Section 4.4: Hazardous Materials Effects

This Chapter discusses the potential impacts that the Proposed Action and the alternatives may have on hazardous materials.

A. ALTERNATIVE 1: PROPOSED ACTION

Under this alternative, which involves placing the Nation's properties into trust, no changes are proposed. As discussed in Section 3.4, "Hazardous Materials," Recognized Environmental Conditions were identified including:

- Past and current use of two parcels (36-1-49 at 2552 Route 89 in Seneca Falls and 134.17-1-1.121 at 299 Cayuga Street in Union Springs) as a gasoline filling station and the past use of parcel 36-1-49 as a auto dealership could potentially have caused a release of petroleum contamination to soil or groundwater at the sites and/or the surrounding properties. EPA has reportedly inspected this facility twice, most recently in 2007, and worked with the Nation to ensure compliance with federal regulations regarding release detection records and Underground Storage Tank records. The compliance status with respect to Federal or State regulations should be verified. Soil sampling conducted as part of Phase II investigations was performed for each of the parcels and the results of which did not indicate that any areas have been adversely affected by current or former on-site operations. Due to soil conditions at each boring location, refusal was encountered before groundwater was reached. Therefore, the status of groundwater remains unknown. Other than the possibility of a release from continuing operations at each retail gasoline filling station, no significant adverse impacts related to hazardous materials would result from proposed activities on the land trust parcels.
- The maintenance, storage areas, and public restrooms contained general cleaning chemicals for parcels 134.17-1-1.121, 134.17-1-1.21, and 36-1-49. No odors or observation of releases were noted during the site inspection.
- Former use of the building on parcel 36-1-48.2 as a boat repair shop may have resulted in releases to the soil or groundwater at the site. There were no areas of staining observed during the site visit.
- Possible PCB-containing fluids in the pole-mounted transformers on parcels 36-1-48.2 and 85.00-1-28.1. There were no areas of stained soil or stressed vegetation beneath the transformers.
- An unpaved right-of-way vehicular access road and natural gas well was located on the northern portion of parcel 141.05-1-3. There was no evidence of contamination observed during the inspection, but possible future activities including gas well development or re-drilling to improve production may present a situation where on-site soil or groundwater could be contaminated near the natural gas well.

- Average radon levels in Cayuga County, 4.37 picocuries/liter, exceed the USEPA recommended action level of 4.0 picocuries/liter affecting parcels 85.00-1-28.1, 150.00-1-29.1, 141.05-1-3, 134.17-1-1.21, and 134.17-1-1.121.
- Suspect ACMs for parcels 36-1-49, 36-1-48.1, 36-1-48.2, 141.05-1-3, 134.17-1-1.21, and 134.17-1-1.121.
- A railroad is located west-adjacent to parcel 134.17-1-1.51. Historically, chemicals such as creosote were applied to railroad ties, which have minor potential to affect conditions at the site.
- Based on the age of the structure on parcel 36-1-48.2, lead-based paint may be present, including under more recently painted surfaces. Lead based paint may have also been used if boats were repainted. The existing painted surfaces were observed to be in good to damaged condition.
- Interviews with knowledgeable site personnel indicated that herbicides and pesticides are applied to the mowed portions of parcels 36-1-48.1, 36-1-48.2, 150.00-1-29.1, 134.17-1-1.51 on an as-needed basis, which may have affected shallow soil and/or surface waters at the site.

Although no changes in land use would occur under the Proposed Action, a change in jurisdiction of environmental regulations would occur, as discussed below in Section E, "Regulatory Jurisdiction," If the property uses change, the above conditions may need to be addressed; however, under this alternative, the properties would continue to be used as they are now. Therefore, other than the possibility of a release from continuing operations at each retail gasoline station, no significant impacts associated with hazardous materials would result from the Proposed Action.

B. ALTERNATIVE 2: NO ACTION

Under this alternative, the Nation's properties would not be placed into trust, and the Nation would continue to own the properties in fee. The Nation would continue use of its properties for the multiple purposes in operation at the time of the fee-to-trust application (e.g., gas stations and convenience stores, and a car wash). Under this alternative, the Nation may elect to return the subject properties to the environmental baseline conditions by reopening its temporarily closed gaming facilities, in which case, no changes from the environmental baseline would occur.

Therefore, other than the possibility of a release from continuing operations at each retail gasoline station, no significant impacts associated with hazardous materials would result from the No Action Alternative.

C. ALTERNATIVE 3: ENTERPRISE PROPERTIES INTO TRUST

Under this alternative, which involves placing the Nation's two Enterprise properties (Seneca Falls and Union Springs) into trust, no changes are proposed. As such, the potential impacts associated with the future without the proposed project would be consistent with the conditions described in Alternative A: Proposed Action for parcels 36-1-49 at 2552 Route 89 in Seneca Falls and 134.17-1-1.121 at 299 Cayuga Street in Union Springs.

Under this alternative, the property would continue to be used as it is now. Therefore, other than the possibility of a release from continuing operations at each retail gasoline station, no

significant impacts associated with hazardous materials would result from the Enterprise Properties into Trust Alternative. Also, see the discussion below in Section E, "Regulatory Jurisdiction," regarding environmental primacy and jurisdiction over environmental issues of sovereign tribal lands.

D. CUMULATIVE IMPACTS

No cumulative impacts associated with hazardous materials are anticipated for the proposed action under any of the analyzed alternatives. No other currently active proposals are similar to the proposal in either county. Tribal fee-to-trust applications in other New York counties are also not anticipated to produce statewide cumulative impacts, since any impacts associated with hazardous materials from other proposals, if any, would be localized. Implementation of the Nation's proposal would return both Counties' conditions to those of the environmental baseline date of the Nation's application, which included the gaming operation. With no impacts associated with hazardous materials resulting from the proposal, and no other proposals with impacts associated with hazardous materials, no cumulative impacts are anticipated.

E. REGULATORY JURISDICTION

The EPA has the right to retain environmental primacy over tribally owned property on federally recognized Indian reservations, including the storage tanks at gasoline stations. Over any property there are overlapping jurisdictions of authority: Federal, State and local, and on reservations, tribal jurisdiction. The U.S. Constitution calls Federal laws and treaties the supreme laws of the land. The U.S. Constitution also reserves to the states the right to establish any laws not specifically reserved to the Federal Government. Laws reserved for the Federal government include laws relating to interstate commerce and Indian tribes. Environmental laws relate to interstate commerce, since the migration of pollution is not limited by state boundaries, but also involve local environmental protection, creating jurisdictional overlap. Because of Federal law supremacy, wherever Federal environmental laws exist, the Federal laws have primary environmental jurisdiction, or what is termed "environmental primacy," and these laws are superior to State or local laws unless management of the Federal program is delegated to a state or tribe. Management of many environmental laws administered by EPA can be delegated to states or tribes whenever the state or tribal program meets Federal requirements and the environmental standards for that program meet or exceed Federal requirements. For delegated EPA environmental programs the state or tribe would then hold environmental primacy for that program. State and local or tribal laws fill in the gaps not covered by Federal law, and states or tribes implement the Federal laws for programs delegated to them. A number of tribes across America currently manage EPA water quality programs on their reservations. Generally, Federal laws and tribal laws both manage trust lands and Indian owned restricted treaty lands, while Federal, State and local laws manage non-Indian lands and unrestricted Indian lands. New York State does not hold UST primacy from EPA, but does have a State UST program. With overlapping jurisdictions and laws, the designation of primacy becomes a common question. The Cayuga Nation properties meet the definition of Indian Country established by Congress by Federal statute in 18 U.S.C. 1151. The EPA retains environmental primacy whenever a state cannot adequately demonstrate jurisdiction over Indian Country. Such demonstrations typically involve a tribe relinquishing environmental jurisdiction through an agreement with the state where their reservation lies. Since the properties are within Indian Country, the Cayuga Nation properties should require such a demonstration before State environmental laws would apply, even for delegated programs, in any area where an established Federal environmental program

exists. The BIA is not aware of any demonstration of environmental jurisdiction by New York State regarding the Cayuga Nation lands. This jurisdictional picture is complicated by the Treaty of Canandaigua that requires mutual noninterference between the signing parties. State and local governments have had difficulty dealing with tribal jurisdictional issues, such as those involving tribal inheritance laws or criminal justice. Congress eased the burden for New York courts and police by providing the State with both criminal and civil jurisdiction over reservations within New York, although the tribal self governance and noninterference principles are still applicable in other areas, including environmental laws. In principle, the equally supreme laws of the land, namely the Federal Treaty of Canandaigua and Federal environmental laws jurisdictionally coexist over Iroquois treaty lands. However, the Cayuga sold their treaty lands long ago and only recently reacquired them. The Federal reservation still exists, but the Supreme Court's *Sherrill* decision requires tribes to go through the fee-to-trust process to reestablish sovereignty over repurchased lands within their reservation. The *Sherrill* case, by denying a tribe's attempted unilateral re-establishment of tribal sovereignty, affirms New York State and local authority to fill in the laws where Federal laws do not exist, and establish laws in areas where states are given primary authority to establish laws by the Constitution, and affirms that justifiable expectations of non-Indians are not affected by the rights of Indians, even over reacquired treaty lands. However, State and local laws cannot take precedence over Federal laws, since that is a Constitutional principle, including the Tribe's right to establish its own laws over lands it owns within Indian country, as defined by Congress. Only Congress can establish or disestablish a reservation, and disestablishing the reservation would be required to disqualify the Cayuga Nation's reacquired lands as Indian Country. These factors support the consideration that EPA should retain Environmental primacy over the Cayuga Nation lands for every Federal Environmental program managed by the EPA. That makes the overlapping jurisdictions over the Cayuga Nation's repurchased lands quite complicated. The lack of UST registration with New York State supports their consideration that the State currently lacks primary jurisdiction. EPA assumption of environmental primacy for USTs is supported by its inspections of the Cayuga Nation gasoline tanks. USTs are a Federal program that has not been delegated to New York State, and without a demonstration of jurisdiction over Cayuga Indian Country, none can be assumed. Therefore, the Cayuga Nation's USTs are considered to be under Federal primary jurisdiction. In addition to EPA inspections, the BIA inspected the gasoline stations, sampling data, and tank reconciliation logs and concluded that the tanks have no leaks. While other State and local regulations may also apply to the reacquired Cayuga properties, USTs are considered the only potential environmental management issue that could potentially have a significant impact. Jurisdictional issues would be considered an indirect potential impact since they would relate to post transfer land management. With only a return to environmental baseline for the properties, there are no direct potential impacts on physical resources. Without a change in primary jurisdiction, there would also be no indirect jurisdictional impacts related to any physical resources under EPA primacy. Issues not under EPA primacy are not considered to have the potential for significant indirect impact from management of the properties. There would also be no cumulative impacts, since all tribal gasoline stations on reacquired reservation lands across the State would fall under Federal law, under EPA primacy, whether or not they are transferred into trust. According to these principles, transfer of the properties from fee-to-trust status would not alter EPA primacy over the gasoline tanks, indicating that the transfer would not have significant impacts resulting from the environmental management of the properties.