



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240



IN REPLY REFER TO:

MAY 16 2000

Gary S. Guzy, Esq.  
Office of General Counsel  
United States Environmental Protection Agency  
Washington, D.C. 20260

Re: Effect of Maine Indian Claims Settlement Act on State of Maine's Application to Administer National Pollutant Discharge Elimination System (NPDES) Program

Dear Mr. Guzy:

In response to your letter dated Oct. 21, 1999, attached is an opinion of the Department of the Interior, Office of the Solicitor, regarding the extent of the State of Maine's jurisdiction over the regulation of water quality in Indian country in light of the Maine Indian Claims Settlement Act. In your letter you indicated that EPA would give great weight to the opinion of the Department of the Interior, since the Department has broad responsibilities in the area of Indian affairs.

While the precise legal issues the state's application raises are of first impression, it is our opinion that as a matter of law, EPA must retain the NPDES permitting authority for discharges within the Indian Territories of the Passamaquoddy Tribe and the Penobscot Indian Nation. As our enclosed opinion shows, the State of Maine cannot demonstrate that it has adequate authority to administer the NPDES program within these Territories. Further, it is our opinion that regardless of EPA's decision on Maine's application, the Agency has a trust responsibility to the tribes in Maine, including the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs and must, therefore, exercise its available authorities to protect tribal lands, waters and other resources.

Thank you for this opportunity to provide the opinion of the Department. Please contact me if you have any questions.

Sincerely,

Edward B. Cohen  
Deputy Solicitor

**OPINION OF THE DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SOLICITOR**

**OPINION SUMMARY**

The State of Maine has applied to administer the Clean Water Act National Pollutant Discharge Elimination System program throughout the state, including within Indian country. The U.S. Environmental Protection Agency (EPA) sought the Department of the Interior's legal opinion on the extent to which, in light of the Maine Indian Claims Settlement Act (MICSA), Maine possesses legal authority over water quality within Indian country. The Clean Water Act requires a state to demonstrate it has such authority to receive program approval.

Under MICSA and the Maine Implementing Act (MIA) it incorporates, Maine is prohibited from regulating "internal tribal matters" within the Indian Territories of the Penobscot Indian Nation and the Passamaquoddy Tribe. This opinion will show that the regulation of water quality, including the regulation of point-source discharges, within these Indian Territories is an "internal tribal matter." The State of Maine, therefore, cannot demonstrate it has adequate authority to administer the National Pollution Discharge Elimination System program for discharges within the Penobscot and Passamaquoddy Indian Territories. Accordingly, it is our opinion that as a matter of law EPA must retain the NPDES permitting authority for discharges within the Indian Territories of the Passamaquoddy Tribe and the Penobscot Indian Nation.

In addition, it is our opinion that even if EPA approves the state's application to administer the NPDES program anywhere within Indian Country in Maine, including the lands of the Houlton Band of Maliseet Indians (Maliseets) and the Aroostook Band of Micmacs (Micmacs), EPA must ensure, through its maintained Clean Water Act authorities and its federal trust obligations, that a state-administered NPDES program within those lands fully protects the Tribal lands, waters and other resources.

**EPA MUST ENSURE PROTECTION OF THE WATERS OF THE MALISEETS AND MICMACS**

When Congress confirmed the federal recognition of the Houlton Band of Maliseet Indians, 25 U.S.C. §1725(I), and the Aroostook Band of Micmacs, 105 Stat. 1143 (1991), it required the United States to protect these Tribes' resources through the trust responsibility. 108 Stat. 4791 (1994). Regardless of EPA's determination as to whether the State of Maine can demonstrate adequate authority to administer the NPDES program on lands belonging to the Maliseets and Micmacs, EPA must still exercise its authority under the CWA, consistent with the trust responsibility to these Tribes, to ensure the protection of Tribal resources, including lands and waters. See e.g., HRI, Inc. v. Environmental Protection Agency, 2000 WL 14443, \*15 (10<sup>th</sup>

Cir. 2000) (the federal government bears a special trust obligation to protect the interests of Indian tribes); State of Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1470 (9th Cir. 1985); Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981). Thus, EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet and Micmac tribal water quality from degradation. Seminole Nation v. United States, 316 U.S. 286 (1942). EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. See Letter from Edward B. Cohen, Deputy Solicitor, to John P. DeVillars, Region I Administrator, EPA 2 (Sep. 2, 1997). Specifically, EPA would have to consider the specific uses the Maliseets and Micmacs make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. See Comments Submitted to EPA Regarding the State of Maine's Application for NPDES Authority by the Maliseets and Micmacs. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets and Micmacs even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

**MICSA AND MIA SPECIFICALLY ALLOCATE LEGAL JURISDICTION AMONG THE PENOBSCOT INDIAN NATION, PASSAMAQUODDY TRIBE AND MAINE, THEREBY MAKING ANY ASSUMPTION OF BLANKET AUTHORITY BY MAINE INAPPROPRIATE**

Several provisions of the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 (MICSA)<sup>1</sup> concern state jurisdiction over the Passamaquoddy and the Penobscot.<sup>2</sup> These

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<sup>1</sup> Section 1725(b)(1) of MICSA incorporates the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214 (MIA), but under section 1721, MICSA takes priority over MIA if there is a conflict.

<sup>2</sup> MICSA also addresses the applicability of the federal laws and regulations to Indian tribes. According to section 1725(h) of MICSA, federal laws that are "generally applicable to Indians" are equally applicable in Maine. However, that section also provides that no federal law or regulation shall apply in Maine if it "accords or relates to a special status or right," of or to Indians and also "affects or preempts" state law, including state laws relating to environmental matters. Certainly, the general provisions of the federal Clean Water Act and any other federal environmental law, apply to Indians within the State of Maine. Because section 402 of the Clean Water Act is a law of "general applicability" and not a law affording a "special status or right" to Indians, we need not address whether any "special" federal law would also preempt state law and thus not apply in Maine.

provisions are complex and the State of Maine inappropriately urges EPA to ignore these complexities and simply recognize blanket state authority over the Indian Territories. See generally, Attorney General's Statement of Legal Authority for Maine's NPDES and Pretreatment Programs, pp 33-36 (Nov. 2, 1999). While MICSA indeed generally subjects Indian Tribes in Maine to state jurisdiction,<sup>3</sup> it also provides for the exercise of tribal jurisdiction by the Passamaquoddy and the Penobscot separate and distinct from the civil and criminal jurisdiction of the state<sup>4</sup> and over land or natural resources acquired by the Secretary in trust for the Passamaquoddy and the Penobscot.<sup>5</sup> Accordingly, state jurisdiction is far from absolute. Rather, it is subject to various exceptions specified in MICSA and MIA.<sup>6</sup>

First, MIA provides the Tribes have exclusive authority to enact ordinances regulating, within their territories<sup>7</sup>, hunting, trapping or other taking of wildlife and the taking of fish on certain ponds. 30 M. R.S.A. § 6207(1). Second, MIA specifically authorizes the Passamaquoddy and the Penobscot, within their respective Indian Territories, to exercise and

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<sup>3</sup> "The Passamaquoddy Tribe [and] the Penobscot Nation . . . shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act." 25 U.S.C. § 1725 (b)(1) (referencing 30 M..R.S.A. § 6204).

<sup>4</sup> "The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto." 25 U.S.C. § 1725 (f).

<sup>5</sup> "The land or natural resources acquired by the Secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title, [the Indian Self-Determination and Education Assistance Act,] or other existing law." 25 U.S.C. § 1724 (h).

<sup>6</sup> For example, rather than providing the state exclusive jurisdiction over fishing within certain waters within the Passamaquoddy and Penobscot territories, MICSA and MIA require the state to exercise its authorities only through a joint State-Indian Tribal commission. 30 M. R.S.A. § 6207(3). Significantly, within the boundaries of the Passamaquoddy and Penobscot reservations, tribal members taking fish for sustenance purposes generally are exempt from any state law and even from the rules of this Commission. 30 M..R.S.A. § 6207(4)

<sup>7</sup> The Passamaquoddy and the Penobscot Indian territories include, respectively, the Passamaquoddy and the Penobscot Indian reservations. 30 M. R.S.A. § 6205.

enjoy all the rights, privileges, powers and immunities of a municipality, including, but without limitation, the power to enact ordinances and collect taxes. *Id.* at § 6206(1). Third, under MIA, the Passamaquoddy and the Penobscot and their officers and employees shall be immune from suit when the Tribe is "acting in its governmental capacity to the same extent as any municipality or like officer or employees thereof within the State." *Id.* at § 6206 (2).<sup>8</sup> Finally, and most importantly, the state is prohibited from regulating the internal tribal matters of the Passamaquoddy and the Penobscot, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government [and] tribal elections . . . . 30 M. R.S.A. § 6206(1) (emphasis added).

Thus, while MICSA may generally provide for state jurisdiction over Maine Indian Tribes and their lands, it does not do so absolutely and the exceptions to this rule are significant. Clearly, MICSA and MIA provide a balance of state and tribal interests. See Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1<sup>st</sup> Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 119 S. Ct. 2367 (1999) ("Congress sought to balance Maine's interest in continuing to exercise jurisdiction over . . . [tribal] land[s] and members . . . with the . . . [Tribe's] 'independent source of tribal authority, that is, the inherent authority to be self-governing'"). In achieving this balance, Congress preserved much of the Passamaquoddy and the Penobscot's inherent sovereignty, while carving out areas for state authority.

In other words, the reservation in MICSA and MIA of certain aspects of the Passamaquoddy and Penobscot's inherent sovereign authority, especially the reservation of their inherent authority over internal tribal matters, acts as a direct and affirmative limitation on MICSA's grant of jurisdiction to the State of Maine. Thus, in order to determine whether the state has "adequate authority" under section 402 of the CWA to administer the NPDES program within the Indian Territories of the Passamaquoddy and the Penobscot, it is necessary to determine what aspects of the Tribes' inherent authority were reserved to them, and, thereby, not granted to the state under MICSA and MIA.

Under section 402 of the Clean Water Act, the Administrator shall not approve a state's permit program for discharges into navigable waters if the Administrator determines, among other things, that the state lacks adequate authority "to abate violations of the permit or the

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<sup>8</sup> "The Passamaquoddy Tribe, the Penobscot Nation, . . . , and all members thereof, . . . may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine; . . . the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act." 25 U.S.C. § 1725 (d)(1) (referencing 30 M. R.S.A. § 6206 (2)).

permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. 1342(b). Since the State of Maine has applied for program approval for permits within the Indian Territories of the Passamaquoddy and the Penobscot, it is necessary to determine if the state has adequate authority to enforce those permits. As noted above, the heart of this analysis rests on a determination that regulation of point-source discharges within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter."

Here, if the regulation of point-source discharges within the Indian Territories of the Passamaquoddy and the Penobscot would be a regulation of "internal tribal matters," under MIA, ratified by MICSA, the matter "shall not be subject to regulation by the State." 30 M. R.S.A. § 6206(1). It would follow therefore, that in this circumstance, the state could not demonstrate it has "adequate authority to carry out the described program" as section 402 of CWA requires for a successful state application. 33 U.S.C. § 1342(b). Thus, EPA must administer the NPDES program within the Penobscot and Passamaquoddy Indian Territories. 40 C.F.R. § 123.1(h).<sup>9</sup>

#### **THE SCOPE OF "INTERNAL TRIBAL MATTERS" IS A QUESTION OF FEDERAL LAW, INFORMED BY GENERAL PRINCIPLES OF FEDERAL INDIAN COMMON LAW**

Whether regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter" is an issue of first impression. However, the legislative histories of MICSA and MIA and First Circuit decisions

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<sup>9</sup> Where a state has applied for authority to run a federal environmental program, EPA, exercising its "core federal trust responsibilities," generally has retained federal authority over environmental pollution affecting the Indian lands. E.g., HRI, Inc. v. EPA, 2000 W.L. 14443; Phillips Petroleum Co. v. United States EPA, 803 F.2d 545 (10<sup>th</sup> Cir. 1986); State of Washington v. USEPA, 752 F.2d 1465; See also 60 Fed. Reg. 25,718, 25,721 (1995) (delegation of NPDES program to State of Florida would not violate trust doctrine because Agency would retain "full jurisdiction" with respect to Miccosukee reservation). Indeed, where there is any uncertainty about the scope of state jurisdiction or the legal status of the affected territory, these "core federal trust responsibilities" warrant retention of federal authority to protect Indian tribes. HRI, Inc. v. EPA, 2000 W.L. 14443, \*15. See also 59 Fed. Reg. 1353, 1542 (1994) (EPA retains control over Yankton waters, deferring decision on "complicated issue" of state's jurisdiction over Indian country); "EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" at 3-4 (July 10, 1991) (EPA will retain enforcement primacy for Indian lands where a state or tribe cannot demonstrate adequate jurisdiction over pollution sources throughout the reservation). Thus, in the exercise of its "core federal trust responsibilities," and in accordance with the terms of MICSA and MIA, EPA must retain federal authority for the NPDES program within the territories of the Passamaquoddy and the Penobscot.

provide guiding analytical principles. Akins, 130 F.3d 482; Fellencer, 164 F.3d 706.

First, it is important to acknowledge that the First Circuit has decided that the terms of the settlement acts are to be interpreted in light of general principles of federal Indian common law and, because Congress adopted the phrase "internal tribal matters" in MICSA, interpreting that phrase is a question of federal law. Fellencer, 164 F.3d at 708, 709; Akins, 130 F.3d at 485, 489. MICSA and MIA's legislative histories support the court's reliance on federal Indian common law to determine what is an "internal tribal matter."

In delivering the Committee's report on MIA to the Maine Senate, Senator Samuel W. Collins, Jr., Chairman of Maine's Joint Select Committee on Indian Land Claims, stated:

To acquire a proper perspective about Indian affairs and the relationship of our own land to Indian rights, we must start with the realization that it is Federal Law which is supreme in this area . . . the premise of this bill and the entire settlement agreement is, that the Indians are Federal Indians. This means that the Indians and their lands are within the exclusive jurisdiction of the Federal Government and its Indian laws. Under this premise, the State has no jurisdiction at all, but the Federal Government has that authority and can presumably delegate it to the State, or, in this instance, ratify and incorporate into Federal Law an agreement between the State and the Indians.

Maine Legislative Record - Maine Senate, April 2, 1980 at 717018.

Similarly, the legislative history of MICSA supports relying on federal Indian law precepts when interpreting provisions of the settlement act. The Senate specifically recognized the hybrid structure of the settlement, providing in some circumstances state authority over the Penobscot and Passamaquoddy, while in other cases, reserving intact the Penobscot and Passamaquoddy inherent sovereignty, consistent with federal Indian law precepts:

[The] treatment of the Passamaquoddy Tribe and the Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.

S. Rep. No. 96-957, 96th Cong. 2d Sess. at 29 (1980) ("Senate Report") (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). The House Committee Report states:

While the settlement represents a compromise in which state authority is extended

over Indian territory to the extent provided in the Maine Implementing Act, . . . the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs . . . the settlement strengthens the sovereignty of the Maine Tribes.

Id. at 14; H.R. Rep. No. 96-1353 at 14-15, reprinted in U.S. Code Cong. & Admin. News 1980, at 3790 ("House Report") (emphasis added).<sup>10</sup>

General principles of federal Indian law provide a framework for determining whether regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter." Indian tribes have the "inherent powers of a limited sovereignty which has never been extinguished." Bottomly, 599 F.2d at 1066 (in rejecting State of Maine's assertion that Maine Indian tribes are without inherent authority, the court explained that powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty, which has never been extinguished*') (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). While subject to divestiture by Congress, Indian tribes have "inherent sovereign authority over their members and territory." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Bracker, 448 U.S. at 142; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, (1982); United States v. Mazurie, 419 U.S. 544 (1975).<sup>11</sup> Thus, unless expressly divested by Congress, their attributes of inherent sovereignty remain

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<sup>10</sup> See also, Senate Report at 17; House report at 17 (Congress promised that "the Settlement offers protections against . . . [acculturation] being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters").

<sup>11</sup> The Senate Report on the Settlement Act, specifically "predicates the [Penobscot] Nation's [and Passamaquoddy Tribe's] right to be free from state interference [in internal tribal matters] on the Nation's [and the Tribe's] 'inherent sovereignty' as recognized in Bottomly, 599 F.2d 1061 and State v. Dana, 404 A.2d 551 (Me. 1979)." Fellencer, 164 F.3d at 712 (quoting S.Rep. 96-957 at 14). "Both Bottomly and Dana drew on federal Indian common law in recognizing the inherent sovereignty of the Penobscot and Passamaquoddy tribes." Fellencer, 164 F.3d at 712; see Bottomly, 599 F.2d at 1066; Dana, 404 A.2d at 560-61. "By characterizing its recognition of the [Penobscot] Nation's [and the Passamaquoddy Tribe's] sovereignty as 'in keeping with' Bottomly and Dana, Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement," including the term internal tribal matters. Fellencer, 164 F.3d at 712 (quoting S.Rep. 96-957 at 14).

intact. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Akins, 130 F.3d 489 (the court will not infer interference with "inherent self-governing authority of a tribe" in face of Congressional silence); State of Rhode Island, 19 F.3d at 701-02; Bottomly, 599 F.2d at 1066 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers").<sup>12</sup> Tribal sovereignty also carries with it "a historic immunity from state and local control." New Mexico v. Mescalero Apache Tribe, 462 U.S. at 332 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973)). See also, Narragansett Indian Tribe v. Narragansett Elec. Co. 809 F.3d at 914 (state "presumptively lacks jurisdiction" to enforce its laws and regulations within an Indian reservation). In addition, courts have found that tribes retain authority over conduct of non-members within the reservation when conduct threatens or has direct effect on "the political integrity, the economic security or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 & n.15 (1981).

Since only Congress has the power to limit the inherent authority of Indian tribes, state jurisdiction over tribal territory and affairs has been conditioned on the express provisions of Congress. E.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 202, 207 (1987); Fisher v. District Court of Sixteenth Judicial Dist. of Montana, 424 U.S. 382, 382, 386-89 (1976); McClanahan, 411 U.S. at 164, 170-71; Williams v. Lee, 358 U.S. 217, 217, 223 (1959). See also, Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co., 809 F.3d 908, 908, 914 (1st. Cir. 1996) (state "presumptively lacks jurisdiction" to enforce its laws and regulations within Indian reservation). In short, "the Indian sovereignty doctrine, which historically gave state law no role to play within a tribe's territorial boundaries . . . provide[s] a backdrop against which applicable treaties and federal statutes must be read. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 114, 123-24 (1993). It is presumed that Congress acts in a manner consistent with "the federal role as guarantor of Indian rights against state encroachment." Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d at 1470.<sup>13</sup> Finally, the

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<sup>12</sup> In finding that the Penobscot Nation was eligible to be treated as a state for purposes of receiving CWA section 106 grants, EPA stated that the analysis should start from the general Federal Indian law principle that Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute or by implication." Memorandum from Julie Taylor, Chief, General Law Office, Region I, EPA, to Harley F. Laing, Regional Counsel 19 (July 20, 1993) (quoting, Felix Cohen, Handbook of Federal Indian Law 231-32 (1982)).

<sup>13</sup> The Supreme Court found nearly two centuries ago that Congress has a duty to protect the inherent authority of Tribes to govern reservation affairs against state encroachment. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832); see also State of Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d at 1465, 1470; Felix Cohen, Handbook of Federal Indian Law 234-35 (trust "relationship not only preserved tribal government, but insulated it from state interference"). See HRI, Inc. v. EPA, 2000 WL 14443, \*15 (federal government

Fellencer Court employed in its analysis special canons of construction "in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence." 164 F.3d at 709 (quoting White Mountain Apache v. Bracker, 448 U.S. 136, 143-44 (1980) and citing Oneida v. Oneida Indian Nation of New York, 470 U.S. at 247 (canons of construction rooted in unique trust relationship between U.S. and Indians)).

Specifically, EPA's interpretation of principles of federal Indian law in other circumstances informs our analysis here. Since 1984, EPA has recognized, in keeping with the principle of Indian self-government, that tribal governments are the "appropriate . . . parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace." "EPA Policy for the Administration of Environmental Programs on Indian Reservations at 2 (Nov. 8, 1984). In the WQS preamble, EPA stated "Tribes are likely to possess sufficient inherent authority to control reservation environmental quality" and that the Agency believes "Congress . . . expressed a preference for Tribal regulation of surface water quality." 56 Fed. Reg. at 64878. EPA long has recognized that:

Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.<sup>14</sup>

Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons. . . . In short, clean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.<sup>15</sup>

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bears special trust obligation to protect interests of Indian tribes, including protecting tribal property and jurisdiction).

<sup>14</sup> "EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" (July 1991).

<sup>15</sup> EPA Memorandum in Support of Motion for Summary Judgment, p. 16 (filed in State of Montana v. United States Environmental Protection Agency, 941 F. Supp. 945 (D. MT 1996)).

[C]lean water, including critical habitat (i.e., wetlands bottom sediments, spawning beds, etc.) is absolutely crucial to the survival of many Indian reservations," particularly those dependent on sustenance fishing rights.<sup>16</sup>

In summary, EPA has determined that the CWA is effectively a legislative determination that "activities which affect surface water and critical habitat quality may have serious and substantial impacts on a community's health or welfare." 56 Fed. Reg. 64876; See 33 U.S.C. § 1251(a). It is with these principles of federal Indian common law as the backdrop that we analyze, according to principles the First Circuit established in Akins and Fellencer, whether regulation of water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter."

### **REGULATING WATER QUALITY, INCLUDING POINT-SOURCE DISCHARGES, WITHIN PENOBSCOT AND PASSAMAQUODDY INDIAN TERRITORIES IS AN "INTERNAL TRIBAL MATTER"**

In order to determine what constitutes an "internal tribal matter," the First Circuit in Akins and Fellencer examined, in addition to the relevant legislative history, MIA's express statutory examples of "internal tribal matters." Akins, 130 F.3d at 486, 488; Fellencer 164 F.3d at 708-709. The First Circuit cautioned, however, that the "list is not exclusive or exhaustive"<sup>17</sup> and the examples "provide limited guidance."<sup>18</sup> When faced with facts that "did not fit neatly within any of these categories,"<sup>19</sup> the First Circuit developed and applied factors to determine what constitutes an "internal tribal matter." 130 F.3d at 487-488; 164 F.3d at 709-713.

#### Statutory Definitions of "Internal Tribal Matters"

MIA defines an internal tribal matter as "including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." 30 M. R.S.A. § 6206(1). Two of those six examples of "internal tribal" authority -- "the right to reside in the respective Indian territories" and "tribal government" -- are of particular relevance here in

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<sup>16</sup> 56 Fed. Reg. at 64878.

<sup>17</sup> Fellencer; 164 F.3d at 709.

<sup>18</sup> Id.; Akins, 130 F.3d at 486.

<sup>19</sup> Akins, 130 F.3d at 486.

determining whether regulation of water quality, including point-source discharges, is an internal tribal matter.

A. Regulation of the "Right to Reside" as an Internal Tribal Matter is Relevant to the CWA

The tribes' right to decide who may reside within their respective Indian Territories is tantamount to the having the right to exclude persons from these territories. The right to exclude clearly includes the right to regulate.<sup>20</sup> As an exercise of this right to determine who may reside and who may be excluded, for example, the Penobscot Nation has adopted a residency ordinance that permits the presence of non-members within the Penobscot territory only at the "sufferance of the Penobscot Nation" and "in accordance with the tribal laws, customs and traditions." Presence of Non-Members at or Within Penobscot Indian Territory, Chapter 11. This ordinance specifically authorizes the removal of non-members whose presence "threatens the health, safety or welfare of the Penobscot Nation." *Id.* at § 7 E. Additionally, general federal Indian common law would support the principle that the tribes retain authority to regulate conduct, especially conduct that may threaten tribal health or welfare, within Indian territories. See discussion of Indian common law, above; Oklahoma Tax Comm'n v. Citizen Band Potawatami Indian Tribe, 498 U.S. 505,509 (1991); Montana v. United States, 450 U.S. 544, 566 & n.15 (1981).

In the WQS preamble, EPA determined that the CWA is effectively a legislative determination that "activities which affect surface water and critical habitat quality may have serious and substantial impacts on a community's health or welfare." 56 Fed. Reg. 64876; see 33 U.S.C. § 1251(a). The protection of health and welfare is one of the core purposes of environmental protection. The "Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." 56 Fed. Reg. at 64878; see also 33 U.S.C. § 1313(c)(2)(A) (purpose of water quality standards is to protect public health and welfare). EPA has also made generalized findings, supported by the overall purposes of the CWA and those of the water quality standards program in particular, that water quality impacts from non-Indian activities would generally have "serious and substantial impacts on tribal health and welfare." 56 Fed. Reg. at 64878.

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<sup>20</sup> As explained above, under *Akins* and *Fellencer* and the legislative history of MICSA and MIA, federal Indian common law informs the interpretations of the settlement acts. Here, relevant federal cases include New Mexico v. Mescalero Apache Tribe, 462 U.S. at 333 ("A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established"); Merrion, 455 U.S. at 141 ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power includes the lesser power to place conditions on entry, on continued presence or on reservation conduct . . .").

Thus, since the regulation of water quality, including point-source discharges, is an activity that threatens or has a direct effect on tribal health or welfare, it is subject to tribal regulation as an exercise of the right to reside within the respective Indian territories, which is an internal tribal matter. Since the Penobscot, or similarly the Passamaquoddy, can pursuant to MICA and MIA's exclusive tribal authority over "internal tribal matters" remove a non-member for threatening tribal health, safety or welfare, then clearly the Penobscot and Passamaquoddy can take measures short of removal, to control such behavior which may have the same detrimental affects. However, we need not rest a finding of "internal tribal matters" solely on the definition of "right to reside." MIA also provides that "tribal government" is an example of an "internal tribal matter." Further, as noted above, the First Circuit has found that these examples are not "exclusive or exhaustive." Fellencer, 164 F.3d at 709.

B. Application of the Authority of "Tribal Government" as an Internal Tribal Matter is Relevant to the CWA

In addition to "the right to reside within the respective Indian territories," discussed above, MIA also provides that "internal tribal matters" include the exercise of authority as a "tribal government." 30 M. R.S.A. § 6206(1). EPA has long recognized that "water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 Fed. Reg. at 64879. In discussing the nature of the Maine Implementing Act, the Senate Report stated that MIA "is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 96-957, at 29 (citing Santa Clara Pueblo, 436 U.S. 49) (emphasis added). Thus, since water quality management is crucial to self-government and MIA recognizes the inherent authority of the Passamaquoddy and the Penobscot to be self-governing, then the retained right of tribal government, must include the right to regulate water quality, including point-source discharges, within the Indian Territories.

As demonstrated above, the regulation of water quality, including the regulation of point-source discharges, within the Penobscot and Passamaquoddy Indian Territories can be found to be an internal tribal matter based on one or more of the specific examples MIA provides for what is included within "internal tribal matters." We believe that either the exemplar of "the right to reside" or "tribal government" provides adequate support for this conclusion. Nevertheless, regardless if one or both of these examples is sufficient for a finding of internal tribal matters here, such a conclusion also is bolstered by factors identified in Akins and supplemented in Fellencer as criteria to consider in determining what constitutes an "internal tribal matter." See Akins, 130 F.3d at 486; Fellencer, 164 F.3d at 709-10.

These factors are: (1) does the activity regulate only tribal members; (2) does the activity

relate to the lands that define the Tribes' territories; (3) does the activity affect the tribes' ability to regulate its natural resources; (4) does the activity implicate or impair any interest of the State of Maine; and (5) is viewing the activity as an "internal tribal matter" consistent with prior legal understandings. Fellencer, 164 F.3d at 709 (quoting Akins, 130 F.3d at 486). In a more recent case, the First Circuit applied these factors, and added one additional consideration: the statutory origins "of the [community nurse] position involved in that case." Fellencer, 164 F.3d at 709-10.

Factor 1: Does the Tribal Activity Regulate only Tribal Members?

Here, the regulation of water quality, including point-source discharges, within the Passamaquoddy and Penobscot Indian Territories would regulate both tribal and non-tribal discharges. However, such regulation would more significantly impact the health and welfare of tribal members than non-members. The discharge of pollutants from these point-source discharges affect the very waters upon which the Passamaquoddy and Penobscot depend for fulfilling their statutorily-protected sustenance fishing right and for cultural and spiritual sustenance. Specifically, Passamaquoddy Tribal members use these waters for "fishing, trapping, clamming and other resource-based activities that form a large part of their heritage and their culture." Comments of the Passamaquoddy Tribe on the Legal Authority of the State of Maine to Administer the NPDES Program for the Waters of the Passamaquoddy Indian Territory at 18. In Fellencer, where the disputed activity affected some non-members, but primarily affected tribal members, the court held that modest non-member effects when compared with broad-based tribal member impacts, does not defeat a determination that the activity is an internal tribal matter. Fellencer, 164 F.3d at 710. *See e.g.*, 56 Fed. Reg. 64876; Montana v. USEPA, 137 F.3d 1 at 1141. Accordingly, like Fellencer, where a non-Tribal nurse was dismissed based on considerations of health and welfare of Tribal members, the fact that some non-members would be regulated in this instance, does not defeat a determination that the activity is an internal tribal matter.

Factor 2: Does the Tribal Activity Relate to the Lands that Define the Tribes' Territories as described in MICSA and MIA?

Section 6206(1) of MICSA reserves the Tribes' authority over internal tribal matters "within their respective Indian territories." The activity at issue here is the regulation of water quality, including point-source discharges, solely within the Passamaquoddy and Penobscot Indian Territories. Accordingly, like the timber permits in Akins which regulated "the very land that defines the territory" the activity here regulates activity only with the Penobscot and Passamaquoddy Indian Territories. Thus, analysis under this factor weighs completely in favor of finding this activity to be an internal tribal matter.

Factor 3: Does the Tribal Activity Affect the Tribes' Ability to Regulate its Natural Resources?

Section 1724(h) of MICA specifically reserves to the Passamaquoddy and the Penobscot the authority to manage their respective lands and natural resources pursuant to the Indian Self-Determination and Education Assistance Act (ISDA) or other existing law, such as, for instance, the Clean Water Act. In Akins, the court found that "it has long been understood that the power to issue permits is an indirect method of managing a natural resource." Akins, 130 F.3d at 488 (quoting California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)). The natural resources at issue here are the water and water-related (e.g., fish, aquatic habitat, other aquatic vegetation) resources within the Passamaquoddy and Penobscot Indian Territories.<sup>21</sup> The discharge of pollutants into the Tribes' waters has a direct effect on the quality of these waters, the health of the Tribes' water-related resources and on the health and welfare of tribal members who use and consume the water and water-related resources. Thus, like the timber permits in Akins, the regulation of water quality through the issuance and enforcement of discharge permits, "involves the regulation and conservation of natural resources belonging to the tribe[s]." Akins, 130 F.3d at 488. Therefore, as in Akins, the activity here, the regulation water quality, including point-source discharges, affects the Tribes' ability to regulate their natural resources and, thus, weighs in favor of finding this activity to be an internal tribal matter.

Here, the interests of the Penobscot and Passamaquoddy in the health of the water resources within their Indian Territories cannot be overstated. The Penobscot and Passamaquoddy depend on the water within their territories for fulfilling their statutorily-protected sustenance fishing right and for cultural and spiritual sustenance. Unfortunately poor water quality in Maine already may have impacted the Penobscot and Passamaquoddy's exercise of these rights. Currently, all lakes in Maine are subject to a Fish Consumption health warning as a result of water pollution. Comments of Donald Soctomah, Representative of the Passamaquoddy Tribe to the Maine legislature, On Maine's Application to EPA for NPDES Delegation, Feb. 28, 2000. The Bangor Daily News recently cited the St. Croix River, which runs through the Passamaquoddy territory, as the 7th worst river in the U.S. due to the amount of pollutants it receives. Bangor Daily News, February 17, 2000. The polluting discharges to the St. Croix river are primarily attributable to pulp and paper mills, an industry similarly discharging into the Penobscot River. Dioxin, from these pulp and paper mills, has accumulated in fish in the Penobscot River at levels unfit for human consumption within the Penobscot Indian Nation's territory. As a result, since 1987, the State of Maine has maintained a fish advisory warning against the consumption of fish caught in that area. Although section 1721(b) of

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<sup>21</sup> MIA defines "land or other natural resources" to include "water and water rights and hunting and fishing rights." 30 M. R.S.A. § 6203(3).

MICSA, by ratifying section 6207(4) of MIA, recognized the tribes' rights to sustenance fishing within their reservations, pollution has all but eliminated the ability of the Penobscot to exercise this reserved right.

Factor 4: Does the Tribal Activity Implicate or Impair Any Interest of Maine?

Certainly the state has an interest in protecting water quality within its boundaries. As in Fellencer, where the state, although not asserted, generally had "a strong interest in protecting all employees against discrimination through its Maine Human Rights Act (MHRA)," here too the state has an interest in protecting the quality of all its surface waters from point-source discharges through the CWA's NPDES program. See Fellencer, 164 F.3d at 710 (citing 5 M. R.S.A. §4552; Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373 (Me. 1978) (stating that the MHRA "was meant to have very broad coverage")). Yet, despite the court's finding in Fellencer that the state had a strong interest in protecting all employees and that the MHRA was meant to have very broad coverage, the court still held that the decision to terminate the employment of a community nurse was an internal tribal matter, not subject to state regulation under the MHRA. Fellencer, 164 F.3d at 710. Thus, here, like Fellencer, the state's interest in protecting its water quality, even if it is a strong interest, is not, in itself, sufficient to defeat a determination that the regulation of the water quality, including point-source discharges, within the Passamaquoddy and Penobscot Indian Territories is an internal tribal matter.

Moreover, in comparing the intensity of the state and tribal interests at stake here, it is important that unlike Fellencer, here, under the CWA, the state has alternative means for protecting its interest other than through the application of state law to the Indian Territories. Recognizing that inter-jurisdictional disputes over water quality protection are inevitable, the CWA provides specific mechanisms, through the 401 certification processes, to protect the interests of neighboring states and tribes. See generally, 33 U.S.C. §1341. The state will be able to take advantage of these particular statutory processes as a state which is authorized to administer CWA programs, even without program approval over Indian Territories. Thus, the state need not exercise permitting authority over discharges within Passamaquoddy and Penobscot Indian Territories in order to protect its interest. Since the state's interest can be protected through other specific statutory processes, these interests are outweighed by the tribes' interest in protecting their water quality.<sup>22</sup>

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<sup>22</sup> In balancing the interests of the state and the Tribes, it is important to note that the discharges at issue here, those within the Passamaquoddy and Penobscot Indian territories, only represent a small percentage of the approximately three hundred and fifty, EPA-permitted discharges in the entire State of Maine. Communication from EPA Region I, Office of Regional Counsel.

Factor 5: Would a finding of "Internal Tribal Matters" Here Comport with Prior Legal Precedent?

As demonstrated in the above analysis, while this would be a case of first impression, it would be consistent with prior First Circuit legal precedent and federal Indian common law to conclude regulation of water quality, including point-source discharges, into rivers within the Penobscot and Passamaquoddy Indian Territories, is an internal tribal matter. Viewing control over water quality, including point-source discharges, as an internal tribal matter would be consistent with the court's prior understanding in Akins that the regulation of tribal natural resources through the issuance of permits is an internal tribal matter. 130 F.3d 482. Similarly, viewing control over water quality, including point-source discharges, as an internal tribal matter would be consistent with the courts prior understanding in Fellencer that decisions having a direct effect on tribal health and welfare are internal tribal matters. 164 F.3d 706.

Further, it is consistent with general principles of federal Indian common law and special canons of construction relied upon in the First Circuit to determine that the Penobscot and Passamaquoddy's authority over internal tribal matters includes the authority to control conduct within their Territories that threatens or has a direct effect on the political integrity, the economic security or the health or welfare of the tribe. Courts have consistently upheld inherent tribal authority to regulate water quality under the CWA. E.g., Montana v. USEPA, 137 F.3d 1135 at 114 (finding tribal authority over nonmember pollution sources based on finding that such sources directly effect tribal health and welfare); City of Albuquerque v. Browner, 97 F.3d 415, 423 (10<sup>th</sup> Cir. 1996), *cert. denied*, 118 S.Ct. 410.

Such a finding also is consistent with prior EPA statements recognizing the inherent sovereign authority of Indian tribes over water quality regulation within tribal lands. "[R]egulation of water quality resides comfortably within a tribe's lawful authority under the Montana test because nonmember activity affecting water quality is likely to threaten tribal health or welfare." EPA Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in Montana v. USEPA, 941 F. 945. See also Supplemental Brief of Federal Appellees in Montana v. USEPA, 137 F.3d 1135 ("water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government")<sup>23</sup>; 56 Fed. Reg. 64,879. Finally, EPA's regulations anticipated that

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<sup>23</sup> The Maine Implementing Act (MIA) recognizes the inherent authority of a tribe to be self-governing. S. Rep. No. 96-957, at 29. Thus, since water quality management is crucial to self-government and MIA recognizes the inherent authority of the Passamaquoddy and the Penobscot to be self-governing, then the retained right of tribal government, a statutory example of an internal tribal matter, must include the right to regulate water quality.

"[i]n many cases, States . . . will lack authority to regulate activities on Indian lands. 40 C.F.R. § 123.1(h).<sup>24</sup>

Thus, concluding that "internal tribal matters" includes the regulation of water quality, including the regulation of point-source discharges within the Penobscot and Passamaquoddy Indian Territories, comports with prior legal understandings.

Fellencer's Supplemental Factor: Do the Statutory Origins of the Program Over which the Tribe Asserts Authority have Particular Bearing on finding "Internal Tribal Matters?"

Following an analysis of the five Akins factors for determining what is an "internal tribal matter," the First Circuit in Fellencer, also considered the statutory origins of the community nurse position involved in that case. 164 F.3d 712. As the First Circuit stated in Fellencer: "Apart from the statutory language, judicial precedent, legislative history and federal Indian common law, the Nation's employment of a community health nurse has particular internal tribal matter implications because of the statutory origins of the position." 164 F.3d 712-713. The community nurse position at issue in Fellencer was funded by the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450, a federal statute containing strong provisions regarding the importance of Indian self-governance and supported by ample legislative history on that point. *See, e.g.*, 25 U.S.C. s 450 (1)(2) (Congress declared ISDA is "crucial to the realization of [tribal] self-government") and H. Rep. No. 1600, 93<sup>rd</sup> Cong., 2<sup>nd</sup> Session (1974), *reprinted in* 1974 U.S.C.C.A.N. 775, 7781 (ISDA articulates "policy of Indian control and self-determination consistent with the maintenance of the federal trust responsibility and the unique Federal-Indian relationship").

Significantly, the activity in question here, regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories, also has the ISDA as a statutory origin. Section 1724(h) of MICSA provides that trust lands and natural resources of the Tribes "shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 45f of this title [the Indian Self-Determination Act] or other existing law." (Emphasis added.) MICSA's provision that the Tribes will manage natural resources "in accordance with" the ISDA indicates Congress' desire to preserve and protect Tribal governmental authority over those resources. *See* 25 U.S.C. s 450(1)(2) (Congress declared ISDA "crucial to the realization of [tribal] self-government").

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The NPDES program for which the state seeks approval also has its statutory origin in the federal Clean Water Act. According to the WQS preamble, "EPA . . . believes that Congress . . . expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA," and, that like the administration of community health services studied in Fellencer, the "management of water quality is crucial to self government." 56 Fed. Reg. at 64878-79. In Fellencer, the court held that "the federal employment preference [in the ISDA] counsels against the application of Maine law in this employment discrimination context." Fellencer, 164 F.3d at 713. Similarly, the federal preference for tribal regulation of surface water quality in the CWA counsels against the application of Maine law to the territories of the Passamaquoddy and Penobscot under the NPDES program. Finally, in Fellencer, the court held that since such preferences have been described as furthering self-government, the "decision . . . to terminate the employment of a community health nurse was an "internal tribal matter" within the meaning of the Settlement Act, and hence . . . [not subject] to state . . . jurisdiction." Id. Here, since the preference for tribal regulation of water quality within the Passamaquoddy and Penobscot Indian Territories also furthers tribal self-government, decisions related to the issuance and enforcement of discharge permits is an internal tribal matter within the meaning of the Settlement Act, and hence, not subject to state jurisdiction.

Or, as phrased in terms the First Circuit used in Fellencer: The "[Tribes' authority over water quality within their territories] has particular "internal tribal matter" implications because of the [legal] origins of the [tribal activity]." Both the Indian employment preference at issue in Fellencer and the regulation of water quality within the Penobscot and Passamaquoddy Indian Territories rely on statutory origins that emphasize the authority of the Tribes to be self-governing. Accordingly, as in Fellencer, the statutory support for the tribal activity have "particular 'internal tribal matter' implications." 164 F.3d 712-713.

## CONCLUSION

In summary, the regulation of water quality, including point-source discharges, is an internal tribal matter of the Penobscot and Passamaquoddy because it 1) is a component of the Passamaquoddy's and the Penobscot's retained inherent right to determine who resides within their respective Indian Territories and under what conditions, 2) is essential to tribal government and 3) meets each of the five factors considered in Akins, 130 F.3d at 486, and the additional factor considered in Fellencer, 164 F.3d at 712-13. According to the terms of the Settlement Act, as an internal tribal matter, the State of Maine is prohibited from regulating water quality, including point-source discharges, within the Territories of the Passamaquoddy and the Penobscot. Therefore, under section 402 of the CWA, the state cannot demonstrate adequate authority to administer the NPDES program within these Territories. Accordingly, EPA cannot make the mandatory findings of § 402(b) and thus, must administer the NPDES program within the Penobscot and Passamaquoddy Indian Territories. See 40 C.F.R. § 123.1(h). Finally,

regardless if EPA approves the state's application for the NPDES program within any area of Indian Country of Maine, EPA must, in accordance with the best interests of the Tribes and the most exacting fiduciary standards, faithfully exercise its federal authority and discretion to protect tribal water quality from degradation.