulate surface waters in the vicinity of its trust lands: inherent authority, the FCPC Constitution, the FCPC’s reserved rights, and the FCPC’s aboriginal rights. Application at 3-4 and Ex. 4 at 5-7. None of these asserted bases of authority provide the FCPC legal authority to regulate water quality in the State of Wisconsin’s surface waters.

A. The FCPC does not have inherent authority to regulate surface waters.

The FCPC, like all federally-recognized tribes, has retained some degree of inherent authority over their FCPC Lands, but this authority does not include authority over the navigable waters that flow through, lie within or abut the described property boundaries of the lands proposed by FCPC for TAS authority. When Wisconsin attained statehood in 1848 it obtained title to all navigable waters and their beds through operation of the equal footing doctrine.⁵ *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). Along with title to the navigable waters and their beds flowed the sovereign right to control the use and water quality of the waters for the benefit of the citizens of Wisconsin.⁶

FCPC’s initial landholdings were acquired by the federal government in 1913 when it purchased cut-over timber lands from private timber companies. Certainly, as between Wisconsin and the private timber companies, it was Wisconsin that held sovereignty and authority over the navigable waters, and there is no reason to conclude that the federal government could in 1913 acquire more rights in waters adjacent to any riparian lands they purchased from timber companies than the timber companies themselves possessed. Approximately 75 years later, Congress declared the purchased lands to be the “reservation of the FCPC.” Nothing in the federal legislation related to the acquisition of FCPC trust lands or the recognition of those lands as a “reservation” suggests that Congress intended to abrogate the State of Wisconsin’s sovereign authority over its navigable waters. As between Wisconsin and the FCPC, authority over the waters at issue here resides exclusively with the State.

⁵ The state’s enabling act, Act of August 6, 1846, 9 Stat. 56, authorized admission “into the Union on an equal footing with the original States in all respects whatsoever,” and, consistent with the Northwest Ordinance of 1787, provided that all waters within the new state would be “forever free, as well to the inhabitants of the said State as to the citizens of the United States.” *Id.* § 3, 9 Stat. 57. The “forever free” guarantee was then carried over into Art. IX, § 1 of the Wisconsin Constitution. As a state that was part of the Northwest Territory, Wisconsin’s ownership and sovereignty over its navigable waters and the beds of those waters are governed by the public trust doctrine. See *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-53 (1892).

⁶ The grant of statehood to Wisconsin was a grant both of property rights and of sovereign power. *Wisconsin v. Baker*, 698 F.2d 1323, 1327 (7th Cir. 1983) (regarding waters within the exterior borders of a post-statehood Indian reservation).

1. The Sufficiency of Tribal Inherent Authority Must Be Determined On A Case By Case Basis.

In *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001), *cert. den.* 535 U.S. 1121 (2002), Wisconsin objected to the application of the Sokaogan Chippewa Community (Mole Lake Band) for TAS authority on the ground that the State had exclusive authority to regulate its navigable waters by virtue of the equal footing doctrine. The Seventh Circuit upheld EPA's grant of TAS authority. Wisconsin does not agree with the Court's reasoning.⁷ Nevertheless, the Seventh Circuit made clear that its decision with respect to the Mole Lake Reservation was not dispositive with respect to other or future TAS applications: "We note once again in closing that the EPA's decision in each case seeking TAS status is fact-specific." *Id.*, at 750. Similarly, EPA has established a policy "[w]hether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings." 56 Fed. Reg. at 64,878. Considered on its own merits, the FCPC application fails to establish an adequate factual basis for the Tribe's assertion of authority over the waters within its trust and homestead lands.

2. Congress Did Not Delegate Federal Authority to FCPC.

The Seventh Circuit accepted Wisconsin's contention that under the equal footing doctrine the State held title to the underlying lake beds of the navigable waters flowing through the Mole Lake Reservation. *Wisconsin*, 266 F.3d at 746-747. The *Wisconsin* Court nevertheless concluded that the State's sovereign authority over its navigable waterways did not exempt the waters from regulation by a tribe under the Clean Water Act. *Id.* The Court based its decision, in part, on the fact that the federal government has the authority to regulate water quality under the Clean Water Act pursuant to the federal Commerce Clause. *Id.*

While Wisconsin fully acknowledges the federal government's authority under the Commerce Clause, the federal government has not delegated its authority to tribes under the Clean Water Act. As EPA has recognized, the Clean Water Act "authorizes use of *existing* Tribal regulatory authority for managing EPA programs, but it does not grant *additional* authority to Tribes." 54 Fed. Reg. 39,098, 39,101 (Sept. 22, 1989) (to be codified at 40 CFR pt. 131) (emphasis added). This approach is consistent with Congress' expressed intention in the Clean Water Act to minimize any intrusion into states' regulatory power: "Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. Unlike the Clean Air Act, the Clean Water Act is *not* an express delegation of power to tribes. See *Wisconsin*, 266 F.3d at 748. Federal authority cannot, therefore, be the source of any inherent authority by FCPC over the State's navigable waters.

⁷ While the *Wisconsin* Court assumed Wisconsin had obtained title to the waters and their beds at statehood in 1848 under the equal footing doctrine, it nevertheless found "reasonable" EPA's conclusion that "ownership of the waterbeds did not preclude federally approved regulation of the quality of the water" by Mole Lake. *Wisconsin*, 266 F.3d at 747. This view of States' interests under the equal footing doctrine cannot be reconciled with the higher court's precedents, including the Supreme Court's rejection of the notion that a State and an Indian tribe can possess "dual sovereignty" over natural resources within a State: "[s]uch a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." *Kennedy v. Becker*, 241 U.S. 556, 563 (1916).

3. The FCPC have not established inherent authority over waters under Supreme Court case law.

Under the Seventh Circuit's *Wisconsin* decision and EPA's current rules, inherent tribal authority can also be established based on federal Indian law. In particular, EPA has determined that a tribe may possess inherent authority under the "second exception" to the general rule established in *Montana v. United States*, 450 U.S. 544, 565 (1981), that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." This "second exception" was described by the *Montana* Court in these terms: "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (emphasis added).⁸

The FCPC acknowledges that if a *Montana* analysis is conducted, EPA makes "a case by case evaluation of a tribal applicant's authority to regulate water quality based on evolving case law." Application Ex. 4 at 5. The application goes on to reference EPA's generalized findings about the relationship between water quality and tribal health and welfare and argues that the case-by-case showing is easy to make. *Id.* at 5-6. However, the FCPC makes no attempt to present a factual showing regarding potential effects to tribal health and welfare due to water quality concerns or any other factor mentioned in the *Montana* second exception. Instead, the Tribe concedes that the "*Montana* issues do not even apply here," because FCPC's proposed FCPC Lands for TAS purposes contains no fee lands owned by non-members. Application Ex. 4 at 6.

The burden is on the tribe to present sufficient evidence to warrant application of the second *Montana* exception. *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt. Dist.*, 890 F. Supp. 878, 888 (D.S.D. 1995), *rev'd on other grounds*, 99 F.3d 1439 (8th Cir. 1996). FCPC has failed to present an adequate factual basis to demonstrate that the Tribe has inherent authority over the navigable streams and lakes that flow through, lie within or abut the described property boundaries of the lands proposed by FCPC for TAS authority.

B. The FCPC's constitution does not and cannot give authority to regulate water quality.

The second source of TAS authority to regulate water quality cited by the FCPC is its tribal constitution. Application Ex. 4 at 6. However, the FCPC cannot arrogate to itself authority it does not have and never

⁸ *Wisconsin* submits that the *Montana* "second exception" should only be applied to activities of non-members *on fee lands within the reservation*, not to the regulation of waters. The *Montana* case involved an action brought by United States seeking a declaration that the Tribe—not the state—owned the bed of the Big Horn River, under the theory that this would establish tribal regulatory authority over nonmember hunting and fishing. 450 U.S. at 549. In Part II of its decision, the *Montana* Court noted that all of the parties and the courts below "assumed that ownership of the riverbed will largely determine the power to control [nonmember hunting and fishing in and on the river]." 450 U.S. at 550, n.1. Having found that the state, not the tribe had authority over the *waters* of the Big Horn River by virtue of its equal footing analysis, the Court then turned, in part III of its decision, to the tribe's assertion of regulatory authority over nonmembers on reservation *lands*. At that point the issue was "the power of the Tribe to regulate non-Indian fishing and hunting *on reservation land owned in fee by nonmembers* of the Tribe." *Id.* At 557 (emphasis added). It was only in this context—regulation of nonmember activities *on fee lands*, as opposed to authority over the waters themselves—that the Court announced its "general rule" against tribal authority. *Id.* at 566.

had. As EPA has noted, “Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law.” 56 Fed. Reg. at 64,880. The FCPC application cites no principle of Federal Indian law standing for the proposition that a tribe may unilaterally determine or expand the scope of its territorial and personal jurisdiction by pronouncement in a tribal constitution.

C. The FCPC has no reserved authority over any water resources in Wisconsin.

As a third source of authority to regulate surface water resources the FCPC claims it possesses reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908). The *Winters* doctrine of implied, pre-statehood reservation of water rights for Indian reservations has no application here. FCPC concedes “the Potawatomi’s original northern Wisconsin presence centered outside of Forest County.” Application, Ex. 4 at 6-7. No tribal right in the waters that flow through, lie within or abut the FCPC trust lands in Forest County was “reserved” from the federal government’s 1848 grant to Wisconsin of equal footing sovereignty over waters within its borders. Moreover, the FCPC Lands were not established on lands occupied by the Tribe before statehood. Because at statehood the lands now constituting the FCPC Lands were the “ceded territory” of the Chippewa Indians, not the Potawatomi, the Potawatomi had nothing to “reserve” in this area.⁹

D. The FCPC has no un-extinguished aboriginal rights or authority with respect to the waters they seek to regulate.

As its fourth and final basis of authority to regulate the disputed water resources, the FCPC asserts that because “generations of Potawatomi lived on what now constitutes the Reservation,” FCPC has “aboriginal water rights” to regulate the State’s navigable waters. Application, Ex. 4 at 6-7. Wisconsin believes that this conclusion has no proper basis in the relevant law or facts. Aboriginal title derives from a native people’s occupancy of a specified area continuously from a time preceding the arrival of white settlers. Ordinarily, aboriginal title requires a showing of exclusive use. *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 207 (W.D. Wis. 1996).

Under Article 9 of the 1825 Treaty With the Sioux, Etc., 7 Stat. 272 (sometimes referred to as “the Treaty of Prairie du Chien”), the Potawatomi aboriginal land claim was identified as lying to the south and east of the area where their present tribal land holdings are located. The present day Potawatomi reservation is located on the aboriginal lands of the Chippewa. Between the aboriginal Chippewa Lands and those of the Potawatomi were the aboriginal lands of the Menominee Indians.¹⁰ Then in 1833 “the Potawatomi sold ... all land in southeastern Wisconsin to the United States at a treaty council in Chicago ... [under the terms of which] the Potawatomi had to leave Wisconsin by 1838.”¹¹

⁹ See also the discussion of the Treaty of Prairie du Chien in part II.D., below.

¹⁰ For the text of the 1825 treaty and a map depicting the various tribal aboriginal lands, see Wikipedia, *Treaty of Prairie du Chien*, http://en.wikipedia.org/wiki/Treaty_of_Prairie_du_Chien (last visited June 2, 2014).

¹¹ With respect to the Potawatomi in Wisconsin, the 1833 treaty provided that “the said Indians are to remove from all that part of the land now ceded ... but to be permitted to retain possession of the country north of the boundary line of the said State [of Illinois], for the term of three years, without molestation or interruption and under the protection of the laws of the United States.” See Milwaukee County Museum, *Potawatomi Treaties and Treaty Rights*, <http://www.mpm.edu/wirp/ICW-107.html> (last visited June 2, 2014); See also Forest County Potawatomi, *Timeline of Potawatomi History*, <http://www.fcpotawatomi.com/culture-and-history/timeline-of->

Cession and removal treaties have the effect of abrogating all aboriginal rights in the lands ceded. *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F. Supp. 999, 1014 (W.D. Wis. 1996) (citations omitted). Thus, the Potawatomi do not have aboriginal water rights in the area of their present day reserved lands because that was not land they occupied before white settlement or statehood, much less land the FCPC used to the exclusion of other tribes or settlers. Moreover, whatever aboriginal rights the FCPC may have had anywhere in Wisconsin were abrogated by the 1833 Treaty of Chicago.

III. The FCPC has not sufficiently identified the waters within the borders of its trust lands that are subject to Clean Water Act jurisdiction.

To satisfy the requirements for TAS authority, the FCPC must include in its application “[a]n identification of the surface waters for which the Tribe proposes to establish water quality standards.”¹² The FCPC application does not clearly identify the surface waters for which the Tribe has proposed water quality standards and certification.

Congress’ authority under the Clean Water Act extends only to “navigable waters.” The Act defines “navigable waters” to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. §§ 1362(7). In light of U.S. Supreme Court case law defining “waters of the United States,” EPA has recently proposed revised rules defining the scope of waters protected by the Clean Water Act. It is unclear whether the proposed rules will cover all of the waters the FCPC seeks to regulate.

A number of the waters depicted on the map accompanying the FCPC’s application are clearly natural navigable waters, susceptible and historically used for commercial and subsistence navigation related activities, both by the aboriginal (Chippewa) occupants and white settlers, before and after statehood.¹³ However, other waters depicted on that map would appear not to meet the test for the navigable “waters of the United States.”¹⁴ In addition, based on the limited information included in FCPC’s application, it

potawatomi-history/ (last visited June 2, 2014): “After the signing of the 1833 treaty, most Potawatomi were forcibly removed west.” For the text of the 1833 treaty, see Kansas Heritage, *Treaty With the Chippewa, Etc.*, http://www.kansasheritage.org/pbp/books/treaties/t_1833.html (last visited June 2, 2014).

¹² The requirement to identify the surface waters for which FCPC seeks to establish water quality standards is in addition to the requirement under 40 C.F.R. 131.8(3)(b)(i) to submit a “map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality.”

¹³ See, e.g., *Lac Courte Oreilles Band of Lake Superior Chippewa v. State of Wisconsin*, 653 F. Supp. 1420, 1425 and 1430 (W.D. Wis. 1987) (1837 treaty guaranteed fishing and hunting rights on rivers and lakes in the Chippewa ceded territory; commercial activity was a major factor in Chippewa subsistence); and Rand E. Rohe, *The Landscape And The Era of Lumbering in Northeastern Wisconsin*, 1 *Geographical Bulletin* 1, 2 (1972) (Wolf River and Rat River watersheds used in commercial logging, including before statehood; rivers acted as “the main thoroughfare of log transportation.”). Many if not all of the water bodies depicted on Application Ex. 8 are also depicted on the relevant J. William Trygg Composite Maps, reflecting the observations of the initial federal surveyors in the early years after statehood, before white settlement or other development of the area.

¹⁴ In the Tribe’s proposed water quality standards, the “Territory Covered” is defined generally as “Waters of the FCPC Reservation.” The proposed standards define “Waters of the FCPC Reservation” as “Any accumulation of water, natural or artificial, public or private, or parts thereof which are wholly or partially within, flow through, or border upon the FCPC Lands, including, without limitation, lakes, ponds, rivers, streams, and wetlands.” Table 1 of the proposed standards and Table 9 setting forth proposed Tier classifications contain a list of some waters, including generically “Wetlands” and “All Other Waters.” Those lists, however, do not identify the specific

appears that several of the water bodies that the FCPC seeks to regulate are neither completely “within the borders” of the Tribe’s riparian lands nor – in at least one instance – do they even abut tribal lands as defined by the FCPC trust land property boundaries. For example, the FCPC has proposed water quality standards for Evergreen Lake but it appears from the State’s GIS maps that Evergreen Lake is not bordered by trust lands (*see* map in Attachment A). In other cases only a small portion of surface water abuts any tribal uplands.

Since the application does not clearly and specifically identify the waters that the FCPC is pursuing for water quality standards coverage and water quality certification authority, the application is incomplete and should be denied on this basis alone. If the application is amended, Wisconsin should be given another opportunity to comment on the surface waters for which the FCPC is seeking TAS authority. In addition, the EPA should deny TAS authority to the FCPC for non-navigable surface waters located completely within an isolated tribal parcel if the isolated tribal parcel does not have any navigable waters within its borders.

IV. The FCPC’s proposed water quality standards do not show that the FCPC would carry out an effective water quality standards program in a manner consistent with the terms and purposes of the CWA, as required by 40 C.F.R. § 131.8(a)(4).

EPA has stated that a tribe’s TAS application must show that there are waters within the reservation that are used by tribal members, that waters and critical habitat are subject to protection under the Clean Water Act, and that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the tribe. 56 Fed. Reg. at 64,879. Although EPA has described this showing as “relatively simple,” in this case, FCPC’s application fails to adequately identify ways in which the approximately 501 tribal members living on the FCPC Lands¹⁵ have been or would be seriously impacted by non-member activities on or outside the identified FCPC Lands.

If there were no regulations currently protecting waters within the area of the FCPC trust lands, there might be more merit to granting TAS status for water quality standards, but this is not the case. The State has an extensive regulatory program of water quality standards for surface waters and/or permitted entities upstream of the FCPC’s lands. The Supreme Court has emphasized that potential impacts to the health and welfare of a tribe must be considered in light of the existing statutory and regulatory scheme that governs non-member activities on nontribal lands, *Montana*, 450 US at 566, and even then, only on-reservation nonmember activities that threaten tribal self-governance are subject to tribal regulation under inherent tribal authority. *See Strate v. A-1 Contractors*, 520 U.S. 438, 457-59 (1997). Not only has the FCPC application failed to identify such gaps or problems in Wisconsin’s water quality standards and WPDES program, but FCPC has also failed to demonstrate how its proposed water quality standards program would effectively address water quality concerns.

stream segments, or the portions of lakes which ‘border upon’ or which Tribal riparian lands surround, that the Tribe would regulate. The Tribe also asserts generally that designated uses should be met “at all locations in and at the border of all Waters of the FCPC Reservation.”

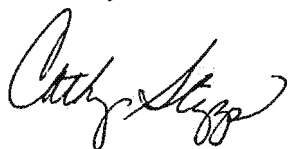
¹⁵ According to the State of Wisconsin 2011-2012 Blue Book, a publication of the Wisconsin Legislative Reference Bureau, the Tribe in 2010 had a “Total Reservation population” of 588 persons, 501 of whom were Indian. *See* the Blue Book at page 791.

The FCPC submitted draft water quality standards as part of its TAS application materials. Application Ex. 16. The State recognizes that EPA has not yet asked for comments on the draft water quality standards. Nevertheless, the Tribe's proposed draft standards raise concerns regarding whether the Tribe can reasonably be expected to administer an effective water quality standards program that is consistent with the Clean Water Act. FCPC proposes to implement its draft water quality standards on a checkerboard of FCPC Lands that are interwoven with non-tribal lands owned by private and public entities lands that would disproportionately affect Wisconsin residents and businesses. Given the nature of the FCPC Lands' geographic distribution, granting the Tribe TAS authority will impose a patchwork of authority that shifts from the State to the Tribe and back again to the State over short segments of navigable streams and portions of lakes. The Tribe's draft standards are not the same as the State's. In at least one instance (phosphorus standards for lakes), FCPC's draft standards are less stringent and the State's standards are more protective of water quality. In other cases, FCPC's draft standards are vague and subjective, and may be extremely difficult if not impossible to meet.

Perhaps most importantly, FCPC has proposed no effective, practical way to implement standards that are different from the State's for the scattered parcels of lands proposed for TAS authority in FCPC's application. A summary of the State's preliminary comments on the Tribe's draft water quality standards is included in Attachment B, which is incorporated here by reference. Should the Tribe be granted TAS authority over the State's objection or should the Tribe submit additional proposed draft water quality standards, the State reserves the right to submit more detailed comments regarding the proposed standards.

Wisconsin does not dispute that clean water is important to the FCPC and its members, just as it is important to all Wisconsin citizens. That said, for the reasons described above, Wisconsin believes the FCPC has not made the requisite showing that its application for TAS status for water quality standards should be granted. In addition to the State's comments and objections, the State is forwarding for your consideration the attached written comments submitted by interested citizens and officials to the DNR. These comments are included in Attachment C.

Sincerely,



Cathy Stepp
Secretary, Wisconsin Department of Natural Resources

cc: Scott Walker, Governor
J.B. Van Hollen, Wisconsin Attorney General
Harold "Gus" Frank, Chair, Forest County Potawatomi Community
Jeffrey Crawford, Attorney General, Forest County Potawatomi Community