United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

SEP 2_ 1997

John P. DeVillars
Regional Administrator
Environmental Protection Agency
Region 1
J.F.K. Federal Building
Boston, MA 02203-0001

Re: Penobscot Indian Nation Request for Evidentiary Hearing
Lincoln Pulp & Paper NPDES permit No. ME0002003

Dear Mr. DeVillars:

The Department of the Interior (Department) has reviewed the correspondence filed with you by the Penobscot Indian Nation (PIN), Lincoln Pulp and Paper Company (Lincoln), and the State of Maine, Department of the Attorney General (State), in the above-referenced Request for Evidentiary Hearing concerning NPDES Permit No. ME0002003. Certain of the positions set forth in those filings cause concern to this Department, in its role as primary agency within the Federal Government charged to act on behalf of Indian Tribes. Consequently, my intent in this letter is to ensure that your agency is fully aware of the positions of this Department, and of the United States, concerning certain issues relevant to the Maine Indian Claims Settlement Act, the Federal Trust responsibility to Maine Indians, and the fishing rights of the Penobscot Indian Nation.[1]

I address three major points, as follows:

1. The Nature of the Federal Government's trust responsibility to the PIN;

2. Interpretation of PIN's fishing rights;

3. PIN's right to appeal the NPDES permit

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[1] The First Circuit has recognized the Secretary of the Interior as the administrator of the Maine Indian Claims Settlement Act (MICSA). Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 794 (1st Circuit, 1996). Moreover, the Department of the Interior is recognized to have reasonable power to discharge effectively its broad responsibilities in the area of Indian affairs, and its actions in interpreting tribal rights are accorded substantial deference. Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996).

1. The Nature of the Federal Government's trust responsibility to the PIN

As you know, the United States has a trust responsibility to protect the lands and resources of federally recognized Indian Tribes. In the exercise of this trust responsibility, the United States is held to the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286 (1942). This fiduciary responsibility extends to all agencies of the Federal Government, including the Environmental Protection Agency (EPA). Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981).

The Department acknowledges that the Maine Tribes came late to federal recognition and protection. However, as of 1975, when the First Circuit recognized that the protections of the federal Trade and Intercourse Act (1 Stat. 137 (1790), now codified at 25 U.S.C. § 177) did apply to the Maine Tribes (See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-380 (1st Circuit, 1975)), the United States has recognized and acted in furtherance of its trust responsibility to protect the lands and natural resources of the Maine Indians, beginning with the United States advocacy on the Tribes' behalf in the Maine land claims litigation. This litigation, which alleged that Massachusetts and Maine illegally took lands of the Maine Indians without federal involvement or consent in violation of the Trade and Intercourse Act, was settled through the enactment by Congress in 1980 of the Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. § 1721, et seq., which ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. § 6201, et seq. (Implementing Act).

Contrary to the assertions made in several of the filings before you, the United States did not through MICSA limit its trust responsibility. While the MICSA did create a unique relationship between the State of Maine and the Maine Tribes, the federal trust obligation to protect the lands and natural resources of the Maine Tribes continues. The Penobscot Nation is a federally recognized Indian Tribe (61 Fed. Reg. 58211, 58213 (1996)) and, as such, is entitled to those rights and benefits which the United States provides to Indians based upon their status as Indians. See 25 U.S.C. § 479a-1(a); H. Rep. No. 96-1353, p. 18, *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3794. The Penobscot Reservation is a federal reservation under the jurisdiction of the United States. 25 U.S.C. §§ 2 and 9.

The Department thus finds erroneous the views expressed which suggest that EPA has no special relationship with the Penobscot Indian Nation. In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. §§ 1722, 1721, 1725(i). (Subsequent Congressional action extended this federal recognition to the Aroostook Band of Micmacs. Pub. L. No. 102-171, 105 Stat. 1143 (1991).) Congress has declared that this

recognition requires that the United States protect tribal resources through the trust responsibility. Pub. L. No. 103-454, 108 Stat. 4791 (1994).

The Department further finds no merit in the claim that MICSA extinguished PIN's sovereignty. Federal recognition connotes recognition of a Tribe's inherent sovereignty. Pub. L. No. 103-454, 108 Stat. 4791 (1994). See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). Passage of MICSA did not terminate the Maine Tribes and thus did not extinguish PIN's sovereignty. Instead, as noted in the legislative history, the "settlement strengthens the sovereignty of the Maine Tribes." H. Rep. No. 96-1353 at 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3790. See also Senate Rep. No. 96-957, pp. 14-15 (1980).

It has been asserted that section 1725(h) of the MICSA, a section of the Act which reflects the unique relationship between the Maine Tribes and the State, prevents the application of the trust responsibility and federal case law interpreting its requirements in Maine (25 U.S.C. § 1725(h)). Through this section, Congress provided that the application of federal Indian law (including case law) in Maine can be precluded, but only if such law would affect or preempt the civil, criminal, or regulatory jurisdiction of the State. If Maine's jurisdiction is unaffected, federal law does apply. See H.R. Rep. No. 96-1353 at 19-20 (1980), *reprinted in* 1980 U.S.C.C.A.N., 3786, pp. 3794-5; Senate Report No. 96-957 at 30 (1980).

In the Department's view, section 1725(h) has no applicability to this situation.[2] The NPDES program has not been delegated by the United States to the State of Maine; it thus remains a federal program for which EPA is the permitting authority. EPA's consideration of federal law to determine its obligations to the PIN in making the NPDES permit decision, therefore, is required in this case.[3]

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[2] While the State does have authority under section 401 of the Clean Water Act to certify that a proposed discharge meets its water quality standards, this does not mean that EPA cannot impose a more stringent standard in its permit. 40 C.F.R. § 124.55(c) provides that a state may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

[3] There is also no merit to the claim that, because MICSA is an Act of Congress rather than a treaty, EPA cannot consider federal case law in determining tribal rights and federal obligations. As with a treaty, MICSA is similarly the "supreme law of the Land," and creates rights and liabilities which are virtually identical to those established by treaties. See Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert.

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. See Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), rev'd. in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) (holding that for the Secretary of Interior to fulfill his fiduciary duty to Tribe while determining amount of water to be diverted from dam for benefit of irrigation district and to detriment of tribal fishery in downstream Pyramid Lake, the "Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake"); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) (Rejecting Secretary's argument that national interest in developing coal resources outweighed trust duty and stating that "identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.") Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICSA to fully protect the PIN's rights and resources.

2. Interpretation of PIN's fishing rights

The historic treaties between PIN and Massachusetts (Maine then being part of the Massachusetts territory) provide the basis for rights expressly confirmed to the PIN through the Implementing Act and MICSA. As a result, PIN's fishing right has two components - the aboriginal right retained through treaty and confirmed by MICSA, and a statutory right included within the Implementing Act.

a. PIN's confirmed aboriginal fishing rights

Through a series of treaties which culminated in the 1818 Treaty with Massachusetts, the PIN retained the islands and natural resources, including fishing rights, within the Penobscot River, beginning at Indian Island and extending upriver. Congress, through its ratification in MICSA of the Maine Implementing Act which defined the retained Penobscot Reservation, confirmed this reservation of lands and resources, including fishing rights, to the PIN. See 30 M.R.S.A. § 6203(8); 25 U.S.C. §§ 1722(i); 1725(b)(1). While Section 1723(b) of MICSA did extinguish

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denied, 116 S. Ct. 2546 (1996); Felix Cohen, Handbook of Federal Indian Law, p. 127 (1982 ed.).

aboriginal title to lands or natural resources given up by the PIN through transactions illegal under the Trade and Intercourse Act, MICSA did **not** extinguish aboriginal title to lands or natural resources retained by the PIN. Rather, Congress confirmed those retained aboriginal rights to the PIN. According to the legislative history of MICSA, fishing rights are an example of natural resources considered **"expressly retained sovereign activities."** H.R. Rep. No. 96-1353 at p. 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3791 (emphasis added).

I attach the brief filed by the United States in Maine's Supreme Judicial Court in Atlantic Salmon Federation v. Maine Board of Environmental Protection, 662 A.2d 206 (Me. 1995), in which the United States position regarding the PIN's fishing right is set out. In short, the brief states that:

> The Penobscot Nation's right is a reserved right, meaning it was reserved from the greater aboriginal rights of the Nation to the use and occupancy of its territory which had not been validly extinguished under 25 U.S.C. 177, prior to the enactment of the Maine Implementing Act and the federal Settlement Act ratifying its terms. The fishing right, therefore, is not a grant from the state of Maine in the exercise of its sovereign authority over fish and wildlife within its borders; it is a reservation from the aboriginal rights given up by the Penobscot Nation in the settlement which finally extinguished its aboriginal rights.

Brief for the United States as Amicus Curiae, filed before the Supreme Judicial Court of Maine in Atlantic Salmon Federation, et al., v. Maine Board of Environmental Protection, Law Docket No. Ken-94-779, January 27, 1995, (p. 15).

b. PIN's statutory fishing right under the Maine Implementing Act

In addition to PIN's retained aboriginal fishing rights within its Reservation, the Maine Implementing Act expressly confirmed to PIN a fishing right, providing that

> the members of the . . . Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance ...

30 M.R.S.A. § 6207(4). The State of Maine has only a residual right to prevent the PIN from exercising its fishing right in a manner which has a substantial adverse impact on fish stocks in or on adjacent waters - the legislative history compares this residual power to that which other states retain with respect to federal Indian treaty fishing rights. See H.R. Rep. No. 96-1353 at p. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3793. Indeed, the State of Maine has acknowledged that, in recognition of "traditional Indian activities" such as fishing, preferential

treatment is to be provided to Maine Indians. See letter from Attorney General Richard Cohen to Senator John Melcher (August 12, 1980), reprinted in U.S. Senate, Select Committee on Indian Affairs, Hearings on S. 2829, Proposed Settlement of Maine Indian Land Claims. See also Letter from Maine Attorney General James Tierney to Atlantic Sea Run Salmon Commission Chair William Vail (Feb. 16, 1988), in which the State recognized that the Penobscot Nation possesses a right to take fish from the Penobscot River for consumption in a manner otherwise prohibited by state law, due to the provisions in the Maine Implementing Act. (Copies attached.)

As provided in the Implementing Act, the PIN fishing right applies within the boundaries of the Penobscot Reservation, as it is defined in the Implementing Act. The Reservation is defined to expressly include the islands in the Penobscot River, beginning at Indian Island and continuing upriver, which were reserved by the PIN in its historic treaties. 30 M.R.S.A. § 6203(8). In those treaties, the PIN ceded lands beginning at the river's edge and extending upland, thereby retaining its rights to the beds and banks of the Penobscot River. See Wilson & Son v. Harrisburg, 107 Me. 207, 210 (1910). Pursuant to the 1818 Treaty, PIN's riparian ownership to the bed and banks of the river is limited only by the commonly recognized right of the public to use the river for navigation. See Pearson v. Rolfe, 76 Me. 380, 386 (1884). In confirming the PIN Reservation, the Implementing Act recognized the retention of PIN's riparian rights to the Penobscot River, including the beds and banks of the river.[4]

As a riparian owner, PIN possesses certain rights under state law which relate to the interpretation of its statutorily-based fishing right. Maine law recognizes that a riparian proprietor, such as the PIN, has a legal right:

> **to take fish from the water over his own land, to the exclusion of the public.** Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec., 333. He does not own the water itself, but he has the right to the natural flow of the stream, and the right to the use and benefit of it, as it passes through his land, for all the domestic and agricultural purposes to which it can be reasonably applied, and **no proprietor above or below can unreasonably divert, obstruct or pollute it.** Waluppa Reservoir Co. v. Fall River, 147 Mass., 548, 554, 18 N.E. 465, 1 L.R.A., 466; Auburn v. Water Power Co., 90 Maine 576-585, 38 Atl. 561, 38 L.R.A., 188.

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[4] Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," included within Appendix, Senate Select Committee on Indian Affairs, hearing July 1-2, 1980.

> The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs. ... All these rights which the riparian proprietor has in the running streams are as certain, as absolute, and as inviolable as any other species of property, ...

Opinion of the Justices of the Supreme Judicial Court, 118 Me. 503, 507 (1919) (emphasis added).

The PIN Reservation encompasses the area into which Lincoln discharges its outfall. As such and as a riparian proprietor, PIN possesses certain rights under Maine law, including the right to take fish and the right that others not unreasonably pollute the waters overlying those lands.

3. PIN's right to appeal

The Department finds particularly questionable the attempt to have EPA deny the PIN's right of appeal. We have examined the NPDES regulations which define standing to request a hearing in this matter. In the Department's view, PIN is an "interested person" as provided in 40 C.F.R. §124.74, which is the sole indicated criterion for filing a request for hearing. Moreover, the PIN meets the criteria under the definitions for "Indian Tribe" and of "person" under 40 C.F.R. § 124.2 as well. The definition for "Indian Tribe" specifically states that "[f]or the NPDES program, the term 'Indian Tribe' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 124.2. PIN meets these requirements. There would appear, thus, no grounds on which to contest PIN's status to request an evidentiary hearing in this proceeding.

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

Sincerely,

Edward B. Cohen
Deputy Solicitor

Enclosures

cc: The Honorable Francis Mitchell, Chief, PIN
Patty Goldman, Sierra Club Legal Defense Fund
Paul Stern, State of Maine, Office of the Attorney General
Kate Geoffroy, Pierce Atwood

EPA, Office of General Counsel, Washington, D.C.
EPA, Office of Regional Counsel, EPA, Boston
EPA, Indian Desk, Washington, D.C.
Department of Justice, Indian Resources Section
Department of Justice, Office of Tribal Justice
Office of the Regional Solicitor, Boston
Bureau of Indian Affairs, Office of Trust Responsibilities
Bureau of Indian Affairs, Eastern Area Office
Fish and Wildlife Service, Maine Field Office