



# United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
WASHINGTON, D.C. 20243

IN REPLY REFER TO:

APR - 8 1994

Ms. Carol M. Browner  
Administrator  
United States Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

I am writing to express my strong concern regarding the possible issuance of a National Pollutant Discharge Elimination System Permit (NPDES) under the Clean Water Act (33 U.S.C. § 1342) to Lincoln Pulp and Paper Company, Inc. (Lincoln) to discharge into the waters of the Penobscot River in Maine. Lincoln is engaged in the manufacture of kraft pulp, fine paper and tissue. It has applied to the Environmental Protection Agency (EPA) for reissuance of its NPDES permit to discharge treated process wastewater, non-contact cooling water and storm water runoff into the river. It is my understanding that this permit is under review by Region 1 of the EPA, for possible issuance this spring.

The Penobscot Indian Nation (Nation) is a federally recognized Indian Tribe, whose reservation consists of islands in the Penobscot River. Numerous reservation islands, including the Nation's main community at Indian Island, are located downstream of the Lincoln discharge point, and are thus directly impacted by the Lincoln discharge. For centuries, tribal members have relied upon the resources of the Penobscot riverine environment for subsistence and for religious and ceremonial purposes. Most particularly, this reliance has depended upon the taking and eating of fish from the river, and the gathering of plant material from the islands.

Recognition of the Nation's fishing rights was included in historical agreements and communications between the Nation and colonial and state governments. Confirmation of the right to take fish for individual sustenance within the boundaries of the reservation is a specific component of the 1980 Maine Indian Claims Settlement Act. (See The Maine Implementing Act, 30 M.R.S.A. §6201, et seq., as confirmed by the Maine Indian Claims Settlement Act, 25 U.S.C. §1721, et seq.). The Nation thus has a protected right to the fish in the Penobscot River within the boundaries of its reservation. This right demands that there be sufficient fish to take and that such fish be safe to eat. United States v. State of Washington - Phase II, 506 F. Supp. 187, 203 (W.D. Wash. 1980), aff'd in part and rev'd in part, 694 F.2d 1374 (9th Cir. 1982),

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vacated, opinion replaced on rehearing en banc, 759 F.2d 1353 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985); See e.g., Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033-34 (9th Cir. 1985) (Treaty reservation of fish implies reservation of sufficient flows to prevent salmon "redds" or nests from exposure to air); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (Court required non-Indians to maintain minimum stream flows necessary for survival of tribal fishery.)

Discharge from the Lincoln Plant includes 2,3,7,8 tetrachlorodibenzo-p-dioxin (dioxin). The Penobscot River is listed on Maine's Clean Water Act Section 304(1) list of water bodies not attaining state water quality standards due to the point source discharge from Lincoln, and the presence of dioxin in that discharge. Low doses of dioxin are known to produce toxic effects, including cancer incidences and deleterious reproductive consequences, in laboratory animals. The State of Maine has already declared a fish consumption advisory for the stretch of the Penobscot River below the Lincoln discharge point. This advisory warns potential fish consumers that no more than two (eight ounce) meals of fish should be eaten each month, and that pregnant women and nursing mothers should avoid eating any fish taken from this stretch of the river. Since the stretch of the river subject to the fish consumption advisory corresponds to the Nation's prime fishing area, its fishing rights are detrimentally impacted by the Lincoln discharge.

As you know, any federal government action, including action by the EPA, is subject to the United States' fiduciary responsibilities toward Indian Tribes. Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981), cert. denied, 454 U.S. 1081 (1981). The federal government has charged itself with moral obligations of the highest responsibility and trust such that, in dealing with Indian Tribes, it is judged by the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). Federal actions which reduce the quantity of fish present in reservation waters, either by adverse impacts to water quality or fish habitat, have been considered a breach of the federal government's trust responsibility towards Indians. Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 586, 605 (N.D. Calif. 1983), 764 F.2d 581 (9th Cir. 1985). Federal agencies must ensure that environmental degradation, such as exists on the Penobscot River, not be allowed to impair the Nation's fishing rights. See, United States v. Washington - Phase II, 506 F. Supp. at 204.

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The Ninth Circuit in Nance required that EPA fulfill its trust responsibility both procedurally and substantively. Thus, while offering a tribe the opportunity to comment on a proposed action may fulfill the procedural responsibility, only by substantively addressing those comments can EPA completely fulfill its fiduciary duties. Here, the Nation has commented extensively on the proposed NPDES permit, voicing serious concerns with the discharge and resulting impacts to the health of tribal members and to fish. To discharge its trust responsibility, EPA must address those concerns.

In its comments, the Nation has emphasized numerous points, of which I will reiterate only a few. First, the Nation urges EPA to mandate establishment of a chlorine-free process at the Lincoln plant to be phased in over a seven year period. Second, the Nation demands that the risk level for dioxin provide adequate protection to members of the Nation, considering in particular the higher rates for fish consumption applicable to tribal members who traditionally have depended on fish for sustenance. Further, EPA's proposed detection limit does not guarantee compliance with the proposed instream standard, which will allow a higher level of dioxin in the water than would be permitted in the draft permit.

Your Pollution Prevention Policy encourages the utilization of EPA's permitting programs to achieve pollution prevention and source reduction. (See June 15, 1993, Memorandum from the Administrator, EPA, p. 4) Despite this initiative, however, the draft permit proposes to increase effluent limits through an increase in production of bleached kraft pulp. Authorization of increased effluent limits would appear to contradict your policy. Further, I am concerned that the production increase will result in higher levels of dioxin in the river, with further detrimental impacts on tribal health and natural resources.

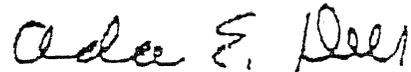
Finally, I wish to point out that President Clinton's recent Executive Order regarding environmental justice should be applied to this permit process. As you know, one purpose of the Order and of the federal government's increased emphasis on environmental justice is to ensure that minorities in our society live in healthy communities. As you have noted, minority communities have borne a disproportionate burden of modern industrial life. Far too often, this burden has fallen upon Native Americans. Due to the island location of its reservation, the Penobscot Indian Nation is subject to a disproportionate burden of the risks and the harms occasioned by industrial plants, such as Lincoln. I feel very strongly that our Native American communities should no longer bear this burden.

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Thus, I urge EPA to give the concerns of the Nation special attention as your agency processes this permit, and to respond to those concerns in keeping with the federal trust responsibility to this tribe.

Thank you for your attention.

Sincerely,



Ada E. Deer  
Assistant Secretary-Indian Affairs

cc: John P. DeVillars  
Joseph Terras  
The Honorable Jerry Pardilla