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May 4, 2015

Jonodev O. Chaudhuri, Chairman
Daniel J. Little, Associate Commissioner
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Re: Comments in Response to February 26, 2015 Notice of Consultation

Dear Commissioners:

The Seneca-Cayuga Office of the Gaming Commissioner (the "SCOGC") appreciates the opportunity to submit comments in response to the National Indian Gaming Commission's ("Commission") Notice of Consultation issued on February 26, 2015. The SCOGC commends members of the Commission for reaching out and engaging with tribal governments during the early planning stages of the proposals outlined in the Notice of Consultation. To be meaningful, consultation must happen early and frequently to ensure that both the Commission and tribes have sufficient time to review the issues, consider alternatives, and develop a consensus on the best available approach.

In the comments below, we offer our comments on the proposals and drafts issued in connection with the Notice of Consultation. It is our hope that the discussion below proves helpful to the Commission in its deliberations on these matters of mutual importance.

I. THE PROPOSED NEPA MANUAL

The Commission is seeking to adopt a policies and procedures manual ("Draft Manual") that includes a Categorical Exclusion ("CATEX") for its management contract approval activities. The Draft Manual defines the extraordinary circumstances under which a CATEX would not be appropriate, which includes situations where the effects of the proposed project may be highly "controversial" on environmental grounds.

Overall, the Draft Manual is a positive development that helps clarify the NEPA-related role and responsibilities of the Commission, particularly in relation to its management contract activities. Unlike the previous version published in the *Federal Register* in 2009, the Draft Manual presents a more simplified approach reflective of the minimal responsibilities arising under NEPA and the limited review required for Commission actions. In reviewing the Draft Manual, we were pleased to find that many of the unnecessarily detailed and extensive procedures in the previous version had been removed.

We were also pleased by the Commission's decision to expand the CATEX to cover *all* management contracts, regardless of the underlying activity taking place under the contract. This is a significant improvement from the previous draft, which limited the CATEX to contracts that did not involve any physical construction or plans to increase patronage. These changes will provide greater

certainly to the NEPA process and help minimize implementation and compliance costs for both the Commission and tribes.

We note, however, that the Draft Manual could have gone further in clarifying that management contract approvals do not rise to the level of a "major federal action" and are thus exempt from NEPA review altogether. Close examination of the approval process shows that the federal interest in a management contract, other than for enforcement of its terms, is slim. Even when a management contract incidentally involves construction activity, the Commission has no ability to control or regulate the size, design, or construction of the project. Nevertheless, in spite of our views, we conclude that the policy and procedures in the Draft Manual are favorable and will have a positive impact by clearing up the uncertainty surrounding NEPA review requirements.

We further note that there are a couple of areas in the Draft Manual that would benefit from further revision. One of the key provisions in the Draft Manual pertains to the "extraordinary circumstances" under which a CATEX would not apply. According to Section 4.3.6 of the Draft Manual, actions that would normally be categorically excluded will not qualify for the CATEX if "[t]here is a reasonable likelihood the proposed action/project will have effects that are highly *controversial* on environmental grounds."

The Draft Manual defines "controversial" to include situations where "a substantial dispute exists as to the environmental consequences of the proposed action." Our concern is that this definition is too broad and could be interpreted to cover disagreements between members of the general public with little to no scientific background. The definition should clarify that the substantial dispute must exist between members of the scientific community who are qualified to make science-based judgments regarding the potential environmental impacts of a proposed project.

The definition should also be revised to clarify that "controversial" does not refer to a preference among alternative approaches. In determining whether an extraordinary circumstance is present, the relevant question is whether there is significant disagreement as to the environmental consequences of a project, not on the preferred approach.

Taken together, these two revisions would result in an updated definition that reads as follows (proposed new language in italics):

- 1.2.7 Controversial:** Meaning a substantial dispute exists *within the scientific community* as to the environmental consequences of the proposed action and does not refer to the mere existence of opposition to a proposed action or a *preference among the alternatives*.

II. PROPOSED WITHDRAWAL OF 25 C.F.R. PART 542 (CLASS III MICS)

We applaud the Commission for taking the initiative to consult with tribes in the early planning stages of its proposal to withdraw 25 C.F.R. Part 542 and issue the Class III MICS as non-mandatory guidance. We appreciate and welcome the Commission's efforts to engage with tribes before undertaking any rulemaking activity or even developing any new drafts. The Commission's commitment to early and meaningful consultation will go far in helping both tribes and the Commission better understand the underlying concepts and potential consequences behind the proposed changes.

Generally speaking, we support the idea of adopting a more flexible regulatory approach that will allow tribes to establish controls and procedures that are appropriate to their specific needs and level of resources. However, before committing to a decision to move forward with the proposed withdrawal, we ask the Commission to consider some of the possible implications and consequences. Specifically, we ask the Commission to consider the potential effects on tribal-state compacts, in particular, those that reference and require compliance with the Class III MICS, as set forth in 25 C.F.R. Part 542.

For instance, our own tribal-state gaming compact with the State of Oklahoma contains a requirement to adopt standards no less stringent than those set forth in 25 C.F.R. Part 542. If the Commission proceeds with its proposed withdrawal, questions may be raised by the State as to whether and how we can continue complying with this MICS provision. If the State perceives a void in this area of regulation, it may find it necessary to increase its compliance oversight and enforcement efforts. Even more troubling, the State may raise the possibility of promulgating and enforcing its own Class III MICS to replace the withdrawn federal regulation.

It may be the case that the regulation will have to be left in place for those tribes whose compacts reference and require compliance with 25 C.F.R. Part 542. For this reason, more consultation and engagement with tribes is needed to ensure that the final outcome is fair, reasonable, and supportive of tribal interests and concerns.

III. AMENDMENTS TO PRIVACY ACT REGULATIONS

The proposed amendments to the Privacy Act regulations set forth in 25 C.F.R. Part 515 are aimed at updating and streamlining the Commission's Privacy Act procedures, as well as incorporating a new exemption for Management Contract Individuals Records System. As a general matter, we do not have any objections to the proposed technical changes to bring the regulation into full compliance with statutory requirements. Furthermore, we understand that the proposed exemption for management contract records is not a new policy to the extent that it codifies the exemption announced in the Commission's Notice of a New System of Records. 69 Fed. Reg. 12,182 (March 15, 2004).

Nevertheless, we believe more information and consultation is needed to better understand the need and purpose of the stated exemptions. As a tribal gaming regulator, we understand the importance of ensuring the proper collection, maintenance, use, and dissemination of personally identifiable information about individuals subject to our regulatory jurisdiction. Although there may be instances in which an exemption to the Act's disclosure requirements is appropriate, these exemptions must be narrowly construed and consistent with the purposes for which the Privacy Act was enacted. We look forward to continued dialogue on this important issue and providing further comments at a future time.

IV. PROPOSED BUY INDIAN ACT POLICY

We support the Commission's initiative to develop policy and procedures to implement the Buy Indian Act. Under the Buy Indian Act and pursuant to the general contracting authority in 25 U.S.C. § 2706(b)(6), (b)(7), the Commission has the authority to set aside procurement contracts for Indian-owned and controlled businesses. We believe this is a long overdue and important policy that will not only encourage procurement relationships with eligible tribal businesses, but also help

increase economic activity in tribal communities and provide greater employment opportunities for tribal members.

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In closing, the SCOGC would like to thank the Commission for this opportunity to submit comments on the proposals and drafts issued in connection with the February 26, 2015 Notice of Consultation. The SCOGC appreciates the Commission's ongoing outreach efforts and looks forward to continuing the dialogue on these important regulatory matters.

Sincerely,



Geneva Fletcher
Interim Gaming Commissioner
Seneca-Cayuga Office of the Gaming Commissioner