



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC 20460

OFFICE OF  
THE INSPECTOR GENERAL

March 5 , 1999

MEMORANDUM

SUBJECT: Region 5 Section 106 Tribal Water Grants  
Audit Report Number E3RWF8-05-0045-9100094

FROM: Elissa R. Karpf /s/ Charles M. Allberry  
Deputy Assistant Inspector General  
for External Audits

TO: David A. Ullrich  
Acting Regional Administrator  
Region 5

We have completed our audit of the Region 5 Section 106 Tribal Water Grants program. We began this audit at the request of Region 5 officials and later expanded the scope of our review, based upon related allegations received through the Office of Inspector General (OIG) Hotline. We found that four of the six allegations were unsupported and we were able to substantiate two of the allegations. We also identified grant management issues that Region 5 needs to address. Our audit work on the first issue discussed in the attached report (i.e., allocation of Section 106 funds) was limited in scope, due to an ongoing investigation by the OIG's Office of Investigations. Our conclusions may have been different, had we been able to perform additional work.

**ACTION REQUIRED**

In accordance with EPA Order 2750, we have designated you as the action official for this report. You are required to provide us with a written response within 90 days of this report. The response should address all recommendations. For corrective actions planned but not completed by the response date, please describe the actions that are ongoing and provide a timetable for completion. This information will assist us in deciding whether to close this report.

We have no objections to the release of this report to the public. Should you or your staff have any questions, please contact Charles Allberry, Audit Manager, at (312) 353-4222.

## **PURPOSE, SCOPE, AND METHODOLOGY**

The overall purpose of the audit was to determine whether Region 5 acted improperly in allocating or awarding Section 106 water grants to Indian tribes. Specifically, the audit objectives were to answer the following questions:

1. Did Region 5 improperly allocate available Section 106 water grant funds to Indian tribes?
2. Did Region 5 improperly award fiscal year 1997 Section 106 grants for amounts in excess of the funds available for such grants?
3. Did Region 5 improperly replace Section 106 grant funds with Section 104(b)(3) funds for tribes whose Treatment as a State (TAS) eligibility was questionable?
4. Did Region 5 improperly use Section 106 grant funds to pay for litigation settlements to the State of Wisconsin and/or Wisconsin tribes?
5. Did Region 5 award Section 106 grants to tribes that had either not received TAS status or whose eligibility could not be verified?
6. Could Region 5 properly account for all available fiscal year 1995 through 1998 Section 106 grant funds?

We performed our audit in accordance with the U.S. General Accounting Office's Government Auditing Standards, 1994 Revision, issued by the Comptroller General of the United States, and included such tests as we saw necessary to complete our objectives. See appendix 1 for further details on our scope, methodology, and prior audit coverage.

## **BACKGROUND**

The Clean Water Act, as amended in 1987, authorized EPA to treat Indian tribes as states for certain purposes identified under Section 518(e). This authorization included awarding Section 106 grants to tribes, provided they met all the requirements listed in Section 518(e) for treatment as a state. Such requirements included:

- the Indian tribe must have a governing body carrying out substantial governmental duties and powers;
- the water resources to be managed and protected must be held by the tribe, held by the United States in trust for Indians, held by a member of an Indian tribe, or otherwise within the borders of an Indian reservation; and

- the Indian tribe must be capable of carrying out the functions to be exercised.

The terms under Section 106(e) also require tribes to demonstrate that they have emergency authority, comparable to EPA's authority under Section 504, before tribes could obtain funding under Section 106.

Grants under Section 106 of the Clean Water Act are intended to assist Indian tribes in carrying out effective water pollution control programs. Section 106 grants may be used to fund a wide range of water quality activities, including: water quality planning and assessments; development of water quality standards; development of total maximum daily loads; issuing permits; ground water and wetland protection; ambient monitoring; and nonpoint source control activities.

## **RESULTS IN BRIEF**

Region 5 acted properly in allocating and awarding Section 106 Tribal water grants, in four of six instances. In two cases, Region 5 did not act properly. First, Region 5 used over \$75,000 of Section 106 funds to reimburse a tribe for litigation expenses incurred in defending a challenge to its authority to administer a water quality standards program. The payment reduced funds available to other tribes and set a potential precedent for future payments of similar expenses. Second, Region 5 awarded a \$130,000 Section 106 grant to one organization that was not eligible, thereby reducing Section 106 funds available to eligible tribes.

Overall, Region 5 did not have adequate management controls in place for the Section 106 grant process. Without sufficient controls, Region 5 officials did not always perform or document eligibility reviews and sometimes awarded grants before the reviews were completed. Region 5 also did not have clear and complete records of grant fund allocations. Incomplete records made it difficult to track where Section 106 funds allocated for Indian tribes were used and the amount of funds that were still available for awards.

## **REGION 5 COMMENTS AND OIG EVALUATION**

In his response, the Acting Regional Administrator stated that Region 5 has initiated improvements to systems and procedures that are consistent with the OIG's recommendations. He said that the system improvements will make information more readily available for managers to track activities and are expected to provide greater degrees of assurance that all applicable requirements are complied with. We generally accepted Region 5's proposed corrective actions. Some milestone dates still need to be provided for when corrective actions will be implemented.

As part of the regional response, the Office of General Counsel (OGC) disagreed with our conclusion that it was improper for Region 5 to use Section 106 funds to reimburse a tribe's litigation expenses associated with a lawsuit challenging the tribe's water quality standards program. The OGC opinion stated, "Like other costs associated with developing a water quality

standards program, the legal fees that the Tribe incurred in defending its ability to administer a water quality standards program (the TAS determination) are reimbursable under a §106 grant.” However, we continue to believe that EPA too broadly interpreted Section 106 as allowing the litigation costs to qualify as costs of administering a water pollution program.

Detailed Regional comments and OIG evaluations appear at the end of issues 4, 5, and 6, beginning on page 7. Region 5's response is included in its entirety as appendix 2.

## **FINDINGS AND RECOMMENDATIONS**

### **Issue 1: Did Region 5 improperly allocate available Section 106 water grant funds to Indian tribes?**

We found no evidence that Region 5 improperly allocated Section 106 grant funds to the tribes. In fiscal year 1998, Region 5 used a formula to allocate Section 106 funds to the tribes. The formula included: (1) a base amount to build a tribe's capacity to run a water pollution control program and (2) a variable amount based on the need for a specific project and its consistency with Section 106 goals and tribal agreements. Prior to fiscal year 1998, Water Division officials allocated funds based on their experiences with the tribes and knowledge of the tribes' capabilities and needs. EPA Headquarters had not established criteria defining how the regions were to allocate the available Section 106 funds. Since EPA had not defined a method for allocating grant funds, Region 5's allocation method did not violate any established criteria.

The levels of funding Region 5 provided to each tribe were not significantly different and did not indicate favoritism or other improper conduct. With a few exceptions in fiscal year 1997, eligible tribes that were included in the fiscal years 1995 through 1998 funding plans received some level of Section 106 funding. The fiscal year 1997 exceptions included eight Wisconsin tribes that were included in the funding plan but did not receive grants. Five of these tribes did not receive grants due to problems with their work plans. The available but unused funds were carried over to fiscal year 1998 and used to fund these proposals once the work plans were revised and approved. The three remaining tribes did not receive fiscal year 1997 grants because they did not submit applications.

### **Issue 2: Did Region 5 improperly award fiscal year 1997 Section 106 grants for amounts in excess of the funds available for such grants?**

Region 5 did not improperly award fiscal year 1997 grants in excess of the available funds. The Region did not have sufficient Section 106 money to fully fund all of the fiscal year 1997 proposals. In preparing the original fiscal year 1997 funding plan, Water Division officials assumed that the Region would supplement the Headquarters Section 106 allocation, almost doubling the amount available for awards. However, Region 5 management decided not to supplement the Headquarters allocation. As a result, the tribes submitted grant proposals that totaled about twice as much as the available funds.

Region 5 officials expected the fiscal year 1998 Headquarters allocation to be significantly greater than fiscal year 1997 (over \$2.7 million versus about \$450,000). Therefore, regional officials approved some fiscal year 1997 grants for the full amounts but only obligated about half of the funds. The Region intended to obligate the remaining amounts when the funds became available in fiscal year 1998, if the Headquarters allocation increased as expected. As a result, the amount approved was greater than the amount available for some grantees, but the actual obligations did not exceed the funds available.

As mentioned above, some tribes received about half of the amount they applied for in fiscal year 1997. These tribes were “made whole” in fiscal year 1998 when Region 5 used fiscal year 1998 funds to award the outstanding amounts from the tribes’ fiscal year 1997 proposals.

**Issue 3: Did Region 5 improperly replace Section 106 grant funds with Section 104(b)(3) funds for tribes whose TAS eligibility was questionable?**

Region 5's plan to award a Section 104 grant to one tribe, Little Traverse Bay Band (LTBB), in place of a Section 106 grant was not improper. Region 5 had found LTBB eligible for Section 106 grants. However, regional officials learned of a significant concern regarding the tribe’s eligibility, and have been investigating the tribe’s eligibility to determine if there is a need to withdraw the tribe’s Section 106 TAS approval. Section 104 grants did not require tribes to have TAS approval. Instead, Section 104 funds could be given to a wide range of entities, including various organizations and even individuals. An Indian tribe that did not meet Section 106 TAS eligibility requirements could qualify under Section 104 as an organization. Therefore, Region 5 was able to provide Section 104(b)(3) funds to the tribe for the proposed project.

**Issue 4: Did Region 5 improperly use Section 106 grant funds to pay for litigation settlements to the State of Wisconsin and/or Wisconsin tribes?**

Region 5 did not use Section 106 funds to pay a settlement to the State of Wisconsin. In the OIG’s opinion, the Region did improperly use \$75,139 of Section 106 funds to reimburse a tribe for litigation expenses incurred in defending a challenge to its authority to administer a water quality standards program.

***Section 106 Eligible Activities***

Section 106 of the Clean Water Act states that grants are to be awarded to assist states, including tribes eligible for treatment as states, and interstate agencies in administering programs for the prevention, reduction, and elimination of water pollution. EPA’s grant guidance includes a number of activities that may be eligible under Section 106, such as developing water quality standards, protecting ground water and wetlands, and controlling nonpoint sources. These activities will help the tribes carry out effective water pollution control programs.

### ***Section 106 Funds Improperly Used to Pay Litigation Settlement***

Region 5 used \$75,139 of Section 106 funds to reimburse a tribe for litigation expenses incurred in defending a challenge to its authority to administer a water quality standards program. The State of Wisconsin sued EPA, challenging Region 5's decision to give TAS status to the Lac du Flambeau tribe to administer a water quality standards program. The tribe voluntarily chose to intervene in the lawsuit and incurred litigation expenses as a result. Because Region 5 did not maintain sufficient administrative records of the TAS approval process, the Region had to withdraw the tribe's TAS status. As a result, EPA filed a motion to dismiss the lawsuit. The Court did so and directed Region 5 to reimburse the State for its attorney's fees and expenses. A special EPA Headquarters account was used to pay the State of Wisconsin. The tribe requested that Region 5 also reimburse its legal expenses. In June 1998, Region 5 amended one of Lac du Flambeau's Section 106 grants to reimburse a portion of the tribe's litigation costs.

EPA management too broadly interpreted Section 106 in reimbursing the tribe's litigation costs. In our opinion, the litigation expenses did not qualify under Section 106 as a cost of administering a program for the prevention, reduction, and elimination of water pollution. If the State of Wisconsin's lawsuit had been a challenge to the water quality standards developed under the authority of the tribe's TAS status, then the tribe's defense of its standards may have qualified as a cost of administering a water quality program. However, the tribe's purpose in incurring litigation expenses, its desire to maintain TAS status and the authority to carry out a water quality program, did not constitute "administering" the program within the meaning of Section 106. Without TAS status, the tribe was not authorized to carry out the water quality standards program.

### ***Region 5 Agreed to Reimburse the Tribe's Litigation Expenses***

Region 5 officials, with input from EPA's Grants Administration Division and the OGC, decided to reimburse Lac du Flambeau's litigation expenses because: (1) the Region's inadequate records caused the tribe's TAS status to be withdrawn and (2) regional officials believed the tribe became involved in the lawsuit in good faith, trusting that EPA had properly conducted the TAS application process. The Region agreed to pay only for "wasted costs" (i.e., the tasks and expenses that were not expected to be useful or incurred in future TAS litigation).

### ***Less Funds Available for Other Tribes and Significant Precedent Created***

The payment of Lac du Flambeau's litigation expenses reduced the funds available for other Region 5 tribes, although not by a significant amount. The \$75,139 reimbursement came from the Section 106 funds available in fiscal year 1998 for distribution to all eligible tribes. Region 5 received a significant increase in Section 106 funds in fiscal year 1998 (over \$2.7 million versus about \$450,000 per annum in prior years). As a result, the impact on other tribes was minimal since \$75,139 was less than 3 percent of the total available. However, another tribe could have used the funds for an environmentally beneficial project.

Reimbursing Lac du Flambeau's legal expenses resulted in a potentially significant precedent for the Agency to reimburse litigation expenses a tribe or a state incurs while defending its right to administer other environmental programs. Another tribe, Oneida, has already expressed a desire to be reimbursed for expenses incurred in another lawsuit the State of Wisconsin filed. As of February 1999, Oneida had not yet submitted a detailed list of legal expenses for analysis and reimbursement, but Region 5 officials indicated they would consider the potential claim in preparing the fiscal year 1999 funding plan. Such a precedent has the potential to significantly affect the available grant funds in the future. It could also reduce the funds available for environmental projects, thereby limiting the Section 106 grant program's future environmental impact.

### ***Recommendation***

Region 5 needs to obtain a written legal opinion from OGC at EPA Headquarters on the legality of awarding Section 106 funds to reimburse a tribe's litigation expenses incurred in defending its ability to administer a water quality standards program. If the OGC opinion does not support Region 5's action, then Region 5 will need to annul the grant and recover the funds from the tribe. If OGC's opinion supports Region 5's action, then the OIG's General Counsel will evaluate the opinion and determine whether to proceed with the issue.

### ***Region 5 Comments***

On December 24, 1998, the Acting Regional Administrator requested a written legal opinion from OGC. OGC responded with its opinion on January 28, 1999. OGC attorneys concluded that the award of a Section 106 grant to Lac du Flambeau for the purpose of reimbursing legal expenses was proper. Region 5 officials stated that, while OGC's opinion provided a legal basis for the award of the Section 106 funds, Region 5 does not consider the reimbursement of such legal expenses as a routine cost of administering a water quality standards program. The Acting Regional Administrator further stated in his response that, as a policy matter, the Region will not give preference for reimbursement of litigation expenses over other programmatic costs of administering a water quality standards program.

### ***OIG Evaluation***

We disagree with the OGC opinion that using Section 106 funds to reimburse the tribe was proper. However, we recognize that the situation involved unusual circumstances and is unlikely to routinely recur. Given the Acting Regional Administrator's assurance that, as a policy matter, Region 5 will not give preference to reimbursing legal expenses over other programmatic costs, we will not pursue this legal disagreement further. If Region 5 officials find that this situation does recur, where other grantees ask for similar legal expense reimbursements, then the Regional officials should re-evaluate their policy on providing legal expense reimbursements, even in such unique circumstances.

## **Issue 5: Did Region 5 award Section 106 grants to tribes that had either not received TAS status or whose eligibility could not be verified?**

Eleven of twelve grantees reviewed were eligible to receive Section 106 grants.<sup>1</sup> However, Region 5 awarded a \$130,000 Section 106 grant to one organization that was not eligible.

### ***Grant Eligibility Requirements***

The Clean Water Act, through Sections 106 and 518, authorizes EPA to provide Section 106 grants only to states, interstate agencies, and tribes that have met certain eligibility requirements. The tribe must show that it is capable of carrying out necessary functions, is recognized as a tribe by the Secretary of the Interior, and has prescribed emergency authorities. Section 104 of the Clean Water Act provides a much broader authority for grants by including various public or nonprofit private agencies and organizations as eligible recipients.

### ***Region 5 Awarded a Grant to an Ineligible Organization***

In June 1996, the Intertribal Council of Michigan (ITC), a health and human services organization designed to provide services to the Federally recognized tribes in the State of Michigan, applied for two grants from the Region 5 Water Division. ITC requested grants to develop: (1) Best Management Practices Plans for four Michigan tribes and (2) Wellhead Protection Plans for two tribes. ITC did not request a specific grant type. In September 1996, Region 5 notified ITC that it would receive a Section 106 water grant for \$130,000 (the Region combined the two grant requests into a single award). Region 5 officials did not perform a TAS determination to ensure that ITC was eligible to receive a Section 106 grant.

In December 1997, when ITC requested a project period extension, a Water Division project officer determined that ITC had not been eligible to receive the Section 106 grant because ITC did not fit within the three groups eligible to receive Section 106 grants (states, interstate agencies, and tribes). ITC had already expended over 70 percent (\$92,538) of the grant. Water Division officials notified ITC that it should stop spending the Section 106 grant funds and provided ITC with a Section 104 grant to complete the original project. ITC's unexpended Section 106 funds (\$37,462) are still obligated in EPA's Integrated Financial Management System.

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<sup>1</sup>The twelve grantees reviewed were Bois Forte, Fond du Lac, Grand Traverse, Intertribal Council of Michigan, Mille Lacs, Oneida, Red Cliff, Red Lake, Sault St. Marie, Sokaogon (Mole Lake), St. Croix, and Stockbridge-Munsee.



### ***Region 5 Did Not Have Adequate Controls for Ensuring Eligibility***

Region 5 did not have adequate controls or procedures in place to ensure that all Section 106 grantees were eligible to receive grants. The lack of procedures allowed Region 5 officials to give a Section 106 grant to an ineligible organization.

In September 1998, Region 5 officials completed their own review of TAS eligibility files and identified a number of file deficiencies. During our review, we confirmed that Region 5 did not have good controls over Section 106 eligibility reviews. In two instances (ITC and Bois Forte), it appeared that Region 5 officials did not perform any reviews and did not determine whether the grantee was eligible to receive a Section 106 grant prior to grant award.<sup>2</sup>

We noted several other instances where the Region did not perform all of the necessary steps before awarding a Section 106 grant. Examples of problems included:

- For five grantees (Fond du Lac, Sault St. Marie, Sokaogon/Mole Lake, St. Croix, and Stockbridge-Munsee), regional officials did not document a capability review (Water Division) and/or an emergency powers determination (Office of Regional Counsel).
- In two instances, Region 5 awarded grants before the TAS determinations were officially completed. For one tribe (Mille Lacs), the grant was awarded in September 1990, when the earliest the TAS determination could have been completed was February 1991. In the second instance (St. Croix), Region 5 awarded the grant in September 1996, although it did not complete its TAS review and notify the tribe it was eligible to receive Section 106 grants until December 1996.

These examples clearly show that Region 5's Water Division and Office of Regional Counsel need to institute better controls over the Section 106 grant process, by developing and implementing procedures for review and documentation of grant eligibility requirements.

### ***Less Funds Available for Eligible Tribes***

When Region 5 officials incorrectly awarded Section 106 funds to an ineligible grantee, they reduced the amount available for eligible tribes. The \$130,000 Region 5 incorrectly awarded was almost 15 percent of the total Section 106 funds available to tribes in fiscal year 1996.<sup>3</sup> This significantly reduced the funds available for improving water quality on eligible Tribal lands in Region 5.

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<sup>2</sup>Bois Forte was eventually found to be eligible, although ITC was not.

<sup>3</sup>Total Section 106 funds available to Region 5 tribes in fiscal year 1996 were \$889,966.

Without adequate procedures for ensuring eligibility, Region 5 may inadvertently award future grants to ineligible grantees. The Region may also be unable to support its eligibility determinations if it does not require complete documentation of future eligibility reviews.

### ***Recommendations***

Region 5 needs to correct its error and restore funds to the Section 106 allocation for eligible Indian tribes.

Region 5 also needs to develop and implement procedures to ensure that Section 106 grantees are eligible to receive the grants before awarding them. The procedures should require complete documentation of the eligibility determinations.

### ***Region 5 Comments***

In response to our recommendation to restore funds to the Section 106 allocation, the Acting Regional Administrator stated that an action to de-obligate the unexpended balance of ITC's Section 106 grant (\$37,462) will be processed during the second quarter of fiscal year 1999. He also stated that Region 5 is examining alternatives for addressing the Section 106 funds ITC already expended (\$92,538).

In response to our recommendation to develop and implement procedures, the Acting Regional Administrator indicated that the Region will implement several corrective actions. For instance, Region 5:

- will finalize changes to its procedures for documenting capability analyses and emergency powers determinations. Once finalized, the procedures will be implemented on a six-month pilot basis and will then be reviewed by a team of staff and management level participants. The procedures will be added to the State and Tribal Programs Branch Procedures Manual.
- has developed checklists for 106 grants, to ensure applicants are 106-eligible tribes and that the activities proposed in the applicant's workplan are eligible for 106 funding.
- will review and improve grant award procedures and associated tools, such as grant processing checklists.
- will make the list of 106-eligible tribes more accessible by adding the list to the TAS and grants processing procedures and including it in the Water Division's Monthly Monitoring Report.

- is considering adding a procedural step where all water program tribal grants will be reviewed by one tribal program person, to help ensure grantee eligibility requirements are met.
- has recently completed a new database system for tracking water program grant-related information and for helping to ensure compliance with applicable requirements.

### ***OIG Evaluation***

We concur with Region 5's decision to de-obligate the unexpended ITC funds and accept the milestone date of March 31, 1999 for completing this action. Regional officials still need to provide corrective action and a milestone date for addressing the expended grant funds.

The Region's proposed corrective actions for developing and implementing procedures to ensure tribal eligibility should address our concerns, when fully implemented. Region 5 officials need to provide milestone dates for when each of the corrective actions will be completed.

### **Issue 6: Can Region 5 properly account for all available fiscal years 1995 through 1998 Section 106 grant funds?**

Region 5 accounted for the Section 106 funds available for award in fiscal years 1995 through 1998, with only two minor exceptions. The exceptions, \$18 in fiscal year 1997 and \$22 in fiscal year 1998, resulted from differences in the figures the OIG and the Region used as the Headquarters allocations in those years.

Although Region 5 was able to account for the funds, we found it difficult to reconcile the amounts available, planned, and awarded in fiscal years 1995 through 1998. This occurred because of a weakness in the Region's management controls. Some supporting documents were not clear or were not available. The Region should document and be able to clearly identify when and where the funds are awarded.

### ***Recommendation***

Region 5 needs to improve its management controls. Specifically, the Region needs to develop better procedures for tracking and documenting how the available funds designated for the tribes are awarded.

### ***Region 5 Comments***

The Acting Region 5 Administrator stated that the Water Division's State and Tribal Programs Branch will refine its procedures to ensure that clear documentation is available in a timely fashion to show the following:

- tribal fund allocations by Headquarters;
- any adjustments made by the region and the supporting rationale;
- development of initial tribal funding plans;
- modifications to the funding plan after its external release and supporting rationale;
- documentation of the actual funding provided;
- a summary of the funds carried over for tribal funding for the following fiscal year.

The documentation will be merged and stored in central State and Tribal Program Branch files at the close of each fiscal year.

***OIG Evaluation***

Region 5's proposed actions should address our concerns, when fully implemented. Regional officials need to provide a milestone date for when the procedures will be revised and implemented.

## Scope, Methodology, and Prior Audit Coverage

### Scope

We reviewed the Clean Water Act Section 106 Tribal Grants program in Region 5. We limited our focus to grants Region 5 awarded to Indian tribes from fiscal year 1995 through fiscal year 1998. We began our fieldwork on June 1, 1998 and completed it on November 23, 1998. We issued a draft report to Region 5 on December 14, 1998 and received the Region's response dated February 16, 1999.

We reviewed management controls over the Section 106 grant process as needed to address our objectives. In general, Region 5's controls over Section 106 grants were not sufficient. Our specific concerns are discussed in the body of the report.

**Limitation:** Due to an ongoing investigation by the OIG's Office of Investigations, we could not perform all of the audit work we would otherwise have completed related to the first issue discussed in our report, whether Region 5 improperly allocated Section 106 grant funds. Had we not been limited in our scope of work, we might have discovered information that would have resulted in a different conclusion than the one presented in this report.

### Methodology

To answer our first objective (allocation of grants), we determined how Region 5 allocated available grant funds to tribes, by interviewing Water Division and Resources Management Division staff. We researched the Clean Water Act, applicable regulations, and EPA policy to find criteria for how Section 106 grant funds were supposed to be allocated.

To answer our second objective (awarding grants in excess of available funds), we interviewed Water Division and Resources Management Division personnel to obtain information about what funds were available and awarded. We researched appropriations law, regulations, and EPA policies to determine what criteria existed regarding use of funds for various fiscal years. Finally, we randomly selected a sample of Section 106 tribal grants to review. In selecting the sample, we obtained a report of grants awarded from fiscal year 1995 through May 21, 1998, from the Grants Information Control System. We did not review the system's controls or verify the accuracy of the data in the system. The universe of grants in that time frame was 40 grants to 20 tribes. We reviewed a total of 14 grants to 7 tribes, covering 35 percent of the universe. See table 1 for a list of grants reviewed. We reviewed the grant files to determine whether: (1) the grants were included in Region 5 funding plans and for what amounts, (2) the grants were awarded for a higher amount than was available, and (3) any other problems or concerns existed.

<b>Table 1: Sample for Objective 2</b>	
<b>Tribe</b>	<b>Grants</b>
Bad River	985321010 985321020
Bois Forte	985316010 985316020
Fond du Lac	985463011 995797020 995797030
Lac du Flambeau	985467010
Menominee	995079050 995079060 995079070
Oneida	985399010 985399020
St. Croix	985372010

To answer our third objective (use of Section 104 grants in place of Section 106 grants), we reviewed the Clean Water Act and EPA guidance for Section 104 and 106 grants to determine their intended uses. We interviewed Water Division officials and reviewed the proposed work plans for the grant in question. We obtained input from the OIG’s General Counsel on whether it was proper to use Section 104 funds for a project that had been proposed under Section 106.

To answer our fourth objective (use of Section 106 funds to pay for litigation expenses), we obtained information about payment of litigation expenses from Water Division, Resources Management Division, and Office of Regional Counsel personnel. We obtained input from the OIG’s General Counsel to determine whether such payments from Section 106 funds were proper.

To answer our fifth objective (awarding grants to tribes who were not eligible), we monitored Region 5’s internal review of its TAS determinations. We also selected a judgmental sample of grantees to review their eligibility for Section 106 grants. We developed a universe of all tribes that had received Section 106 grants between fiscal year 1995 and fiscal year 1998.

From a universe of 22 grantees, we reviewed 12, or 55 percent.<sup>4</sup> In selecting our sample, we included tribes that Region 5 believed had complete eligibility determinations (4 selected of 7 total), as well as tribes the Region believed had incomplete determinations, but still found to be eligible (6 of 13). We also reviewed two grantees that Region 5 did not include in its internal review. In selecting grantees to review, we also considered which state the tribes were located in, so we could obtain a balance of tribes in each state. We reviewed 3 of 4 grantees located in Michigan, 4 of 8 from Minnesota, and 5 of 10 from Wisconsin. See table 2 for a listing of grantees reviewed.

<b>Table 2: Sample for Objective 5</b>				
<b>Tribe</b>	<b>State</b>	<b>Region 5 Eligibility Review Category</b>		
		<b>Complete</b>	<b>Incomplete, but Eligible</b>	<b>Not Reviewed</b>
Mille Lacs	MN	X		
Oneida	WI	X		
Red Cliff	WI	X		
Red Lake	MN	X		
Bois Forte	MN		X	
Fond du Lac	MN		X	
Sokaogon/Mole Lake	WI		X	
St. Croix	WI		X	
Sault St. Marie	MI		X	
Stockbridge-Munsee	WI		X	
Grand Traverse	MI			X
Intertribal Council	MI			X

When reviewing the files, we considered whether the tribe: (1) met the eligibility requirements from the Clean Water Act Section 518(e) and 40 Code of Federal Regulations (CFR) Part 130.6(d), (2) had emergency authorities required under the Clean Water Act Section

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<sup>4</sup>Two tribes, Forest County Potawatomi and Grand Traverse, were added to this universe, although they were not part of the universe for objective 2, because they did not receive Section 106 grants until later in fiscal year 1998.

504 and 40 CFR Part 35.260, and (3) was Federally recognized by the Secretary of the Interior. We also reviewed how Region 5 reached its eligibility determination.

To answer our sixth objective (accounting for all available Section 106 grant funds), we obtained information on the amount of funds available for award each year for fiscal years 1995 through 1998. We compared the funds available to the funds Region 5 planned to award and the funds actually awarded for each year. We created a spreadsheet in Lotus 123 Release 5 to track the funds available for each fiscal year, including any carryover of funds not awarded. We worked closely with regional staff to reconcile any differences found between our records and theirs.

### **Prior Audit Coverage**

There was no prior audit coverage of the Region 5 Section 106 Tribal Water Grants program.



## Region 5 Response to Draft Report



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590  
FEB 16 1999

### MEMORANDUM

**SUBJECT:** Region 5 Response to the office of Inspector General  
Draft Report on Region 5 Section 106 Tribal Water  
Grants

**FROM:** David A. Ullrich  
Acting Regional Administrator

**TO:** Elissa R. Karpf, Deputy Assistant Inspector General  
For External Audits

Thank you for the opportunity to respond to the draft report on Region 5 Section 106 Tribal Water Grants. Most of the Region's issues with the draft report were resolved through intense negotiations between our staffs, and we appreciate the responsiveness of the OIG to the Region's concerns. The Region's remaining comments are attached, along with our formal response to the OIG recommendations.

If you have any questions concerning these comments, please contact Ms. Mary Pat Tyson, at (312) 886-3006.

David A. Ullrich

cc: Gail C. Ginsberg, Regional Counsel  
Norman R. Niedergang, Asst. Regional Administrator  
for Resources Management Division  
Tinka Hyde, Acting Director, Water Division

Attachment

*Note: The original response was signed by David A. Ullrich.*

**Region 5 Response to OIG Report  
on the Region's Use of Clean Water Act Section 106 Funds**

**Issue 4**

**Issue: Did Region 5 improperly use Section 106 grant funds to pay for litigation settlements to the State of Wisconsin and/or Wisconsin Tribes?**

OIG noted in its report that Region 5 used \$75,139 in Section 106 funds to reimburse the Lac du Flambeau Band of Chippewa for litigation expenses incurred in defending a challenge to the Tribe's authority to administer a water quality standards (WQS) program. OIG questioned whether this use of 106 funds was proper.

***Background***

The State of Wisconsin filed a lawsuit challenging Region 5's decision to grant Treatment as a State (TAS) designation for the Clean Water Act Section 303 WQS program. Although the original parties of the lawsuit were the State and EPA, the Lac du Flambeau Tribe felt the matter was critical to its sovereignty and environmental well-being, and joined the case as an intervening defendant. The Tribe incurred legal expenses as a result of its intervention in the lawsuit, and requested reimbursement for some of these expenses. After reviewing the Tribe's request, EPA determined that it would reimburse the Tribe for a specified portion of these costs.

Region 5 sought the advice of U.S. EPA's Office of General Counsel (OGC) on whether EPA could legally reimburse legal fees of the Wisconsin Tribes involved in this litigation. OGC advised Region 5 that it would be legal to reimburse the Tribe's legal fees under CWA Section 106. After consideration of the matter, EPA decided, as a policy matter, that Section 106 funds should not be used to reimburse routine legal fees for a Tribe's development of water quality standards and TAS applications. However, EPA determined that due to the unique circumstances concerning this litigation, circumstances that Region 5 does not envision reoccurring, it would be appropriate to reimburse a portion of the Tribe's legal fees, i.e., that portion which represented wasted effort.

After determining the amount of the Tribe's legal costs which potentially could be eligible, the Region sought deviations from regulatory requirements of Part 31 in order to allow the Region to proceed with a grant amendment. A deviation was approved by the Grants Administration Division in June 1998. An amendment was subsequently processed to reimburse the Tribe.

***Response***

The Region consulted with the Office of Water and OGC prior to processing the amendment for Lac du Flambeau. These offices concurred with the Region's decision that Section 106 funds could be awarded to the Tribe for a specified portion of its legal costs. OIG recommended that Region 5 obtain a written legal opinion from EPA's OGC on the legality of awarding Section 106 funds to reimburse a Tribe's litigation expenses incurred in defending its ability to administer a water quality standards program. Region 5 followed up on this recommendation--see Attachment 1 (memo dated December 24, 1998). A written response from OGC on the use of Clean Water Act Section 106

funds for legal expenses was provided in response to this memo--see Attachment 2 (dated January 28, 1999). While OGC's opinion provides the legal basis for the award of Section 106 funds to reimburse litigation expenses incurred in defending a tribe's ability to administer a water quality standards program, Region 5, as a policy matter does not consider the reimbursement of such legal expenses as a routine cost of administering a water quality standards program. Region 5, as a policy matter, will not give preference for reimbursement of litigation expenses over other programmatic costs of administering a water quality standards program. See Attachment 3, Memorandum from David Ullrich, Acting Regional Administrator, to Jo-Lynn Traub, Director, Office of Water, April 23, 1998.

#### **Issue 5**

**Issue: Did Region 5 award Section 106 grants to Tribes that had either not received TAS status or whose eligibility could not be verified?**

#### ***Eligible Recipients***

OIG noted in its report that eleven of the twelve grantees reviewed as part of its assessment were eligible recipients for Clean Water Act Section 106 grants. However, OIG pointed out that Region 5 awarded a \$130,000 Section 106 grant to one organization that appears not to have been eligible, the InterTribal Council of Michigan (ITC). ITC defines itself as a "health and human services organization designed to provide services to the Federally recognized Tribes in the State of Michigan," which includes assisting in the development of environmental program capacity for its member Tribes [ITC, Proposal for the Development of Best Management Practices for Non-Point Source Pollution of Surface Waters, June 1996].

In June 1996, ITC applied for two water program grants, to develop: (1) Best Management Practices Plans for four Michigan Tribes (Grand Traverse Band of Ottawa and Chippewa Indians; Bay Mills Indian Community; Saginaw Chippewa Indian Tribe of Michigan; and the Hannahville Indian Community); and (2) Wellhead Protection Plans for two Tribes (Grand Traverse Band of Ottawa and Chippewa Indians, and the Hannahville Indian Community). In September 1996, Region 5 awarded a Section 106 water grant for these activities (the Region combined the two grant requests into a single award). In December 1997, a Water Division project officer determined that ITC appeared to have been ineligible to receive a Section 106 grant because ITC was not a State, interstate agency, or a 106-eligible Tribe.

Upon learning of this issue, Region 5 immediately took action to stop further expenditures under this grant. A Section 104 grant was awarded to complete the planned activities. However, ITC had already expended \$92,538 out of this grant by the time these actions were taken.

In its report, OIG recommended that Region 5 "correct its error and restore funds to the Section 106 allocation for eligible Indian Tribes" (Draft Report at 8).

*Response*

Region 5 has examined several issues and alternatives associated with addressing the Section 106 award to ITC, including:

- ▶ Whether ITC was eligible for a 106 grant as a consortium;
- ▶ How to best process an action(s) to make available to one or more 106-eligible Tribes the balance that was not expended by ITC (\$37,462);
- ▶ What actions are appropriate to address the issue of the balance expended by ITC. Among options specifically evaluated were:
  - The appropriateness of bringing a cost recovery action for the Section 106 funds expended by ITC; and
  - Options for supporting the work done by ITC (\$92,348) using Section 104(b)(3) funds.

Recipient Eligibility - The Region first examined whether ITC would be eligible for a Section 106 grant as an inter-Tribal consortium. In the Agency's discussion of CWA Tribal grant eligibility found at 54 F.Reg. 14354 April 11, 1989, the Agency stated that it

anticipates that smaller Tribes may have difficulty administering these grant programs effectively and efficiently. Consequently, EPA encourages smaller Tribes to consider consortia or InterTribal agencies as a way to obtain the necessary expertise to administer these programs. While EPA encourages applications by groups or consortia of small Tribes

the same geographical area, each application, regardless of the applicant's size, will be evaluated on a case-by-case basis.

This provision, read together with the definition of eligible Indian Tribe found at 40 CFR 35.110, which defines an eligible Tribe for purposes of the CWA, as "any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation," suggests that inter-Tribal consortia may be eligible for Section 106 grants in some cases, for example if a consortium of Tribes (such as the Minnesota Chippewa, which is made up of six member bands) is recognized as a federal Indian Tribe by the Secretary of Interior; or if a consortium comprised of individual Tribes, which each respectively had been determined eligible for Section 106, applies for a 106 grant.

The InterTribal Council of Michigan is not in and of itself a federally recognized Tribe. As stated above, it is a service organization for federally recognized Tribes in Michigan. At the time of the ITC grant award in 1996, none of the Tribes for which projects were submitted under ITC's grant workplan had demonstrated eligibility for Section 106. Therefore, at the time of the award, ITC appears to not have been eligible to receive the grant funds under Section 106.

Unexpended Balance - The unexpended balance in the ITC grant (\$37,462) remains obligated at this time as unexpended Section 106 funds, as discussed in the draft OIG Report. The Region has confirmed that the \$37,462 balance can be de-obligated and the funds will be returned to Region 5 for subsequent award to an eligible Region 5 Tribe later in FY 1999. This would partially address OIG's recommendation that the Region "restore funds to the Section 106 allocation for eligible Indian Tribes." An action to de-obligate this balance will be processed during the second quarter.

Expended Balance - The Region has closely examined whether it should seek recovery of the funds awarded to and expended by ITC. In assessing this option, the Region considered the following: (1) ITC did not seek Section 106 funds in its grant application; rather ITC applied for funding without specifying the source; (2) The award of funds to ITC through the Section 106 program appears to have been the result of a processing error. The commitment notices for this grant initially identified the award as an "X" grant (grants which begin with the letter "X" generally utilize Section 104 funds, while "I" grants use Section 106 funds). There was communication during the preparation of the grant documents that the grant should be processed as a Section 104 award; and (3) the work proposed by ITC was eligible for funding under another CWA grant program, Section 104(b)(3). Because it appeared that the award of funds to ITC through the 106 program was due to the Region's error, and the work proposed would have been eligible for funding through the Section 104(b)(3) program, the Region currently does not recommend seeking repayment of the funds from ITC.

Region 5 believes the preferred choice for addressing the issue of the \$92,538 awarded to and expended by ITC is to process actions to support the work done by ITC using Section 104(b)(3) funds, rather than pursuing cost recovery. Based on the Region's preliminary review, ITC is eligible to receive a Section 104 grant, and the water program work carried out by ITC would be eligible under Section 104. Specifically, Section 104(b)(3) of the CWA authorizes the Administrator to "make grants to State water pollution control agencies, interstate agencies, other public or non-profit institutions, organizations, and individuals" 33 U.S.C. § 1254(b)(3). ITC is a service organization. The projects to be funded through its 1996 grant proposal were for development of a wellhead protection plan for the Hannahville Indian Community and the Grand Traverse Band, as well as development plan of best management practices for non-point source pollution of surface waters for Grand Traverse Band, Bay Mills, Saginaw Chippewa Tribe, and Hannahville Indian Community. Work of this nature would be eligible for funding under Section 104(b)(3) of the CWA.

The Region is investigating alternative approaches for making this correction. The alternatives currently being evaluated include:

- ▶ Reprogramming the 106 funds on the ITC grant, to change these funds to 104(b) money. The Region would process an amendment to the ITC grant changing the authority and the accounting data to reflect the reprogramming.
- ▶ Processing amendments to previously-awarded Section 104(b)(3) grants and to the ITC grant, with the result that the work done by ITC would be funded using 104(b)(3) monies. The Region has preliminarily identified 106-eligible Tribes that have received 104(b)(3) grants, with workplans comprised of activities that would also be eligible for funding under Section 106.

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Under this alternative, the Region would amend suitable 104(b)(3) grants to support the program work done with Section 106 monies, and would amend the ITC grant to support water program work performed with 104(b)(3) funds.

Region 5 will continue its examination of the alternatives for supporting the work done by ITC using Section 104(b)(3) funds, and determine what approach is most appropriate. Any actions would be carried out only following complete investigation into the eligibility of the work performed by the recipients, and verification that there are no other legal issues associated with implementing these actions. Region 5 will apprise OIG of the actions determined to be appropriate to resolve this issue.

***Controls for Ensuring Recipient Eligibility***

OIG expressed in its report that Region 5 did not have adequate controls/procedures in place to ensure that all Section 106 grantees were eligible to receive grants. OIG noted that in two instances (ITC and Bois Forte), it appeared that Region 5 did not perform appropriate reviews to confirm the grantee was eligible to receive a Section 106 grant prior to grant award. OIG also noted other areas where the Region's grant-related procedures should have been stronger, specifically:

- ▶ Five cases where the Region did not document a capability review and/or an emergency powers determination in its TAS decision-making; and
- ▶ Two instances where the Region awarded grants after TAS review work had been done but before the TAS approval letters had been sent to the Tribes.

The Region has recognized the need to strengthen its controls and procedures related to TAS determinations and program grant awards, and has been working on numerous improvements. A summary of some of the key actions taken and planned is provided below:

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1. TAS Procedures: Capability Reviews - Region 5 had identified in 1996 and 1997 that needed to strengthen and document its procedures related to TAS determinations for 106 grant eligibility, as well as for other CWA programs. Among the specific changes made to the procedures was to add a step to specifically document the Region's capability determinations. Based on conversations with present and former EPA employees who worked on 106 eligibility determinations, the process that was historically used for capability determinations did not call for a written summary of the capability review. The Water Division, with

input

capability

from others (e.g. Indian Environmental Liaisons) as appropriate, would make a determination taking into account:

- ▶ The materials submitted in the application (e.g. Tribal environmental regulations);
- ▶ The Region's previous work with the Tribe;
- ▶ The Tribe's performance in administering other EPA grants (e.g. GAP grants); and
- ▶ Current and future Tribal staffing of environmental programs.

In some cases this review was documented on a checklist, but in many cases it was not.

Following a positive determination regarding capability, and already having received a memo

from the Office of Regional Counsel on other eligibility requirements, the Water Division would prepare a decision package for the Regional Administrator to document the results

the entire review. Capability determinations were not separately documented by the Water Division in a memo to the file. This lack of complete documentation was identified by the Region as a procedural flaw, and current procedures call for a documented capability analysis. The Water Division and the Office of Regional Counsel have also created two specific checklists to guide staff reviewers in making 106 eligibility determinations, one of which

specifically intended for capability reviews. These checklists are included in the Region's *Procedures for Processing Indian Tribe Applications for Water Program Eligibility Approval and Program Funding Approval*, and are available to OIG upon request.

2. TAS Procedures: Emergency Powers Determinations - Region 5 had identified in 1998 that it needed to clarify the appropriate criteria for emergency powers determinations, and strengthen its procedures for documenting reviews of Tribes' emergency powers (pursuant Section 106(e) of the Clean Water Act). Through the course of reviewing files for all of 106-eligible Tribes, the Region found four tests had been used to make determinations regarding whether a Tribe could satisfy the emergency powers requirement. Tribes were to have powers equivalent to EPA's powers under Section 504 of the Clean Water Act if:

- ▶ The Tribal Attorney General (or equivalent) submitted an affirmative statement asserting that the Tribal court had general authority to issue temporary restraining orders ("Fort Berthold" test outlined in memo from Robert B. Schaefer to Richard Freeman, July 10, 1989);
- ▶ The Tribal constitution provides the Tribe with broad authority to pass and enforce laws/ordinances necessary to protect health and welfare, with authority to create law enforcement agencies, and with the authority to govern the conduct of members ("Oneida" test described in memo from Robert B. Schaefer to Richard Freeman, July 10, 1989, and also used in the Red Cliff, Red Lake, and Grand Portage Section 106 eligibility approvals);
- ▶ The Tribe's application contains a narrative statement by the Tribal attorney, or other equivalent Tribal official stating that the Tribe possesses emergency authority comparable to that of EPA under Section 504 (see for example the February 6, 1992 letter from Keweenaw Bay Indian Community Tribal Attorney); or
- ▶ The Tribal constitution or laws clearly provided the Tribe with power to enjoin activities determined to be harmful to the health or welfare of persons or natural resources (see for example the Mille Lacs Band's and Fond Du Lac Band's explicit abatement authority).

The Region convened a conference call with OGC on September 17, 1998, to discuss the different tests used by the Region in its past 106 eligibility determinations. The discussion focused on how numerous different tests might be used, and that the threshold test for

establishing emergency powers/contingency plan capability might be satisfied in many different ways depending upon a Tribe's governing system (for example, participants in the call discussed the fact that Section 504 would not require that a Tribe possess its own court



system). Thus the criteria that had been used in Region 5 106 eligibility determinations were reconfirmed.

Reflecting that documentation of the emergency powers reviews had been somewhat sporadic, the TAS procedures now call for the Region to specifically document the emergency powers determination (including the criteria or "test" used to find a Tribe had adequate emergency powers).

The current procedures used by the Region for TAS determinations are reflected in a draft flow chart and a procedural document (*Procedures for Processing Indian Tribe Applications for Water Program Eligibility Approval and Program Funding Approval*). Once finalized, Water Division and the Office of Regional Counsel will implement these procedures in all TAS reviews. Until these procedures have been finalized, the Region is not processing program applications currently in house. The Region intends to implement the procedures on a six-month pilot basis, after which they will be reviewed by a team comprised of staff and management level participants in the process. The TAS procedures will be added to the State and Tribal Programs Branch Procedures Manual, and will be periodically reviewed and revised to reflect experience gained in completing eligibility reviews and any new guidance from EPA Headquarters.

3. Grant Award Procedures - In addition to strengthening TAS review procedures, the Water Division has since 1997 been working to enhance grant processing procedures, to ensure grant eligibility requirements (and other applicable requirements) are met prior to awards. Procedures have been refined and documented, and have been provided to the staff for use. Grant processing-related procedures are included in the State and Tribal Programs Branch Procedures Manual. The Water Division and the Office of Regional Counsel have also developed a specific checklist for 106 grants, to ensure applicants are 106-eligible Tribes and that the activities proposed in the applicant's workplan are eligible for 106 funding. Efforts

are

being made to review and improve procedures and associated tools, such as grant processing checklists, on a periodic basis. For example, a "Grants Roundtable" meeting was held

in

August 1998, with Water Division Project Officers and Grants Specialists participating. The objective for this meeting was to discuss and evaluate ways of strengthening grants

processing

and grants management procedures.

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The Water Division will make the list of 106-eligible Tribes more accessible through

following:

- ▶ Including the list in the TAS procedures and the grants processing procedures;
- ▶ Including the list in the Water Division's Monthly Monitoring Report, which is distributed to the Water Division Managers and Project Officers, and to the Acquisition and Assistance Branch in the Resources Management Division (RMD).

grantee

The Water Division is also considering adding a procedural step where all Tribal program grants are reviewed by one Tribal program person, as an added control to help ensure

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eligibility requirements are met, and to foster consistency across water program grants

Tribes.



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4. Tracking Systems - Region 5 has recently completed the development of a new database system for tracking water program grant-related information, and for helping to ensure compliance with applicable requirements. The Tracking and Information Management (TIMS) builds off of information in GICS, but will include significantly more information pre-award activities, project/program workplans, QAPP requirements, and other data for Project Officers to manage grants and for program supervisors and RMD to track progress. Among the data elements in the pre-award folder will be information on the eligibility potential 106 recipients. This will provide even a further control to help ensure compliance with eligibility requirements.

**Issue 6: Can Region 5 properly account for all available fiscal years 1995 through 1998 Section 106 grant funds?**

OIG noted that the Region accounted for the Section 106 funds available for award in fiscal years 1995 through 1998, with only two minor exceptions. The exceptions, \$18 in fiscal year 1997 and \$22 in fiscal year 1998, resulted from differences in the figures OIG and the Region used for the Headquarters allocations for those years.

OIG stated that although Region 5 was able to account for the funds, the auditors found it difficult to reconcile the amounts available, planned, and awarded in fiscal years 1995 through 1998, because some supporting documents were not clear or were not available. OIG recommended that the Region improve procedures for tracking and documenting funding allocations.

***Response***

Over the past 2-3 years, the Water Division has centralized management of funding plans for its many grant programs. All planned allocations to Tribes for water program grants are consolidated and tracked by one employee (the Funding Plan Coordinator) in the State and Tribal Programs Branch, and are aggregated on a spreadsheet. Memoranda or other documentation related to the establishment of these allocations or changes to these allocations will be maintained by the Funding Plan Coordinator. Back-up information, e.g., checklists used to screen and rank pre-proposals to help develop the funding plan, will be maintained by the Tribal 106 Coordinator in a central file. This role clarification and changes to the Branch's operating systems have improved documentation of funding plans, and the ease with which grant awards can be cross-referenced back to funding plans.

Funding plans by their nature are subject to change. The Region must make adjustments as new information is learned, e.g., grantee financial status reports show unspent balances which need to be de-obligated and then appropriately reallocated, or a potential grantee is found to be not performing well in its management of an existing grant. Branch procedures call for all changes to funding plans to be managed through and fully documented by the Funding Plan Coordinator.

Branch procedures will be further refined to ensure that clear documentation is available in a timely fashion to show the following:

- ▶ Tribal fund allocations by Headquarters;
- ▶ Any adjustments made by the Region, and the supporting rationale;
- ▶ Development of initial Tribal funding plans;
- ▶ Modifications to the funding plan after its external release, and supporting rationale;
- ▶ Documentation of the actual funding provided (compiled at the end of the fiscal year); and
- ▶ A summary of the funds carried over for Tribal funding for the following fiscal year.

At the close of the fiscal year, the documentation maintained by the Funding Plan Coordinator and the Tribal 106 Coordinator will be merged and stored in central State and Tribal Program Branch files.

### **Conclusion**

Region 5 appreciates OIG's thorough review of the Tribal 106 grant program, and has initiated improvements to systems and procedures that are consistent with OIG's recommendations. The system improvements will make information more readily available for managers to track activities, and are expected to provide greater degrees of assurance that all applicable requirements are complied with. Efforts will be on-going to continuously improve systems and procedures over time.

Region 5 will keep OIG apprised of its further progress in strengthening and documenting procedures, and actions to address the 106 grant that was awarded to ITC. Should managers or staff in the Office of the Inspector General have any questions regarding the Region's response to OIG's draft audit report, please ask that they contact Ms. Mary Pat Tyson at (312) 886-3006.

Attachments (3)

Attachment 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590  
DEC 24 1998

REPLY TO THE ATTENTION OF

MEMORANDUM

SUBJECT: Request for a Legal Opinion on CWA Section 106

FROM: David A. Ullrich (R- I 9J)  
Acting Regional Administrator

TO: Gary S. Guzy (W635D)  
Acting General Counsel

This memorandum is to request a written legal opinion from the Office of General Counsel ("OGC") on the legality of awarding Clean Water Act ("CWA") Section 106 funds to reimburse certain Indian Tribes' legal expenses incurred in the State of Wisconsin v. U.S. EPA Treatment as a State litigation.

Background

The State of Wisconsin filed a lawsuit in Federal District Court in both the Eastern District and the Western District of Wisconsin to contest U.S. EPA's 1996 decisions to treat certain Wisconsin Indian Tribes as States for purposes of administering a water quality standards program under the CWA ("TAS determinations"). The Lac du Flambeau Tribe intervened in the Western District lawsuit, and the Oneida Nation intervened in the Eastern District. During the litigation, the State of Wisconsin challenged the adequacy of the administrative record for the TAS determinations. As a result of testimony and documents produced in discovery on this issue, U.S. EPA concluded that the precise contents of the administrative record for the Oneida TAS determination was uncertain. Because of this uncertainty in the administrative record, U.S. EPA withdrew its TAS determinations for the Oneida and Lac du Flambeau Tribes in May 1997, and moved to dismiss the lawsuits. After the Courts granted U.S. EPA's motions to dismiss, U.S. EPA settled with the State of Wisconsin on the State's petition for attorneys fees.<sup>1</sup> U.S. EPA received a request from the Lac du Flambeau for reimbursement of its litigation expenses.

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<sup>1</sup> The attorney fees were paid from the U.S. Judgment Fund.

*Note: The original was signed by David A. Ullrich.*

U.S. EPA Region 5 sought the advice of OGC on whether U.S. EPA could legally reimburse legal fees of the Lac du Flambeau Tribe. OGC verbally advised U.S. EPA Region 5 that it would be legal to reimburse the Lac du Flambeau legal fees under CWA Section 106. However, the Office of Water (“OW”) decided, as a policy matter, that Section 106 funds should not be used to reimburse routine legal fees or litigation expenses for a Tribe’s development of water quality standards and TAS applications. Nevertheless, OW agreed with Region 5 that, due to the unfortunate and unique circumstances of this particular situation, U.S. EPA could reimburse the portion of the litigation expenses that represented wasted effort; that is, those tasks and expenses that would have to be repeated for any future TAS litigation. After evaluating the litigation expenses documentation provided by the Lac du Flambeau to determine the amount of costs that met this criteria, U.S. EPA Region 5 reimbursed \$75,000 of the Lac du Flambeau’s litigation expenses.

Draft Report of the Inspector General

On December 14, 1998, the Office of Inspector General (“OIG”) issued a draft report on “Region 5 Section 106 Tribal Water Grants.” (See Attachment.) One of the issues examined by the OIG was whether Region 5 “improperly used Section 106 grant funds” to pay for litigation expenses of Wisconsin tribes. The OIG’s recommendation on this issue is that Region 5 obtain a written legal opinion from OGC on the legality of awarding Section 106 funds to reimburse a tribe’s litigation expenses. The OIG recommends that if the OGC opinion does not support Region 5’s action, then Region 5 will need to annul the grant and recover the funds from the tribe.

U.S. EPA Region 5 has 30 days to respond to the OIG’s draft report. U.S. EPA requests that OGC provide a written legal opinion on the legality of using CWA Section 106 to reimburse litigation expenses. If possible, we would appreciate having the legal opinion to include with our response to the OIG, which is due January 14, 1998.

cc: Robert G. Dreher (W635E)

Attachment

Attachment 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**RECEIVED**

**FEB 0 2 1999**

U.S. EPA REGION 5  
OFFICE OF REGIONAL ADMINISTRATOR

OFFICE OF  
GENERAL COUNSEL

January 28, 1999

MEMORANDUM

**SUBJECT:** Use of Clean Water Act section 106 grant funds for the payment of legal expenses

**FROM:** Leslie Darman  
Office of General Counsel  
Finance and Operations Law Office,  
Assistance Law Practice Group

**THROUGH:** Steve Pressman, Assistant General Counsel  
Office of General Counsel,  
Finance and Operations Law Office,  
Assistance Law Practice Group

**TO:** David Ullrich  
Acting Regional Administrator  
Region V

By memorandum dated December 24, 1998, you requested a legal opinion from the Office of General Counsel (OGC) on the legality of awarding Clean Water Act (CWA) Section 106 funds to reimburse some of the Lac du Flambeau Tribe's legal expenses incurred in the *State of Wisconsin v. U.S. EPA* litigation concerning EPA's designation of certain Tribes as eligible for treatment in a manner similar to a state for the purpose of administering water quality standards.

According to your letter, the State of Wisconsin filed complaints against EPA in both the Eastern and the Western Districts of Wisconsin contesting EPA's 1996 decision to treat certain Wisconsin Indian Tribes as states for purposes of administering a water quality standards program under the Clean Water Act ("TAS determinations"). The Lac du Flambeau Tribe intervened in the Western District lawsuit, and the Oneida Nation intervened in the Eastern District. During the litigation, Wisconsin challenged the adequacy of the administrative record for the TAS determinations. As a result of testimony and documents produced in discovery on this issue, EPA concluded that the precise contents of the administrative record for the Oneida TAS determination were uncertain. Because of this uncertainty in the administrative record, EPA withdrew its TAS determinations for the Oneida and Lac Du Flambeau Tribes and moved to dismiss the complaints. After the Court granted EPA's motions to dismiss, EPA settled

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*Note: The original was signed by Leslie Darman and Steve Pressman.*



Wisconsin's petition for attorney's fees and the fees were paid from the United States Judgment Fund.

The Lac du Flambeau Tribe also requested reimbursement of its legal expenses. EPA Region V sought the advice of OGC on whether and how EPA could reimburse the Lac du Flambeau Tribe's legal expenses. The Office of General Counsel advised Region V and the Office of Water that, as a legal matter, the Agency could award a § 106 grant to the Tribe for legal expenses incurred in defending its ability to administer a water quality standards program. Region V also consulted with the American Indian Environmental Office and the Office of Water.

After consideration of the matter, EPA decided, as a policy matter, that Section 106 funds should not be used to reimburse routine legal expenses for a Tribe's development of water quality standards and TAS applications. However, EPA determined that it would be appropriate to reimburse a portion of the Lac du Flambeau Tribe's legal fees, specifically, that portion of the legal fees attributable to the Tribe's efforts in defending its ability to administer a water quality standards program that were wasted because of the unfortunate and unique circumstances of this case.

In an audit of Region V's award of CWA § 106 grants to tribes, the EPA Office of Inspector General (OIG) reviewed a CWA § 106 grant to the Lac du Flambeau Tribe for these legal expenses and concluded that the award was not proper because:

In [the OIG'S] opinion, the litigation expenses did not qualify under Section 106 as a cost of administering a program for the prevention, reduction, and elimination of water pollution. If the State of Wisconsin's lawsuit had been a challenge to the water quality standards developed under the authority of the tribe's TAS status, then the tribe's defense of its standards may have qualified as a cost of administering a water quality program. However, the tribe's purpose in incurring litigation expenses, its desire to maintain TAS status and the authority to carry out a water quality program, did not constitute "administering" the program within the meaning of Section 106. Without TAS status, the tribe was not authorized to carry out the water quality standards program.

Draft Audit Report No. E3RWF8-05-0045 (December 14, 1998). The OIG recommended that Region V obtain a written opinion from OGC "on the legality of awarding Section 106 funds to reimburse a tribe's litigation expenses incurred in defending its ability to administer a water quality standards program."

We disagree with the OIG's analysis and conclusion. Section 106 funds could be used to reimburse the Lac du Flambeau Tribe for legal expenses associated with a lawsuit challenging the Tribe's water quality standards program. Section 106 of the Clean Water Act authorizes grants to assist States, interstate agencies, and Indian tribes "in administering programs for the prevention, reduction, and elimination of pollution, including enforcement . . . ." The

development, expansion, and implementation of a water quality standards program can clearly be a part of a larger “program[] for the prevention, reduction, and elimination of pollution.” Expenses incurred in a tribe's efforts to develop, expand, or implement a water quality standards program are thus encompassed by the phrase “administering programs for the prevention, reduction, and elimination of pollution.” The Lac du Flambeau Tribe needed a separate TAS determination in order to administer a water quality standards program. Like other costs associated with developing a water quality standards program, the legal fees that the Tribe incurred in defending its ability to administer a water quality standards program (the TAS determination) are reimbursable under a §106 grant.

The OIG’s analysis is conclusory and simply suggests that the Tribe’s litigation expenses are not allowable under § 106 because the Tribe did not already have TAS status to administer a water quality standards program.<sup>1</sup> The unstated premise in the OIG’s analysis is that § 106 grants may not be used to develop programs. We disagree. Costs (not otherwise unallowable) that are associated with a prerequisite to the actual administration of a water quality standards program are eligible for funding under § 106. We interpret the phrase “administering programs” to include the development and expansion of programs. This is consistent with the statute itself. While § 106(a) authorizes EPA to make grants for “administering programs”, § 106(c) authorizes EPA to “pay ... the reasonable costs as determined by the Administrator of *developing* and carrying out a pollution program.” 33 U.S.C. § 1256(a) and (c)(emphasis added). If Congress intended “administering” to mean exclusively the “carrying out” of a program, then it would not have given EPA the authority to pay for developing a program as well.

There is nothing in the legislative history to suggest that Congress used the term “administering programs” to preclude the Agency from awarding grants to establish, develop or expand State or Tribal programs for the prevention, reduction, and elimination of pollution. Moreover, Congress has demonstrated its ability to give EPA the limited authority to award grants exclusively for either development or implementation activities. *See, e.g.*, Indian Environmental General Assistance Act, 42 U. S. C. § 43 68b(b)(d) and (f); Clean Water Act, 33 U.S.C. § 1329(h); *compare* Clean Air Act, 42 U.S.C. § 7405(a) (“for the purpose of this section ‘implementing’ means any activity related to the planning, developing, establishing, carrying-out, improving, or maintaining of such programs”). Congress chose not to so limit EPA’s grant authority in § 106.

In conclusion, EPA’s interpretation of “administering” to include activities in support of the development, expansion, and establishment of a program is very reasonable. The Lac du Flambeau Tribe’s defense of its ability to administer a water quality standards program supported its development of a water quality standards program. Therefore, as a legal matter, the award of a § 106 grant to the Tribe for that purpose is proper.

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<sup>1</sup> It is difficult to discern the rationale for the OIG’s conclusion. OGC would have been able to respond more fully if the OIG had articulated more fully its reasons for concluding that the Tribe’s legal expenses were not reimbursable under a § 106 grant.

cc: Gary Guzy, General Counsel  
Robert Dreher, OGC  
Marla Diamond, OGC  
Howard Corcoran, OGC  
Jim Havard, OGC  
Clarence Braddock, OW  
Kathy Gorospe, AEEO  
Gaylene Vasaturo, ORC Region V  
Padma Klejwa, ORC Region V  
Barbara Wester, ORC Region V

Attachment 3



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590  
**APR 23 1998**

REPLY TO THE ATTENTION OF:

MEMORANDUM

**SUBJECT:** Decision to use CWA Section 106 Grant Funds to Reimburse Certain  
Legal Expenses for Wisconsin TAS Litigation

**FROM:** David A. Ullrich (R-19J)  
Acting Regional Administrator

**THRU:** Robert L. Springer (M-9J)  
Director, Resources Management Division

**TO:** Jo-Lynn Traub (W-15J)  
Director, Office of Water

As you know, last year U.S. EPA Region 5 withdrew its Treatment as a State ("TAS") decisions for the Oneida Nation and Lac du Flambeau Band due to uncertainties regarding the precise contents of the administrative records. Then, U. S. EPA moved to dismiss the pending litigation in Federal District Court in both the Eastern District of Wisconsin and the Western District of Wisconsin. The Western District Court granted U.S. EPA's motion last June and the Eastern District Court granted U.S. EPA's motion to dismiss last month.

After dismissal in the Federal District Court for the Western District of Wisconsin, U.S. EPA received a request for reimbursement of legal expenses from two of the tribes involved in the TAS litigation. After considerable evaluation, U.S. EPA Headquarters and Region 5 together made a decision that, due to the unique circumstances of this litigation, Section 106 grant money could be used to pay a portion of TAS legal expenses, as set out below.

Clean Water Act ("CWA") Section 106 grants are to assist Indian Tribes in administering programs for the prevention, reduction, and elimination of water pollution. U.S. EPA considers that some legal fees are within the scope of activities covered by the Section 106 grant authority; however, U.S. EPA's Office of Water does not allow, as a policy matter, Section 106 grant money to be awarded for routine legal costs associated with the tribes TAS water pollution control programs.

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*Note: The original was signed by David A. Ullrich and Robert L. Springer.*

2

Nevertheless, the Region, together with U.S. EPA's Office of Water, determined that, due to the circumstances presented by the Wisconsin litigation, it would be appropriate to reimburse a portion of the tribal attorneys' fees from the Fiscal Year (FY) 1998 Section 106 funds. Specifically, U.S. EPA would reimburse the portion of the tribal attorneys' fees which represented wasted effort, i.e., those tasks and expenses that would have to be repeated for any future TAS litigation or which would not be expected to be incurred in future TAS litigation.

Because there was no pre-approval for the expenditure of the tribal attorneys' fees, in order for the Section 106 funds to be awarded through a grant, it is necessary to seek a deviation for use of the funds to cover these costs. A copy of the deviation request for the Lac du Flambeau Band, which was sent by the Region to Headquarters on April 17, 1998, is attached as Attachment A. This deviation request further sets forth the rationale of the Agency for the abovementioned course of action.

We consider these legal expenses to be a one-time expenditure, again, due to the unique circumstances presented by the Wisconsin litigation. Please take all necessary steps to coordinate with the Resources Management Division to investigate the availability of discretionary funds. Our goal is to prevent the net loss of funds available to the tribes in your development of the Regional CWA Section 106 funding plan for Fiscal Year 1998.

Attachment

### **Abbreviations**

CFR	Code of Federal Regulations
EPA	United States Environmental Protection Agency
ITC	Intertribal Council of Michigan
LTBB	Little Traverse Bay Band
OGC	Office of General Counsel
OIG	Office of Inspector General
TAS	Treatment as a State

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