from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in EPA's electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to Whom Do I Submit Comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 12, 2003.

Lisa K. Friedman,

Associate General Counsel, Air and Radiation Law Office, Office of General Counsel.

[FR Doc. 03–28785 Filed 11–17–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7587–4]

State Program Requirements; Approval of Application by Maine To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Maine

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; final approval of the Maine Pollutant Discharge Elimination System under CWA.

SUMMARY: On October 31, 2003 the Regional Administrator for the Environmental Protection Agency, Region I, approved the application by the State of Maine to administer and enforce the Maine Pollutant Discharge Elimination System (MEPDES) Program for the territories of the Penobscot Nation and the Passamaquoddy Tribe, with the exception of facilities with discharges that qualify as internal tribal matters. The authority to approve state programs is provided to EPA in section 402(b) of the Clean Water Act (CWA). The state will administer the approved program through its Department of Environmental Protection (DEP), subject to continuing EPA oversight and enforcement authority, in place of the National Pollutant Discharge Elimination System (NPDES) program previously administered by EPA in these territories. The program is a partial program to the extent described in the section of this Notice entitled ''Scope of the MEPDES Program.'' In making its decision, EPA considered and addressed all comments and issues raised during the public comment period relating to jurisdiction over the territories of the Penobscot Nation and Passamaquoddy Tribe and related issues.

DATES: Pursuant to 40 CFR 123.61(c), the MEPDES program was approved and became effective on October 31, 2003.

ADDRESSES: Questions or requests for additional information may be submitted to: Stephen Silva, USEPA Maine State Office, 1 Congress Street—Suite 1100 (CME), Boston, MA 02114–2023; or Dennis Merrill, MEDEP, Statehouse Station #17, Augusta, ME 04333–0017.

Copies of documents Maine has submitted in support of its program approval and copies of the comments received on this request may be reviewed during normal business hours, Monday through Friday, excluding holidays, at: EPA Region I, 11th Floor Library, 1 Congress Street—Suite 1100, Boston, MA 02114–2023, 617–918–1990 or 1–888–372–5427; and MEDEP, Ray Building, Hospital Street, Augusta, ME.

FOR FURTHER INFORMATION CONTACT: Stephen Silva at the address listed above or by calling (617) 918–1561 or Dennis Merrill at the address listed above or by calling (207) 287–7788. Part of the state's program submission and supporting documentation is available electronically at the following Internet address: *http://www.maine.gov/dep/blwq/delegation/index.htm.*

SUPPLEMENTARY INFORMATION: On January 12, 2001, EPA approved Maine to implement the MEPDES program in all the areas of the state outside Indian country. 66 FR 12791 (February 28, 2001). In that approval, EPA took no action on the state's program application as it applied to the territories and lands of the four federally recognized Indian tribes in Maine, including disputed territories. Id. at 12792–93. In our approval on October 31, 2003, EPA authorized the state to implement the MEPDES program as it applies to the territories of the Penobscot Nation and the Passamaquoddy Tribe, with the

exception of facilities with discharges that qualify as internal tribal matters.[1]

A. Scope of the MEPDES Program

Maine's MEPDES program is essentially unchanged since EPA approved it in January 12, 2001. For the territories of the Penobscot Nation and Passamaquoddy Tribe, EPA is approving Maine to administer both the NPDES permit program covering point source dischargers and the pretreatment program covering industrial sources discharging to publicly owned treatment works in these territories, except as to facilities with discharges that qualify as internal tribal matters. Maine is not being approved at this time to regulate cooling water intake structures under CWA section 316(b). Thus the state is being approved to operate a partial permit program, pursuant to CWA section 402(n)(4). The state program will cover all NPDES permitting responsibilities other than under CWA section 316(b). Sources with cooling water intake structures subject to CWA section 316(b) will need to obtain permits from the state regulating their discharges (including thermal discharges regulated under CWA section 316(a)), but also will need to obtain supplemental permits from the EPA regulating their cooling water intake structures pursuant to CWA section 316(b).[2]

The state is not applying for authorization for the municipal sewage sludge program at this time. EPA will continue to regulate sewage sludge in these territories in accordance with CWA section 405 and 40 CFR part 503.

Pursuant to CWA section 402(d), EPA retains the right to object to MEPDES permits proposed by MEDEP, and if the objections are not resolved, to issue the permits itself. EPA also will retain jurisdiction over all NPDES permits it has issued in these territories until MEDEP reissues them as MEPDES permits. As part of operating the approved program, the Maine DEP generally will have responsibility for enforcement, except as to facilities whose operations qualify as internal tribal matters. However, EPA will retain its full statutory enforcement authorities under CWA sections 308, 309, 402(i) and 504. Thus, EPA may continue to bring federal enforcement action under the CWA in response to any violation of the CWA in these territories. In particular, if the EPA determines that the state has not taken timely enforcement action against a violator and/or that its action has not been appropriate, the EPA may take its own enforcement action in Maine.

B. Responsiveness Summary

With no substantial changes to Maine's approved program, the only question remaining in this action involves the state's assertion of jurisdiction in these tribes' territories and issues related to the state, tribal, and federal authority in these areas. EPA received a large number of comments on these issues. In the section below entitled ''Overview of EPA's Rationale,'' EPA generally addresses the major comments we received. A detailed response to comments document, which more specifically addresses all the relevant comments we received, is part of the record supporting this approval. The EPA Regional Administrator hereby concurs with and adopts the responses to comments set forth in that document. That response to comments document together with this **Federal Register** notice constitute EPA's Responsiveness Summary. 40 CFR 123.61(b). A copy of the response to comments document is available upon request.

C. Overview of EPA's Rationale

1. Introduction

a. Maine's Application

On December 17, 1999, EPA determined that the State of Maine had submitted a complete application for approval to administer the MEPDES permitting program pursuant to CWA section 402(b), 33 U.S.C. 1342(b). 64 FR 73552, 73553 (December 30, 1999). In its application, the state asserted that it has authority to administer the program throughout the state, including in the territories of the federally recognized Maine Indian tribes. *See* 40 CFR 123.23(b) and Maine's application in the administrative record supporting this decision, Ad. Rec. section 1d–1 at 33–38. Maine argued that Congress granted the state jurisdiction over the territories of the federally recognized Maine Indian tribes in the Maine Indian Claims Settlement Act of 1980 (MICSA), 25 U.S.C. 1721, *et seq.*, which, among other things, ratified the Maine Implementing Act (MIA), 30 M.R.S.A. section 6201, *et seq*. The state argues that the combination of the federal and state statutes grants the state authority to regulate discharges to water adequate to support Maine's administration of the MEPDES program in the Indian Territories.[3]

EPA has thoroughly analyzed MICSA and MIA, the case law, and an administrative opinion interpreting MICSA to determine the scope of the regulatory authority Congress granted to the state in the southern tribes' Indian Territories. Based on that analysis, EPA finds that MICSA grants the state adequate authority to implement its MEPDES program in the Indian Territories of the Penobscot Nation and Passamaquoddy Tribe, with the exception of any permits for facilities with discharges which would qualify as an internal tribal matter. EPA has determined that there are currently two tribal facilities with discharges that the state cannot regulate, and EPA will retain the authority for the NPDES permits for those facilities.

b. Federally-Recognized Indian Tribes in Maine

There are four federally recognized Indian tribes in Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmac Indians. For the purposes of this notice, EPA will refer to the Penobscot Nation and Passamaquoddy Tribe collectively as the ''southern tribes.'' MICSA sets up the same jurisdictional arrangement for both southern tribes, and their Indian Territories generally lie to the south of the ''northern tribes,'' the Houlton Band of Maliseet Indians and the Aroostook Band of Micmac Indians.

As described more fully below, the configuration of the southern tribes' Indian Territories raises the most pressing questions about how Maine's MEPDES program applies under MICSA to facilities in and around those

[1] In this notice, EPA uses the terminology of the Maine Indian Claims Settlement Act in referring to the Passamaquoddy Tribe and Penobscot Nation. *See* 25 U.S.C. 1722(h) and (k). Although the Bureau of Indian Affairs refers to the Penobscot Nation as the ''Penobscot Tribe of Maine'' in its list of federally recognized tribes, 67 FR 46328, 46330 (July 12, 2002), the tribal government and MICSA identify the tribe as the ''Penobscot Nation.'' EPA also notes that the Passamaquoddy Tribe has two tribal governments in Maine, the Passamaquoddy Tribe of Indians Indian Township Reservation and the Passamaquoddy Tribe of Indians Pleasant Point Reservation. Our reference to the Passamaquoddy Tribe includes both these governments and their territories.

[2] The state has adopted statutory authority for DEP to regulate cooling water intake structures. 38 M.R.S.A. section 414–A(6), c. 231, section 11 (Public Law of 2001). Once DEP develops implementing regulations and submits a program to address CWA section 316(b), EPA will invite comment separately on this program element.

[3] EPA used the term ''Indian country,'' 18 U.S.C. 1151, to refer to the areas the Agency retained from its partial approval of Maine's program on January 12, 2001 (*see* 66 FR at 12792–12793) because the tribal lands involved in this dispute appear to come within the statutory definition of Indian country. Several parties have questioned the use of the term ''Indian country'' in Maine. EPA has decided that it is appropriate to adopt the term ''Indian Territory,'' 25 U.S.C. 1722(g) and (j), that MICSA uses to describe the lands of the Penobscot Nation and Passamaquoddy Tribe because it is MICSA that defines the jurisdictional status of those lands.

territories. In addition, certain provisions in MICSA apply solely to the southern tribes, and EPA's administrative record very thoroughly presents the legal arguments on all sides concerning the southern tribes. Therefore, EPA is acting now on Maine's application solely as it applies to the Indian Territories of the southern tribes, and does not address Maine's application with regard to the northern tribes' lands.

c. EPA's Process

The question of whether Maine possesses adequate authority to administer the MEPDES program in the Indian Territories has been particularly controversial, and EPA has gone to great lengths to understand all the relevant arguments from the tribes, the state, members of the public, and other governmental bodies.

i. Public Comment

EPA provided two public comment periods on this application. The first, starting December 30, 1999, invited comment on the entirety of Maine's application to administer the MEPDES program, including the state's assertion of authority in the Indian Territories. 64 FR 73552. EPA received extensive comment on the question of the state's authority in the Indian Territories, and that topic was the focus of most of the comments presented at the public hearing EPA held in Augusta, Maine on February 16, 2000. On May 16, 2000, EPA received a legal opinion it had requested in October 1999 from the Department of the Interior (DOI) addressing the state's application to administer the program in the Indian Territories of the southern tribes. In light of the importance of DOI's analysis, on June 28, 2000 EPA extended the public comment period to invite further comment on the question of the state's authority in the southern tribes' Indian Territories. 65 FR 39899. After one further extension, the comment period finally closed on August 21, 2000. 65 FR 47989 (August 4, 2000). In addition, EPA has held numerous informal meetings with members of the public concerned about jurisdiction in the southern tribes' Indian Territories.

ii. Consultation With Maine Tribes

EPA anticipated that the state would apply to administer its MEPDES program within the tribes' lands and territories and that this application would obviously have a significant impact on the Maine tribes in particular. Therefore, as described in our original notice inviting comment on Maine's application, EPA initiated consultations with the Maine tribes even prior to the state's submission of its application. *See* 64 FR 73552, 73554 (December 30, 1999). The Agency met numerous times with the tribes and their representatives concerning Maine's application. These sessions include a series of meetings during the winter of 2000 concerning the state's authority in the southern tribes' Indian Territories and northern tribes' lands, a conference call with EPA's Administrator, a series of discussions surrounding efforts between the state and the southern tribes to negotiate a settlement of the dispute, and two sets of meetings between the tribal representatives of the southern tribes, including Chiefs, Governors, and tribal council members, and each of the successive EPA Regional Administrators delegated to make this decision during the pendency of this action. *See* generally Ad. Rec. section 2.

iii. Consultation With DOI

EPA solicited the views of DOI on the interpretation of MICSA. On May 16, 2000, DOI provided EPA with a legal opinion (DOI Op.) finding that Maine did not have adequate authority under MICSA to administer the NPDES program in the Indian Territories of the southern tribes. DOI Op. at 18–19.

d. EPA's Approval Outside of the Tribes' Indian Territories and Lands

On January 12, 2001 EPA approved Maine to administer the MEPDES program in areas of the state outside of Indian country. EPA deferred action on the balance of Maine's application and retained responsibility to administer the NPDES program in the Indian Territories and lands. 66 FR 12791 (February 28, 2001). Disputes over the boundaries of the southern tribes' Indian Territories raised questions about the reach of the area EPA retained. To preserve the status quo pending a final determination on Maine's application, EPA deferred action on all the disputed areas. As a result, EPA retained responsibility for twenty-two NPDES permits for existing point source discharges, including two tribal facilities, nineteen non-member facilities, and one facility jointly owned by a tribe and town (*id.* at 12795, App. 1) pending a final decision. Pursuant to CWA section 402(c)(1), however, EPA's authority to issue permits remained suspended in the areas where it deferred action on the state's application. *Id.* at 12793.

e. Discharges to Indian Territory Waters

EPA currently retains 19 NPDES permits for non-member discharges and 2 permits for tribal discharges to waters that are arguably within the southern tribes' Indian Territories. The tribes and the state disagree both as to whether these discharges are to waters within the Indian Territories and as to whether the state has adequate authority to regulate any discharges in the Indian Territories. In addition, EPA retained the permit for a facility that the Passamaquoddy Tribe's government at Pleasant Point owns jointly with the neighboring town of Eastport.[4]

In the state's view, none of the non-member discharges are to waters within the Indian Territories. Solely for purposes of this decision, however, EPA has assumed that all of the 19 non-member discharges and the two tribal discharges are to Indian Territory waters and are therefore subject to MICSA's special jurisdictional arrangements. Even the most expansive interpretation of the boundaries of the Indian Territories advanced by the southern tribes, however, would only include the discharge points themselves, not the rest of the non-member facilities and their operations.

f. Framework for EPA's Analysis of State Authority

Consistent with their distinctive history, the status of the southern tribes under MICSA is unique in federal law. *See Passamaquoddy Tribe* v. *State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996). As a result, EPA's analysis of the state's application to administer the MEPDES program within the tribes' Indian Territories must rely on a different analysis than that which would control other tribes' Indian country areas in other states. While this decision is based primarily on EPA's analysis of whether MICSA grants the state jurisdiction over discharges into navigable waters within the southern tribes' Indian Territories, the Agency must also consider relevant federal Indian law, the CWA, and EPA's implementing regulations.

[4] In our partial program approval on January 12, 2001, EPA temporarily retained three facilities operated entirely or in part by the southern tribes. *See* 66 FR 12791, 12795 App.1 (February 28, 2001). Today, EPA is retaining the two of those facilities that are entirely contained within the southern tribes' Indian Territories and serve only tribal members: Penobscot Indian Nation Indian Island (NPDES Permit No. ME0101311) and Passamaquoddy Tribal Council (NPDES Permit No. ME0100773). The third facility, Passamaquoddy Water District (NPDES Permit No. ME0102211), is connected to a water system that serves not only the Passamaquoddy Pleasant Point reservation, but also the adjacent town of Eastport. In addition, while the drinking water distribution pipes reach into the Pleasant Point reservation, the facility and its outfall do not lie in an Indian Territory, disputed or otherwise. Therefore, EPA is including this permit in the state's approved MEPDES program.

i. NPDES Program Approvals Under the CWA

Before EPA may approve a state's application to administer the NPDES program, CWA section 402(b) and its implementing regulations require that the state must show that it has adequate authority to carry out the NPDES program. 33 U.S.C. 1342(b); 40 CFR 123.21–123.30. In addition, a state that ''seeks authority over activities on Indian lands'' must provide an attorney general's statement containing ''an appropriate analysis of the State's authority.'' 40 CFR 123.23(b). Section 402(b) of the CWA provides that ''[t]he Administrator shall approve each such submitted program unless he determines that adequate authority does not exist'' for the state to implement the program consistent with the Act's requirements. EPA's state program approval regulations provide that ''the Administrator shall approve or disapprove the program based on the requirements of (40 CFR part 123) and of the CWA and taking into consideration all comments received.'' 40 CFR 123.61(b).

ii. States Generally Lack Jurisdiction in Indian Country

The most significant unresolved issue regarding Maine's application to administer the NPDES program is whether the state has authority to regulate discharges to waters of the Indian Territories. The well-established principle under federal Indian law is that states generally lack authority in Indian country. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 214–15 (1987). Thus, if a state does not demonstrate specific authority in Indian country, EPA will not approve a state application to administer an EPA program in Indian country. ''EPA regulations allow for the possibility that a State may be authorized to issue NPDES permits on a Federal Indian reservation after adequate demonstration by the State of regulatory authority, although EPA recognizes that the threshold demonstration is high and that EPA has not expressly authorized a State to do so.'' 58 FR 67966, 67978 (1993). ''Under 40 CFR 123.23(b) * * *, a State seeking to carry out * * * the NPDES program[] * * * on Indian lands must provide a specific analysis of its authority to do so.'' *Id.* at 67973.

EPA's actions can neither change the congressionally determined status of that land, nor deprive the federal government of its duty and prerogative to protect tribal governance of Indian lands. *HRI, Inc.* v. *EPA*, 198 F.3d 1224, 1242 (2000). It is Congress which has plenary power over Indian affairs based on the Indian commerce clause of the Constitution and the trust responsibility of the federal government to the tribes. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). As a result, only Congress may change the jurisdictional relationships in Indian country by expanding or contracting state, tribal and federal jurisdiction. The sole limitation is that those changes bear some rational relationship to the best interests of the Indian tribes. *Morton* v. *Mancari,* 417 U.S. 535 (1974).

iii. Trust Responsibility and Interpreting MICSA

The federal government and each of its agencies, including EPA, have a trust relationship with federally-recognized Indian tribes. *Penobscot Nation* v. *Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999). Indeed, that trust relationship was part of the basis supporting the land claims suit that ultimately led to Congress passing MICSA. *Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975). As discussed below in section III, EPA is not persuaded by the arguments that MICSA generally precludes operation of the trust responsibility in Maine. In any case, the United States Court of Appeals for the First Circuit has confirmed that the canons of construction favoring tribes still operate in Maine. *Penobscot Nation* v. *Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999). In Fellencer, the court found that these special interpretive rules obliged the court to construe statutes that diminish ''the sovereign rights of Indian tribes * * * strictly,'' and ''ambiguous provisions * * * to the [Indians'] benefit,'' which is ''rooted in the unique trust relationship between the United States and the Indians.'' 164 F.3d 706, 709 (1st Cir. 1999) (quoting *Rhode Island* v. *Narragansett Indian Tribe,* 19 F.3d 685, 702 (1st Cir. 1994); County of *Oneida* v. *Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985)) (insertion in original); *see also*, HRI, 198 F.3d at 1247.

iv. Framework for Decision

The State of Maine must have adequate authority in the southern tribes' Indian Territories in order for EPA to approve the state's application for those areas, and federal Indian law would generally bar state authority in Indian country. Thus, EPA must determine whether MICSA granted adequate authority to the state in the Indian Territories. Because of the canon of construction requiring that statutory ambiguities be construed in favor of tribes, such a grant of authority to the state would have to be unambiguous.

2. Approval of Maine's Application To Administer the MEPDES Program in the Indian Territories of the Penobscot Nation and Passamaquoddy Tribe

After analyzing the state's application through our framework for decision, EPA has determined that MICSA unambiguously granted the state adequate authority to administer the MEPDES program in the Indian Territories of the southern tribes. EPA also has found that MICSA did not grant adequate authority to administer permits for facilities with discharges that qualify as internal tribal matters, which includes two existing tribal facilities' discharges. Pursuant to the provisions of CWA section 402(b), therefore, EPA is approving Maine's application to administer the MEPDES program for discharges to Indian Territory waters, except for permits that EPA determines are internal tribal matters, subject to the requirements imposed by the CWA on all state-run NPDES programs.

EPA emphasizes that we base this conclusion on the unique provisions of MICSA and MIA. Congress was very clear that the combination of these statutes creates a jurisdictional arrangement for the southern tribes' Indian Territories unlike any other in the nation. S. Rep. 96–957 at 29 (1980)(S. Rep.)(''The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Maine Implementing Act is original.''); *Akins* v. *Penobscot Nation,* 130 F.3d 482, 484 (1st Cir. 1997). Because MICSA is unique, EPA's decision here does not have any bearing on the question of state and tribal jurisdiction in Indian country outside of Maine. In addition, EPA has not yet decided what action to take on Maine's application as it relates to the lands of the northern tribes, and this discussion does not necessarily bear on that part of Maine's application.

a. Penobscot and Passamaquoddy Indian Territories

This analysis relates to the Indian Territories of the southern tribes, which include both the tribes' pre-MICSA reservations and their trust lands acquired post-MICSA. 25 U.S.C. 1722(g) and (j); 30 M.R.S.A. section 6205(1) and (2). MICSA confirmed the southern tribes' reservations as those reservations were defined in the MIA. 25 U.S.C. 1722(f) and (i). The MIA, in turn, included definitions of the southern tribes' reservations, and those definitions referred to treaties concluded between the southern tribes and the States of Maine and Massachusetts in the eighteenth and

nineteenth centuries. 30 M.R.S.A. section 6203(5) and (8). MICSA provides for the southern tribes to acquire lands outside the original reservations and to have the United States take up to 150,000 acres acquired by each southern tribe into trust ''for the benefit of the respective tribe or nation.'' 25 U.S.C. 1724(d).

The geography of the pre-MICSA reservations, which are still the center of the Indian Territories, demonstrates the importance of water quality to the southern tribes. Portions of the Passamaquoddy Pleasant Point Reservation lie along the St. Croix River and the tribe's community at its Indian Township Reservation is housed in immediate proximity to areas flooded by the Grand Falls Dam impoundment. Notwithstanding the dispute discussed below, all parties appear to agree that the Penobscot Nation's reservation includes at least the islands in the main stem of the Penobscot River, which were not sold prior to 1980, starting with Indian Island, and proceeding north approximately 45 miles up to the fork in the river where west and east branches of the river converge. There also appears to be no dispute that the reservation does not include the upland on either side of the Penobscot River's banks. The Penobscot community is housed on Indian Island, completely surrounded by the river. The river also flows through and around the rest of the original reservation. Clearly, the physical setting of the southern tribes in such close proximity to important rivers and waters makes surface water quality very important to them and their riverine culture.

The lands taken into trust for the southern tribes pursuant to MICSA are generally large unfragmented parcels spread across central Maine that are clearly described in modern conveyances recorded with the relevant registry of deeds and the Bureau of Indian Affairs. The boundaries of the original reservations are much less clear, however. There are serious disputes about the precise geographic reach of the southern tribes' reservations under MICSA, some of them arising out of interpretations of the treaties referred to in MIA. EPA specifically invited comment on those disputes when we first extended the comment period on Maine's application. *See* 66 FR 12791, 12793 (February 28, 2001).

The dispute that most directly impacts existing permitted discharges involves how far the Penobscot Reservation in the Penobscot River extends upriver and whether it includes the bed and banks of the river. DOI has concluded that the Penobscot reservation includes the bed and banks of the Penobscot River. Letter from Edward B. Cohen to John P. DeVillars, September 2, 1997 at 6 (Ad. Rec. section 4–25). According to DOI, the Penobscot River bank separates the reservation—the river and islands—from the non-Indian land on either side. Pursuant to DOI's position, facilities located near the bank of the river where the Nation's reservation lies, with discharge pipes into the river, are crossing a boundary into the Nation's reservation. The Penobscot Nation also asserts that its reservation includes not only the main stem of the Penobscot River north of Indian Island, but also the east and west branches up to the headwaters and tributaries. The state maintains that the reservation only includes the islands in the main stem. DOI has not announced a position on this dispute over the branches and tributaries.

The NPDES program applies at the point of discharge, and it is the location of the discharge outfall that generally determines which NPDES permitting authority has jurisdiction to issue permits for discharges from a facility that straddles a jurisdictional boundary, such as the border between two states or between Indian country and non-Indian country areas. All nineteen of the non-member facilities EPA retained are situated with the bulk of their facilities and operations on non-tribal land and outfall pipes in the Penobscot River, its branches, or tributaries north of Indian Island. According to DOI's announced position on the boundaries of the Penobscot's reservation, at least seven nonmember facilities located outside of the reservation discharge into its waters of the main stem.

EPA acknowledges that the state and other interested parties vigorously dispute DOI's conclusion about these boundaries. EPA emphasizes that we are taking no action to determine the boundaries of the southern tribes' Indian Territories. Today, EPA is approving the state to administer the MEPDES program both inside and outside of the southern tribes' Indian Territories, except permits for facilities with discharges that EPA determines are internal tribal matters. Therefore, EPA need not determine the exact location of those boundaries in this action.

b. Authority To Regulate Discharges to Indian Territory Waters Under MICSA

EPA has concluded that MICSA unambiguously grants Maine adequate regulatory authority to administer the MEPDES permitting program for most of the discharges in the southern tribes' Indian Territories. EPA does not agree with the DOI opinion that the southern tribes' area of exclusive jurisdiction over internal tribal matters reaches so far as to preclude the state from regulating any discharges to water in the southern tribes' Indian Territories. Rather, the Agency has concluded that the permitting of two existing tribal facilities are internal tribal matters and beyond the reach of Maine's program.

When interpreting the meaning of federal statutes, EPA's first duty is to determine whether Congress has spoken to the issue at hand. *Hughes Aircraft Co.* v. *Jacobson,* 525 U.S. 432, 438 (1999). In the *Chevron* case, the Court used three methods to determine Congress' intent: the plain meaning of the statutory text; reasonable inferences from the structure of the statute; and the legislative history. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859–864 (1984); *see also, Passamaquoddy Tribe* v. *Maine*, 75 F.3d 784, 793 (1st Cir. 1996). As EPA applies these methods, we remain mindful that Congressional intent to intrude on tribal sovereignty must be unmistakably clear. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 59 (1978); *Penobscot Nation* v. *Fellencer,* 164 F.3d 706, 709 (1st Cir. 1999).

i. Statutory Text of MICSA and MIA

The key provision in MICSA addressing the jurisdictional relationship between the southern tribes and the state defines that relationship by referring to MIA.

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. 1725(b)(1). In addition, one of the purposes of MICSA is ''to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation.'' 25 U.S.C. 1721(b)(3). The ultimate source of MIA's authority to affect Indian jurisdiction is MICSA, and where the MIA and MICSA conflict, the federal act controls. 25 U.S.C. 1735(a). The two statutes are closely intertwined, and under the U.S. Constitution, only Congress may alter a tribe's jurisdiction; therefore, federal courts have concluded that MIA's interpretation is a matter of federal law. *Akins,* 130 F.3d at 485; *Penobscot Nation* v. *Fellencer,* 164 F.3d 706, 708 (1st Cir. 1999), cert. denied 527 U.S. 1022 (1999).

Section 6206(1) of the MIA sets out the core of the jurisdictional

relationship between the state and the southern tribes.

[T]he Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, 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 shall not be subject to regulation by the State.

30 M.R.S.A. section 6206(1). MIA in turn defines ''laws of the State'' to include ''the Constitution and all statutes, rules or regulations and the common law of the State * * *.'' 30 M.R.S.A. section 6203(4). Therefore, the combination of MICSA and MIA makes state regulatory authority applicable to the southern tribes and their Indian Territories, with the very important exception of ''internal tribal matters.''

MICSA and MIA make that state regulatory authority applicable to the water and water rights in the southern tribes' Indian Territories. MICSA provides that the jurisdictional formula in MIA applies to the southern tribes ''and the land and natural resources owned by, or held in trust for the benefit of the tribes, nation, or their members.'' 25 U.S.C. 1725(b)(1). MICSA specifically defines ''land or natural resources'' to include ''water and water rights.'' Id. at section 1722(b). MIA section 6204 generally makes state law applicable to ''any lands or other natural resources'' owned by Indian tribes or held in trust for them. MIA also defines ''land or other natural resources'' to include ''water and water rights.'' 30 M.R.S.A. section 6203(3). When MIA section 6206(1) addresses the southern tribes in particular, it does not refer specifically to the ''land or other natural resources'' of the tribes when it applies state law to the tribes. But MIA section 6204 appears to operate in parallel with the language in MIA section 6206(1) providing that the southern tribes are ''subject to the laws of the State'' in their quasi-municipal status. And section 6204 makes it clear that under MIA this grant of jurisdiction was designed to cover ''natural resources'' defined to include ''water and water rights.'' [5] Moreover, when Congress ratified MIA's jurisdictional arrangement as to the southern tribes, including section 6206(1), it used a parallel construction in MICSA, making that jurisdictional arrangement applicable to ''natural resources,'' defined to include ''water and water rights.'' 25 U.S.C. 1725(b)(1) and 1722(b). Therefore, MICSA and MIA clearly combine to apply state regulatory authority to the waters of the southern tribes' Indian Territories.

ii. Statutory Structure of MICSA

MICSA includes a specific reference to state environmental laws, a provision that prevents the application of generally applicable federal Indian laws and regulations that would otherwise ''affect or preempt the * * * jurisdiction of the State of Maine including, without limitation, laws of the State relating to land use or environmental matters, * * *.'' 25 U.S.C. 1725(h)(emphasis added).[6] This provision operates together with section 1735(b), which prevents subsequently enacted federal Indian statutes from inadvertently affecting or preempting state jurisdiction after the effective date of MICSA. 25 U.S.C. 1735(b).[7]

The combination of these two subsections, or ''savings clause[s']'' as the First Circuit has labeled them (*Passmaquoddy Tribe,* 75 F.3d at 789), prevents the general body of federal Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state. The two were the subject of considerable attention and deliberation during the legislative process. S. Rep. at 30–31 and 35; H.R. Rep. 96–1353 at 19–20 and 29 (1980), reprinted in 1980 U.S.C.C.A.N. 3786 (H.R. Rep). And in *Passamaquoddy Tribe* v. *Maine,* 75 F.3d 784 (1st Cir. 1996) the court upheld the operation of section 1735(b) when it found that the subsequently-enacted Indian Gaming Regulatory Act does not apply in Maine because Congress did not make it specifically applicable to the state. The court found that ''section 16(b) of the Settlement Act [25 U.S.C. 1735(b)] gave the State a measure of security against future federal incursions upon [its] hard-won gains in settling the tribes' land claims and gaining jurisdiction over the tribes and their lands. 75 F.3d at 787.

EPA agrees with DOI that these provisions, including section 1725(h), do not directly answer the question before us. DOI Op. at 2 n. 2. A provision that shields state authority from generic intrusions by federal law does not control the question of what authority Congress gave the state in the first place. Nevertheless, it is notable that one area of state authority Congress specifically called out in the savings clauses is the ''laws of the State relating to * * * environmental matters.'' This provision supports the conclusion that the original grant of jurisdiction to the state was designed to include some measure of environmental regulation. Otherwise, why would Congress have bothered to protect that area of state authority under section 1725(h)?

iii. Legislative History of MICSA

MICSA's legislative history also demonstrates that Congress understood state environmental law would apply in the southern tribes' Indian Territories. Indeed, the only passages in the Senate and House Committee reports EPA could find that specifically address environmental regulation under MICSA and MIA show quite explicitly that Congress understood it was making state environmental regulation applicable to the southern tribes' Indian Territories.[8]

The Senate Report discusses the application of state environmental law under section 1725(b)(1), the provision in MICSA that ratified MIA and its

[5] EPA here takes no position on the effect of MIA section 6204 on the northern tribes, other than to note that it is without effect on them absent some corresponding Congressional action in MICSA or another federal statute.

[6] In its entirety, section 1725(h) reads:

Except as other wise [sic] provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for [them] shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

[7] In its entirety, section 1735(b) reads:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

[8] All sides refer EPA to extensive and conflicting remarks made in the debate of both MICSA and MIA during the federal and state legislative processes. We address those comments in our response to comments document. The focus of our inquiry, however, is not the statements of individual partisans in the debate, but the considered remarks made by the two congressional committees in reports designed to present the collective views of each committee. EPA relies especially on the Senate Report, which the House Report ''accepts as its own'' in part. H.R. Rep. at 20. *Akins* v. *Penobscot Nation,* 130 F.3d 482, 489 (''We look to the Committee Report of the Senate Select Committee on Indian Affairs concerning the Settlement Act.'')(citing *Garcia* v. *United States,* 469 U.S. 70, 76 (1984)).

jurisdictional provisions for the southern tribes:

> State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27.

In addition, when explaining the operation of the savings clauses, 25 U.S.C. 1725(h) and 1735(b), discussed in the previous section, the Senate Report provides a specific example of a federal environmental law that would be excluded from operating in Maine Indian Territories to avoid interfering with state environmental law. Although the example in this passage focuses on the provision in the Clean Air Act that allows Indian tribes to reclassify their lands under the prevention of significant deterioration air permitting program, the passage ends by emphasizing that this exclusion would also operate more generally to protect state environmental regulations.

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. at 31; *see also* H.R. Rep. at 29. In addition, this passage makes clear that Congress was not limiting the application of federal Indian law in Maine solely to avoid any interference with state environmental regulation as it applies to lands outside the Indian Territories. The report specifically discusses Congress's intent to protect the application of state air quality laws which will be applicable to land held ''for the benefit of the Maine Tribes.'' Again, this discussion would be pointless if Congress did not specifically intend to make state environmental regulation applicable in the southern tribes' Indian Territories.

iv. Concurrent Jurisdiction

Several tribal commenters have argued that the southern tribes have concurrent jurisdiction with the state under MICSA, and this concurrent jurisdiction prevents the state from exercising adequate authority to implement its NPDES program in the Indian Territories. In our consultations, those commenters specifically asked EPA to address the question of concurrent jurisdiction. Indeed, the First Circuit has held that simply because Congress has made state law applicable in Indian country does not mean that Congress has necessarily limited an Indian tribe's inherent sovereignty. In *State of R.I.* v. *Narragansett Indian Tribe,* 19 F.3d 685 (1st Cir. 1994), cert. denied 513 U.S. 919 (1994), the court reviewed the effect of the Rhode Island Indian Claims Settlement Act (25 U.S.C. 1701–1716) and the Indian Gaming Regulatory Act on the Narragansett Tribe. In language very similar to MICSA section 1725(b) and MIA section 6204, the Rhode Island settlement act provides that the tribe's ''settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.'' 25 U.S.C. 1708. In analyzing the effect of this language, the court concluded:

> [T]he mere fact that the [Rhode Island] Settlement Act cedes power to the state does not necessarily mean, as Rhode Island suggests, that the Tribe lacks similar power and, thus, lacks ''jurisdiction'' over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad, . . . we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands and that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the Gaming Act.

Narragansett, 19 F.3d at 701. In a subsequent dispute over the law applicable to construction of a tribal housing complex, the District Court sorted through the overlapping authorities of state and tribal concurrent jurisdiction using a preemption analysis, generally finding that state law was preempted, with the one exception of the state's coastal resources management plan. *Narragansett Ind. Tribe of RI* v. *Narragansett Elec.,* 878 F.Supp. 349, 361–66 (D.R.I. 1995), rev'd on other grounds 89 F.3d 908 (1996). The District Court specifically found the state regulations to implement the CWA were preempted. 878 F.Supp. at 362; *see also Narragansett,* 19 F.3d at 703. Therefore, it is important to assess whether MICSA allows the southern tribes to assert concurrent jurisdiction that might preempt the laws of the state.

Notably, the First Circuit in the *Narragansett* case briefly compared the Rhode Island settlement act with MICSA. The court intended to highlight the extent to which Congress had not impaired the Narragansetts' sovereignty in Rhode Island:

> Comparative analysis is also instructive. We think it is sensible to compare the jurisdictional grant embedded in the [Rhode Island] Settlement Act with the jurisdictional grants encased in two other Indian claims settlement acts that were to some extent modeled after the Settlement Act. Both of the latter pieces of legislation—one involving Massachusetts, one involving Maine—contain grants of jurisdiction parallel to section 1708, expressed in similar language. *See* . . . 25 U.S.C. 1725 (1988). Yet both acts also contain corresponding limits on Indian jurisdiction, conspicuously absent from the Settlement Act. *See* . . . 25 U.S.C. 1725(f). By placing state limits on the retained jurisdiction of the affected tribes, these newer acts imply that the unadorned grant of jurisdiction to a state . . . does not in and of itself imply exclusivity.

Id. at 702. The cross reference to MICSA is to a section specifically addressing the southern tribes' concurrent jurisdiction:

> 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) (emphasis added). While MICSA specifically reserves the southern tribes's exclusive jurisdiction over Indian child custody proceedings (25 U.S.C. 1727(a)), Congress provided in section 1725(f) that MIA generally defines the extent of the southern tribes' jurisdiction. Section 6206(1) of MIA defines the scope of the general powers of the southern tribes as generally the same as those of municipalities in Maine. In matters where MIA accords the southern tribes a status similar to Maine municipalities, they enjoy considerable homerule authority. See *International Paper Co.* v. *Town of Jay,* 665 A.2d 998 (Me. 1995); *Central Maine Power* v. *Town of Lebanon,* 571 A.2d 1189 (Me. 1990). But that authority is ultimately subject to definition and preemption by the state. *Midcoast Disposal* v. *Town of Union,* 537 A.2d 1149 (Me. 1988). In the case of Maine's MEPDES program, the state has not delegated to municipalities the authority to issue permits that would implement the NPDES program under the CWA. Therefore, EPA sees no basis under MIA for finding that the southern tribes' concurrent jurisdiction could exclude or preempt state regulation of

discharges to waters in the Indian Territories.[9]

v. Conclusion

In sum, the text, structure, and legislative history of MICSA each indicate that Congress clearly granted the state authority to regulate the environment in the Indian Territories of the southern tribes, and read in combination they make this conclusion unambiguous. Where there is no ambiguity in Congress' intent, EPA may not apply the interpretive canon favoring Indian tribes. *See Passamaquoddy,* 75 F.3d at 793 (''If ambiguity does not loom, the occasion for preferential interpretation never arises.'') This grant of authority is adequate to support the state's application to administer the MEPDES program in the Indian Territories of the southern tribes. As discussed below, EPA must also consider that MICSA limited that grant by reserving exclusive jurisdiction over internal tribal matters to the southern tribes, but we have determined that this exception to the state's authority currently only excludes two tribal facilities from the Maine's MEPDES program.

c. The Scope of the Tribes' Authority Over Internal Tribal Matters

The DOI opinion that EPA requested and the parallel comments from the southern tribes make persuasive arguments about the importance of the internal tribal matters exception and about Congress's purpose to preserve the southern tribes' culture and protect them as sovereign entities. EPA agrees with DOI and the tribes about the importance to the tribes of the internal tribal matters exception, and that we must analyze the scope of MICSA's internal tribal matters exception to fully understand the extent of the broad grant of authority to the state. To that extent, EPA is essentially adopting DOI's legal analysis of the basic structure of MICSA.

EPA does not agree, however, with DOI's assessment of the scope of the matters reserved to exclusive tribal jurisdiction under the internal tribal matters exception. DOI and the tribes concluded that the exclusion of internal tribal matters from state regulation prevents Maine from regulating the environment, at least for the purposes of implementing its MEPDES permitting program in the southern tribes' Indian Territories. When EPA takes DOI's legal analysis of the structure of MICSA and applies it to the facts we have in Maine, we believe that DOI has misunderstood what Congress intended in MICSA and the practical impacts of implementing an NPDES program. EPA does not disagree with DOI lightly, because the Department is the federal government's expert agency on Indian law and is charged with administering MICSA. The Supreme Court has made it clear that an advisory legal opinion such as DOI's May 16, 2000 letter is owed respect to the extent it is persuasive. *United States* v. *Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 2175–76 (2001); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); and *AIAM* v. *Mass. DEP,* 208 F.3d 1, 6 (1st Cir. 2000).

Nevertheless, this matter requires us to analyze how MICSA's jurisdictional formulation applies to implementing the NPDES program. As the agency Congress has delegated to implement the CWA and the NPDES program nationwide, EPA has particular expertise in administering NPDES programs. The Agency takes issue with some points in DOI's opinion that are purely legal in nature. On these points, EPA has had the benefit of reviewing a fully developed administrative record presenting the legal arguments and relevant information submitted from all sides of this dispute. In addition, part of our disagreement with the Department's analysis turns on our understanding of the effects of NPDES permitting in these areas. Our experience in assessing the impacts of NPDES permitting on the regulated community and the public particularly qualifies EPA to apply DOI's legal principles to these difficult facts.

The factual scenario we confront directly implicates the conduct of non-members and the core of the southern tribes interest in protecting their environment. Assuming DOI is correct that the Penobscot reservation reaches bank to bank in the Penobscot River, any facility located near the bank of that river that needs to discharge into the river crosses a boundary into Indian Territory. The land-based portion of the facility's operations would not be in the Nation's reservation and would clearly be subject to state jurisdiction. But this part of Maine is not extensively served by sewage systems that could allow a facility to avoid direct discharges into the Penobscot River. So in the event a facility needs to discharge into the Penobscot River above Indian Island, its discharge would be into the Penobscot Nation's reservation as defined by DOI. These facts present a clear tension between the interest of the Nation in the environmental quality of its Indian Territory and the interest of the state in applying its discharge permitting program statewide. We believe the Agency's understanding of the CWA in general and the NPDES program in particular makes an important contribution when weighing these interests, and that we are in a position to refine DOI's analysis.

i. MICSA and Strengthening the Sovereignty of the Maine Tribes

Early in their analyses, the tribes and DOI examine the theme in MICSA's legislative history that Congress was strengthening the sovereignty of the Maine tribes by passing MICSA and ratifying MIA. For example the Senate Report concludes that ''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.''* DOI Op. at 6–7, quoting S. Rep at 14 (DOI's emphasis). DOI's opinion then looks to the legal status of the southern tribes immediately prior to passage of MICSA. The opinion argues that in *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1065–66, the First Circuit held in 1979 that the southern tribes were in essentially the same position as Indian tribes across the nation, with ''inherent powers of a limited sovereignty'' to regulate their own affairs. DOI Op. at 7; see also *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 378–80 (1st Cir. 1975). Accordingly, DOI infers that if Congress were indeed strengthening the sovereignty of the Maine tribes in comparison with their legal status immediately prior to 1980, MICSA must accord the southern tribes at least as much authority to regulate their own environment as Indian tribes outside Maine enjoy.

EPA agrees that the southern tribes had won important victories in court, and their legal status prior to MICSA as a matter of federal Indian law may well

[9] Several sections of MIA reserve specific matters for exclusive tribal jurisdiction. See 30 M.R.S.A. sections 6206(3) (exclusive tribal jurisdiction over violations of tribal ordinances by tribal members within Indian Territory), 6207(1) (exclusive tribal authority to regulate hunting, trapping or other taking of wildlife, and taking of fish on ponds under ten acres within Indian Territory), 6209–A(1) and 6209–B(1) (exclusive tribal court jurisdiction over certain misdemeanors and small claims by and against tribal members, Indian child custody proceedings, and domestic relations matters between tribal members residing on the reservation), and 6210(1) (exclusive authority of tribal law enforcement officers to enforce laws within the exclusive regulatory or adjudicatory jurisdiction of the tribes). None of these specific categories of the southern tribes' exclusive jurisdiction would preempt sufficient state authority to prevent Maine's MEPDES program from operating in the southern tribes' Indian Territories. In addition to giving the southern tribes the powers and limitations of municipalities under Maine law, section 6206(1) also carves out the broadest exception to state authority, ''internal tribal matters,'' that is discussed in the next section of this notice.

have been essentially that of other tribes nationwide, but that conclusion was far from settled law. The *Bottomly* court found that Congress had never acted to deprive the Passamaquoddy Tribe of its sovereign immunity. 599 F.2d 1061. The Supreme Judicial Court of Maine in *State of Maine* v. *Dana* found that the trial court had erred in not conducting fact-finding to determine if the site of a crime had retained its aboriginal character and was therefore under the exclusive criminal jurisdiction of the federal government. 404 A.2d 551 (1979). While both courts found that the Passamaquoddy Tribe retained a limited sovereignty and the *Dana* court strongly intimated that the area where the crime took place qualified as Indian country, 404 A.2d at 563, neither court ruled on the subject of the state's and tribes' respective jurisdictions over the reservation, and neither case involved the Penobscot Nation. It thus makes sense that Congress viewed MICSA as a settlement of the parties' positions in litigation that were not yet finally resolved.

Both of the congressional committee reports for MICSA make it clear that Congress understood it was acting against the backdrop of Maine's position that the southern tribes were essentially wards of the state. Based on this assertion, the state claimed the authority to regulate virtually all aspects of the southern tribes' existence, with little to distinguish the tribes from any other voluntary association of state citizens. ''Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes.'' S. Rep. at 14; *see also* H.R. Rep. at 14. When Congress preserved a subset of the southern tribes' inherent sovereignty from state regulation by carving out ''internal tribal matters'' from the grant of state jurisdiction, it was strengthening the southern tribes sovereignty in comparison with the federal government's nearly complete abandonment of the tribes' inherent sovereignty up to that point. See *Joint Tribal Council,* 528 F.2d at 375 (in which the U.S. Secretary of the Interior argued that the United States had no trust relationship with the Passamaquoddy Tribe). The language that surrounds DOI's quotation from the Senate Report confirms this conclusion:

> While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions [recognizing the federal status of Maine tribes] 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 and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

S. Rep. at 14; H.R. Rep. at 15.

Therefore, EPA does not believe that the reference to strengthening tribal sovereignty in the legislative history indicates that Congress meant ''internal tribal matters'' to act as a codification of either the full scope of inherent sovereignty retained by most Indian tribes or the core governmental powers of other tribes. Rather, Congress clearly intended internal tribal matters to be a more narrow reservation of a subset of tribal authority that was unique in scope from those powers retained by other tribes.

ii. Statutory Analysis and Internal Tribal Matters

The southern tribes and DOI are clearly correct that Maine is prevented from regulating internal tribal matters. This term is not exhaustively defined in either MIA, where it appears, or in MICSA, which simply ratifies its appearance in MIA. 30 M.R.S.A. section 6206(1); 25 U.S.C. 1725(b)(1). Rather, MIA simply provides a list of examples illustrating internal tribal matters, and the First Circuit has twice held that this list is not exclusive. *Akins,* 130 F.3d at 486; *Fellencer,* 164 F.3d at 709. But EPA is unable to conclude that this exception extends generally to reserve regulation of discharges to Indian Territory waters from the grant of state authority under MICSA.

DOI's statutory analysis focuses on two of the examples of internal tribal matters in MIA: ''the right to reside within the respective Indian territories'' and ''tribal government.'' The tribes and DOI assess how federal courts and EPA have interpreted similar attributes of tribal sovereignty as they operate generally under federal Indian law outside the context of MICSA. Under DOI's interpretation, the internal tribal matters exception would swallow the rule. The greatest weakness of DOI's argument that internal tribal matters includes ''regulation of water quality including point-source discharges,'' DOI Op. at 18, is that it largely fails to reconcile that conclusion with the grant of authority to the state to regulate the environment in the southern tribes' Indian Territories, as reflected in text, structure, and legislative history of MICSA and MIA outlined in the previous section.

DOI's interpretation of these statutory examples renders the concept of internal tribal matters virtually indistinguishable from the ''inherent powers of a limited sovereign'' that tribes generally have outside of Maine. But as the *Akins* court concluded, one cannot equate internal tribal matters under MICSA with customary concepts of internal matters or internal affairs under federal Indian law:

> While defining what constitutes an internal matter controlled by Indian tribes is hardly novel in Native American law, it is novel in this context. The relations between Maine and the Penobscot Nation are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.

130 F.3d at 483. Therefore, EPA concludes that the simple reference to the general federal Indian law defining the traditional concepts of tribal government and tribal control over access to their lands cannot provide the complete answer to this question that DOI finds. DOI Op. at 12.[10]

Although the examples of internal tribal matters in MIA do not completely describe the scope of the exceptions to the state's regulatory authority, it might well be possible for an environmental regulatory program, or elements of it, to operate in a manner that its effects on non-members are limited enough or that the tribal interest is so great that it qualifies as an internal tribal matter. Indeed, for two existing tribal facilities in the southern tribes' Indian Territories, EPA has determined that regulating their water discharges is an internal tribal matter, as described below. But EPA concludes that regulating discharges that would have substantial effects on non-members is not so confined that it qualifies as an internal tribal matter.

iii. Judicial Guidance on Internal Tribal Matters: The *Akins* and *Fellencer* Cases

Independent of DOI, EPA has reviewed the two federal Court of Appeals decisions that depended on the scope of internal tribal matters, *Akins* v. *Penobscot Nation,* 130 F.3d 482 (1st Cir.

[10] That is not to say that the internal tribal matters examples of tribal government and the right to reside are rendered meaningless. EPA notes that the tribes may decide who may live in their Indian Territories and how to conduct the affairs of their governments without the ability to regulate non-member discharges to waters of Indian Territory by facilities located outside of Indian Territory. *See e.g. Great Northern Paper, Inc.* v. *Penobscot Nation,* 770 A.2d 574, 590–91 (Me. 2001)(southern tribes control access to the internal deliberations of their tribal governments).

1997), and *Penobscot Nation* v. *Fellencer,* 164 F.3d 706 (1st Cir. 1999). Those opinions presented factors the court used to assess whether an activity is an internal tribal matter. Although the Penobscot Nation won both of these cases when the court found that the activity involved was an internal tribal matter, EPA believes that the analysis in these opinions actually confirms the Agency's finding that regulating the discharges to Indian Territory waters by non-member facilities is not an internal tribal matter.

Akins is the most relevant case, because it involved a dispute over natural resources management, specifically the Nation's right to license the cutting of timber on its Indian Territory. Indeed, it is notable that *Akins* involves ''timber and timber rights,'' which is listed as a subject matter of state regulation in Indian Territory under MIA's definition of natural resources. 30 M.R.S.A. section 6203(3). The Nation had adopted a requirement that only tribal members who were also residents of Maine could receive permits to cut the Nation's timber, or ''stumpage permits.'' Akins had recently moved to Alabama, and he was the only tribal member deprived of a license by the new residency requirement. Akins made claims for deprivation of rights under Maine law and under section 1983 of the Civil Rights Act, which requires that the alleged misconduct have taken place ''under color of state law.'' *Akins,* 130 F.3d at 483–84. If the dispute over the stumpage permit was an internal tribal matter, then it would not arise under state law, and the tribal courts would have exclusive jurisdiction over Akins's claims. *Id.* at 485.

Superficially, *Akins* may appear to stand for the principle that a tribe using permits to manage its natural resources is an internal tribal matter, but the facts of the case and the court's analysis are considerably more narrow. There was no allegation before the court that the Nation's timber licensing program was at any variance with otherwise applicable state environmental or land use regulations: ''* * * the Implementing Act, section 6204, makes state laws regulating land use or management, conservation and environmental protection applicable to tribal lands. The absence of an assertion that any such laws are involved here is telling.'' Id. at 488. Moreover, the court was at pains to point out that the dispute did not implicate state law or any interest other than a dispute between tribal members:

> This is not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws. * * * This is not an instance of the potential conflict or coincidence of Maine law and federal statutory law. This is not even a situation of substantive rights regarding stumpage permits granted to persons by statute, state or federal. This is instead a question of allocation of jurisdiction among different fora and allocation of substantive law to a dispute between tribal members where neither the Congress nor the Maine Legislature has expressed a particular interest.

Akins, 130 F.3d at 487–88. When EPA applies the court's discussion of its analytical factors to the facts that confront us in this situation, we conclude that the analysis in *Akins* strongly confirms our finding that regulation of the non-member discharges to Indian Territory waters is not an internal tribal matter.

The facts of the *Fellencer* case do not bear as directly on water quality regulation, but the court's analysis further illustrates its approach to defining internal tribal matters. The Penobscot Nation fired Fellencer, a non-Indian community nurse who worked for the Nation. After discharging her, Fellencer alleged that the Nation posted an opening for a community nurse with an express preference for Indian applicants. Fellencer sought to enforce state law prohibiting employment discrimination based on race or national origin. *Fellencer,* 164 F.3d at 707. If the Nation's decision to terminate Fellencer's employment was an internal tribal matter, she had no claim under state law. As discussed below, applying the *Fellencer* court's analysis of its factors to the facts in this case supports EPA's view that regulation of the non-member discharges to Indian Territory waters is not an internal tribal matter.

EPA has carefully analyzed the court's factor test as it applies to the MEPDES program generally as follows:

Effects on tribal members and non-members: ''First, and foremost'' in the *Akins* court's analysis, the stumpage ''policy purports to regulate only members of the tribe, as only tribal members may even apply for permits. The interests of non-members are not at issue.'' *Akins*, 130 F.3d at 486. The court added:

> Of great significance is that this is an intra-tribal dispute. It involves only members of the tribe, and not actions by the Nation addressed to non-members. The tribe's treatment of its members, particularly as to commercial interests, is not of central concern to either Maine or federal law. * * *

Id. at 488.

By contrast, there are currently seven facilities owned and operated by non-members, whose operations are located on non-Indian lands, with discharges into the main stem of the Penobscot River above Indian Island. Of these seven facilities, three are publicly owned treatment works (POTWs) for municipalities, and one is among the region's largest employers. 66 FR at 12795, App.1. Decisions about the terms under which these facilities can discharge into the Penobscot River implicate the interests of the citizens of these towns and employees of these facilities, easily thousands of people, most of whom are non-members.[11] If the Penobscot Nation is correct about the boundaries of its reservation, the number of non-tribal facilities discharging into the Nation's reservation with operations outside the reservation rises to 19, including at least one other major employer. *Ibid.* If the *Akins* court's ''foremost'' concern was impacts on non-members, the potential for impacts on a substantial number of non-members weighs heavily against finding the regulation of the discharges from these facilities to be an internal tribal matter.

Fellencer did involve one non-member. DOI's opinion notes how the court weighed her interests against those of the Nation, ultimately favoring the Nation's need to control its own employment policies. The court contrasted the limited impact on one non-member with the facts in the *Stilphen* case, where the Maine Supreme Judicial Court found that the regulation of ''beano'' games was not an internal tribal matter. *Penobscot Nation* v. *Stilphen*, 461 A.2d 478 (Me. 1983). In *Stilphen* ''[t]he ''beano'' games * * * were designed to ''draw many hundreds of players to the Penobscot reservation from all over Maine and beyond.' '' *Fellencer*, 164 F.3d at 710, quoting *Stilphen*, 461 A.2d at 480. Thus, in the *Fellencer* court's analysis, the suggestion appears to be that impacting one non-member can be an internal tribal matter, but impacting hundreds may not be. EPA believes that the regulation of water discharges, where

[11] It is difficult to assess the exact number of non-members affected, but relatively easy to gauge the order of magnitude. The populations of the three towns with POTWs discharging into the main stem, Lincoln, Mattawamkeag, and Howland, were 5,587, 830, and 1,435, respectively, in 1994, the most recent census estimate available when Maine submitted its application. The most recent 2000 census figures indicate the towns' populations were 5,221, 825, and 1,362, respectively. Not all these residents are necessarily tied into the POTW, and not all POTW hook-ups correspond directly to use by one or more members of the public. But the ''user'' records for these POTW facilities provide some sense of scale. The Lincoln POTW had approximately 4,200 users, Mattawamkeag had approximately 295, and Howland had approximately 623 as of 2000.

thousands of non-members might be potentially affected, falls well beyond the scope of the *Fellencer* court's delineation of internal tribal matters. Even if EPA only considers the direct effects, the group of non-member facilities is much larger than the single person affected by the tribal decision in *Fellencer*.

Moreover, the *Fellencer* court simplified its analysis of this factor by discounting the interests of the one non-member affected. In a telling footnote to its conclusion that the Nation's ''employment decision has its immediate effect on only one non-tribal member,'' the court makes a cross reference to another of its analytical factors—the ''interest of the State of Maine.'' *Id.* at 710 n. 1. As we discuss in more detail below, the state specifically declined to assert an interest in applying its nondiscrimination laws to protect Ms. Fellencer, which appears to have made it easier for the court to find that the Nation's interests outweighed hers. Where the state adamantly asserts its interest in regulating these dischargers, however, EPA cannot discount the interests of the non-members in the same way.

Use of tribal lands and natural resources: The *Akins* court next found that the stumpage dispute involved ''the commercial use of lands acquired by the Nation with the federal funds it received for this purpose as part of the settlement agreement.'' 130 F.3d at 486. While MICSA in section 1725(b)(1) subjects the southern tribes' ''natural resources,'' including ''timber and timber rights,'' 25 U.S.C. 1722(b), to state jurisdiction ''to the extent and in the manner provided in [MIA],'' the court emphasized that the Act in section 1724(h) also provides that ''natural resources'' shall be managed in accordance with a self-determination contract with the Secretary of the Interior. Therefore, the court concluded that timber rights ''involve[] the regulation and conservation of natural resources belonging to the tribe.'' *Id.* at 488.

EPA does not agree with DOI that this factor weighs ''*completely* in favor of finding this activity to be an internal tribal matter.'' DOI Op. at 13 (emphasis added). The Penobscot and St. Croix Rivers are the waters that have been the focus of the dispute over the state's asserted authority to regulate discharges to Indian Territory waters. Depending on how one defines the boundaries of the Nation's reservation, these rivers originate in, or flow over, around, or through the southern tribes' Indian Territories, or possibly all four, but they also flow through the state. This stands in contrast to *Akins* that concerned trees, which are stationary and clearly the property of the Penobscot Nation.

EPA recognizes that regulation of discharges into these rivers is vitally important to the southern tribes, but unlike the court's assessment of the timber interests at stake in *Akins*, water quality in these rivers is also vitally important to the state and its non-tribal member citizens. Along the stretch of the Penobscot River's main stem that appears to be at the heart of the Nation's reservation as determined by DOI, the river is a critical environmental resource for both the Nation, many of whose members live on Indian Island surrounded by the river, and the non-members who live or work on either side of the river's banks. Unlike the trees in *Akins*, these rivers are a shared resource for tribal members and non-members alike. The fourth factor in the *Akins* test, discussed further below, requires EPA to acknowledge the state's interest in a natural resource in the southern tribes' Indian Territories, at least in this case where the use and enjoyment of that natural resource has such obvious impacts outside the tribes' Indian Territories.

Tribal control over their natural resources: The *Akins* court's third factor appears to be an outgrowth of the second factor discussed above: ''The control of the [stumpage] permitting process operates as a control over the growth, health, and reaping of that resource.'' 130 F.3d at 487. It is notable that the court introduced its detailed discussion of this factor with the following caveat: ''Third, the subject matter, involving tribal lands, appears to have no impact on Maine's environmental or other interests.'' *Id.* at 488. And, as quoted above, the court goes on to observe that MIA section 6204 makes state laws regulating environmental protection applicable to tribal lands. Again, EPA agrees with DOI that the southern tribes have pressing environmental concerns over water quality within their Indian Territories. But the weight of those concerns is not sufficient basis to oust the state from the grant of authority Congress made in MICSA.

Interest of the State of Maine: The fourth *Akins* factor is whether the state has an interest in regulating the subject matter. Although the State of Maine and its municipalities regulate forestry, the *Akins* court made short work of this factor: ''The [stumpage] policy, at least on its face, does not implicate or impair any interest of the state of Maine.'' *Id.* at 487. Maine was not a party to the *Akins* case, nor the *Fellencer* case. In *Fellencer*, the court assessed the state's interest at greater length, noting that ''Maine has a strong interest in protecting all employees against discrimination. * * *'' *Fellencer*, 164 F. 3d at 710. The court went on to summarize its understanding of how this factor applied in both cases:

> In this case, however, the State is not attempting to apply its laws to the Nation's employment decision. To the contrary, the Maine Attorney General ruled long before this case that ''the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the state[.]'' * * * Maine did not intervene to argue the contrary. In *Akins* we found this posture significant. Even though Akins alleged violations of Maine law, we noted that there was ''*not a dispute between Maine and the Nation* over the attempted enforcement of Maine's laws.'' * * * The state disavows the very ''state interest'' that Fellencer seeks to invoke in support of her private cause of action.

Id. at 710–11 (emphasis in original). And as noted above, the absence of state interest in protecting Fellencer appears to have played a role in the court's assessment of the limited impact its holding had on non-members.

The state's expression of interest in this case is different in degree and kind from the facts in either *Akins* or *Fellencer.* Water quality regulation plays a critical role in how the state promotes the interests of environmental quality and economic development when deciding how to use and protect these major rivers. By its very application to EPA to administer the program, the state is asserting its interest in issuing discharge permits for these waters. EPA has on its record vigorous assertions of the state's interest from virtually every level of state government, including municipal officials, the Commissioner of the Department of Environmental Protection, the Maine Attorney General, and the Governor. In addition, each member of Maine's congressional delegation and several groups and businesses representing the interests of dischargers in the affected area submitted comments supporting the state's application. Further, the Maine legislature has retained direct control over many specific discharge permit requirements, implementing them through statute, rather than delegating most or all of the detailed decisions to the state's Department of Environmental Protection, as is the practice in most other states.[12] Finally, Maine has statutes that specifically address surface water quality classifications for stretches of rivers that may lie in the

[12] *See e.g.*, 38 M.R.S.A. sections 414–A, B, and C, 417, 419, 419–A, and 420.

Indian Territories. *See e.g.*, 38 M.R.S.A. section 467(7). EPA cannot deny the strong interest that the state has shown in regulation of discharges to Indian Territory waters.

Given the state's strong interest in regulating discharges to waters in Maine, the fact that all but three of the discharges to Indian Territory waters are by non-member facilities and all but two have their operations located outside of the Indian Territories by any interpretation of Indian Territory boundaries takes on great significance. Because the facilities are located outside of the Indian Territories, the factor relating to the diminishment of the state's interest and authorities within Indian Territory does not apply. Because they are not tribal or tribal member facilities and are located outside of the Indian Territories, the tribal interest in regulating them is diminished and the state interest increased. The state would have its full inherent authority to regulate the facilities themselves. If EPA found that the state lacked adequate authority to regulate the discharges for purposes of the NPDES program because the discharge points for these facilities were in the Indian Territories, however, it would have a grave effect on the state's very strong interest in regulating the discharges to water by facilities which it otherwise may regulate.

DOI's opinion notes that only a small percentage of the discharges covered by the state's program application are in the southern tribes' Indian Territories. DOI Op. at 15 n. 22. The suggestion appears to be that denying the state's application for these discharges will not substantially impair the state's overall interest in regulating discharges to waters throughout the state. EPA does not agree that this approach adequately characterizes the state's interest in the waters at issue here.

First, this jurisdictional dispute is about the state's authority in the Indian Territories. Therefore, the more relevant analysis is the apportionment of discharges into waters that may lie in those Indian Territories, not the whole state. From this perspective, 19 of the 21 dischargers are non-tribal facilities, and two are tribal.

Even if we look at the entire state, however, the state's interest in these waters is considerable, though the number of permits may be small. The Penobscot River is the state's largest river and its largest watershed; it is literally an artery for the state's economy and a major resource for much of central Maine. Withholding the permitting authority for the discharges along this stretch of the Penobscot River from the state's water quality permitting program would deprive the state of the ability to implement its MEPDES program in a significant portion of a critical waterway. EPA believes that doing so would have a significant effect on the state's interest in this application.

Prior legal understandings: While noting that MICSA creates a unique framework distinct from federal Indian law, the *Akins* court looked to ''[g]eneral federal Indian caselaw'' for support of its conclusion that stumpage permits are an internal tribal matter, because it had ''long presumed that Congress acts against the background of prior law.'' 130 F.3d at 489 (citing *Kolster* v. *INS*, 101 F.3d 785, 787–88 (1st Cir. 1996)); see also *Fellencer*, 164 F.3d at 712 (''a court must take into account the tacit assumptions that underlie a legislative enactment, including not only general policies but also preexisting statutory provisions.'') (quoting *Passamaquoddy Tribe*, 75 F.3d at 789). The *Akins* court cited with approval both a case holding that state taxation of non-Indian activities on tribal lands was preempted, *Akins,* 130 F.3d at 490 (citing *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 (1980)), and a case holding that a tribe had the inherent authority to tax non-Indian activities on tribal land as part of its powers of self-government. *Id.* (citing *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). DOI's opinion and the southern tribes' comments summarize the federal Indian case law, which has uniformly upheld inherent tribal authority to regulate water quality under the CWA, including non-member pollution sources. DOI Op. at 16 (citing, inter alia, *Montana* v. *EPA*, 137 F.3d 1135 (9th Cir. 1998)).

The *Akins* court noted that ''[the *White Mountain Apache* and *Merrion*] cases uniformly recognize the importance of the factors we have stressed: that the issue involves matters between tribe members and matters of the economic use of natural resources inherent in the tribal lands.'' 130 F.3d at 489–90. The court contrasted *White Mountain Apache* and *Merrion*, which permitted tribal taxation of non-member timber harvesting and mineral extraction that took place on tribal lands, with *Montana* and *Strate*, which denied tribal jurisdiction over hunting and fishing and torts on non-member lands. *Id.* The court referred to those cases to throw into sharp relief the fact that *Akins* concerned tribal member timber harvesting from tribal lands. Although the court noted that ''tribes retain considerable control over nonmember conduct on tribal land,'' it limited the holding of the case by noting that ''only tribal conduct [was] at issue'' in *Akins. Id.* (quoting *Strate* v. *A–1 Contractors*, 520 U.S. 438, 445 (1997)). The First Circuit focused on its conclusion that tribal control over the conduct of tribal members' use of tribal natural resources was clearly within the scope of inherent tribal authority under general federal Indian law, and was therefore consistent with prior legal understandings. It drew no larger conclusions under MICSA about the regulation of non-members.

The *Fellencer* court did not examine how federal Indian law treats members versus non-members, having disposed of the impact on the non-member Fellencer in its discussion of the previous factors. The *Fellencer* court found ''particularly important'' the prior legal understandings that Title VII of the Civil Rights Act of 1964 (employment discrimination) exempted tribes from its coverage, and that the Indian Civil Rights Act of 1968 granted exclusive jurisdiction to the tribal courts ''because they inform the intent of Congress in the adoption of the Settlement Act.'' *Fellencer*, 164 F.3d at 712. The court's analysis of this factor merges into the following discussion of statutory origins, where the court also examined the support in federal Indian law for tribes preferring Indians in employment decisions.

The tribal regulation of even non-member discharges to Indian Territory waters is consistent with the prior legal understandings against which MICSA was enacted. EPA finds that this factor is outweighed by the other factors. Furthermore, Congress clearly intended to depart from prior legal understandings concerning environmental regulatory authority in these Indian Territories.

Statutory origins of the subject matter: The *Fellencer* court noted an additional factor beyond those addressed in *Akins*: do the statutory origins of the subject matter suggest that tribal control is appropriate? In *Fellencer* the community nurse position was funded under a program where Congress specifically provided for ''an employment preference for Indians in the legislation.'' Id. at 713. DOI and the tribes point out that MICSA itself, 25 U.S.C. 1724(h), provides for the southern tribes to manage their ''land or natural resources'' pursuant to agreements with DOI under the Indian Self-Determination Act, which promotes tribal self-government by transferring federal programs to the tribal governments. But MICSA also uses exactly the same term, ''land or natural resources,'' in section 1725(b)(1) to

describe the areas over which it is giving the state jurisdiction by ratifying MIA. If Congress's use of the Indian Self-Determination Act in MICSA section 1724(h) were meant to be an indication that resource management was internal to the southern tribes and not subject to state regulation, section 1725(b)(1) would be left without much content when it refers to ''land and natural resources.'' On the other hand, it is relatively easy to give both these provisions meaning by concluding that any management agreements for the southern tribes' land and natural resources must also comply with relevant state land use and environmental laws, at least to the extent there are impacts on the state's interests outside the tribes' Indian Territories.

As another argument that the statutory origins weigh in favor of finding discharges to waters to be internal tribal matters, DOI notes that the NPDES program is part of the CWA, and EPA has long interpreted the CWA to embody a preference for tribal regulation of surface water quality on Indian reservations.[13] DOI Op. at 17–18. EPA continues to strongly agree that Congress expressed a preference for tribal programs under the CWA within Indian reservations. But we find that this preference is not analogous to the statutory origins of the nursing position that the *Fellencer* court reviewed. In *Fellencer*, the matter subject to regulation was the employment of a community health nurse. The nurse's position was created under and funded by a federal program designed to promote tribal self-determination through, among other things, Indian employment preferences. *Fellencer*, 164 F.3d at 713. The nursing position at issue owed its very existence to a federal program designed to prefer Indian employment; therefore, it was reasonable to shield that position from state laws that would undo any such preference.

Here, the matters subject to regulation are the discharges to the waters of the Indian Territories by private persons and municipalities. The first goal enumerated in the CWA is to control and eventually eliminate such discharges, not to create them. *See* 33 U.S.C. 1251(a)(1). Although the non-tribal wastewater treatment plants may have received federal funding, the funding was of a general nature aimed at reducing discharge of pollutants to navigable waters, not at promoting tribal self-determination. Unlike the nursing position in *Fellencer*, these discharges exist regardless of the federal government's preference for tribal self-determination, and the federal statutory framework regulating these discharges would not be defeated if an approvable state program is used to control them.

iv. The Great Northern and Georgia-Pacific Cases

The Maine Supreme Judicial Court and the United States Court of Appeals for the First Circuit issued their decisions in the *Great Northern* and *Georgia-Pacific* cases following DOI's issuance of its opinion and the major comments submitted by all the parties. *Great Northern Paper, Inc.* v. *Penobscot Nation,* 770 A.2d 574 (Me. 2001), cert. denied 534 U.S. 1019 (2001); *Penobscot Nation* v. *Georgia-Pacific*, 254 F.3d 317 (1st Cir. 2001), cert. denied 534 U.S. 1127 (2002). The parties hotly dispute the significance of these cases. These cases sprang out of a disagreement between the southern tribes and the paper companies as to whether the state's Freedom of Access Act (FOAA), 1 M.R.S.A. sections 401–410, Maine's counterpart to the federal Freedom of Information Act, applied to the tribes.

In state court, three paper companies sought to require the southern tribes to provide access to tribal governmental documents relating to environmental and water quality regulation. *See Great Northern Paper*, 770 A.2d at 577–80. The companies argued that the southern tribes' status as municipalities under MICSA and MIA requires them to comply with FOAA, just like other political subdivisions of the state. Shortly before the paper companies filed their case in state court, the southern tribes unsuccessfully sought an injunction in federal court to bar the paper companies from interfering with an internal tribal matter in violation of MICSA. The paper companies won access to certain tribal documents in the state courts, and the federal appeals court upheld the federal district court's decision not to enjoin the state court action. *See Georgia-Pacific*, 254 F.3d 317.

The Maine Supreme Judicial Court found that the internal deliberations of the tribes are internal tribal matters, but held that communications with other governments were not: ''the Freedom of Access Act does not apply to the Tribes in the internal conduct of their governments, but does apply when the Tribes communicate and interact with other governments.'' *Great Northern Paper, Inc.,* 770 A.2d at 591. The court decided that the decisions taken within a tribe to petition the federal or state government and the documents generated in the process were internal tribal matters excluded from state regulation. *Id.* at 589. When the tribes acted on that decision by communicating their desire, among other things, to have EPA retain the NPDES program in the Indian Territories, the documents generated in the process of that communication were subject to the FOAA because the communications sought to limit the authority of the state in the Indian Territories and could affect the relationships among the state, the tribes, and the federal agencies. *Id.* at 590. The state asserts that this holding indicates surface water quality regulation cannot be an internal tribal matter.

Opponents of the state point to the limits of these decisions. The state court's decision does not address the underlying question of environmental regulation in the tribes' Indian Territories; it is a decision about access to documents. Moreover, a state court decision is not generally binding on EPA when assessing the scope of internal tribal matters, which the First Circuit has twice held is a question of federal law. Finally, the First Circuit's decision to decline jurisdiction over the dispute is simply a narrow application of the ''well [*i.e.*, properly] pleaded complaint'' rule designed to prevent litigants from transforming defenses under state law into federal causes of action. *Georgia-Pacific,* 254 F.3d at 321–22.

EPA agrees that neither of these cases dictate the outcome of our decision on Maine's application in the southern tribes' Indian Territories. The decision of the Maine Supreme Judicial Court did not find that the internal tribal matters exception is limited to those matters that do not affect non-members. 770 A.2d 574, 590 n. 19. The court also found, however, that because the communications between the tribes and the federal and state governments might have a meaningful effect on the public through EPA's action on the NPDES application, the documents were subject to the FOAA.

[T]he relationship between the state and the Tribes regarding the regulation of water quality within the state is a matter of legitimate interest of the citizens of this state. * * * In sum, because the decisions reached by the Tribes have resulted in actions of a

[13] The clearest statement of Congress's preference for tribal regulation of surface water quality is section 518, which, among other measures, provides for EPA to authorize Indian tribes to administer programs under the CWA, including NPDES programs. 33 U.S.C. 1377(e). The state and some commenters have vigorously argued that the savings clauses in MICSA prevent CWA section 518(e) from applying in Maine. EPA is not acting today on an application from any Maine tribe to implement the NPDES program, therefore, the question of whether section 518(e) operates in Maine is not directly relevant to our decision.

governmental nature that may have a meaningful effect on members of the public who are not members of the Tribes, the provisions of the Freedom of Access Act apply to those actions.

Id. at 590. In its decision, the First Circuit made no findings whatsoever with regard to the scope of internal tribal matters exception to state authority. The federal court refused on grounds of issue preclusion to disturb the decision of the Maine court, stating ''[c]ertainly, nothing in *this* state decision is so implausible as to suggest the need for independent federal reexamination.'' 254 F.3d at 324 (emphasis in original).

v. Existing Tribal Facilities as Internal Tribal Matters

Although EPA cannot embrace the ultimate conclusion of DOI's internal tribal matters analysis, the Agency believes it is important to assess with great particularity how this reservation of the southern tribes' sovereignty applies. As both the Supreme Court and the First Circuit have noted, generalizations on the subject of Indian jurisdiction are ''treacherous.'' *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 141 (1980); *Akins,* 130 F.3d at 487 (''We tread cautiously and write narrowly, for the problems and conflicting interests presented by this case will not be the same as the problems and interests presented by the next case.'') EPA has concluded that regulating the non-member discharges to water with substantial effects on non-members is not an internal tribal matter, but our conclusion is quite different when we analyze the regulation of two existing tribal facilities located within the southern tribes' Indian Territories.

We note at the outset that this analysis is limited to these two existing facilities only. As is common in matters involving tribal jurisdiction, EPA must undertake a careful case-by-case assessment. Based on the facts we have available on this record, we conclude that the *Akins* court's internal tribal matters factor analysis weighs in favor of excluding these two existing tribal discharges from Maine's MEPDES program.

EPA reiterates that it is finding that Maine has adequate authority to implement its MEPDES program in the Indian Territories, including the existing discharges we are assuming lie within those Territories from non-member facilities which do not. Therefore, EPA does not believe it is necessary to delve into the boundary disputes that surround these Indian Territories. Maine's authority within the southern tribes' Indian Territories is limited, however, and cannot reach permits for facilities with discharges that qualify as an internal tribal matter.

While we are not announcing immutable rules for future permitting scenarios, we nevertheless believe that it is possible to suggest some general guidelines that the Agency will employ when assessing whether individual facilities with discharges to waters within the southern tribes' Indian Territories fall within the internal tribal matters exclusion and therefore outside of Maine's approved MEPDES program. EPA expects that permitting facilities owned and operated by non-members, when those facilities have their operations located outside of the southern tribes' Indian Territories, will not be internal tribal matters even where the discharge is to Indian Territory waters. For example, the state has inquired about the status of its general permit program for storm water discharges on lands surrounding the southern tribes' Indian Territories. EPA believes that non-member activities around the southern tribes' Indian Territories would be included in the state's program, both for discharges to non-Indian Territory waters and any discharges of storm water run-off that may reach the southern tribes' Indian Territories.

EPA is not aware of any non-member facilities located entirely within the Indian Territories. EPA expects any possible future non-member activity in the southern tribes' Indian Territories will be subject to negotiated consensual arrangements between the parties for access to the tribes' lands. Therefore, EPA will not present any presumption that might affect such negotiations.

As to tribal or tribal-member facilities located in the Indian Territories that discharge to what may be Indian Territory waters, EPA will carefully assess their impact on non-members and their importance to the tribe involved, as illustrated in the following discussion of the *Akins* factors. For example, if EPA were to conclude that a proposed construction project within a southern tribe's Indian Territory has impacts that are internal to the tribe, EPA would issue the storm water permit for that activity. In any case, EPA believes it can undertake this assessment without defining the boundaries of the southern tribes' Indian Territories, at least with respect to existing dischargers and any likely future activity in or around the tribes' Indian Territories.[14] Our analysis of the effects of the tribal discharges focuses on their environmental impacts on the waters surrounding that discharge regardless of any territorial claim to that water. Here we find the impact so minimal that it matters little whether the tribal outfall lies within or just outside of the tribes' Indian Territories.

EPA has carefully analyzed the First Circuit's factor test as it applies to these two tribal facilities as follows:

Effects on tribal members and non-members: The impacts on non-members from the permitting of these two facilities' discharges are minimal. The two discharges come from waste water treatment facilities serving the Penobscot Nation on Indian Island and the Passamaquoddy Tribe at their Pleasant Point reservation. They are owned by the Penobscot and Passamaquoddy tribal governments, and they exclusively serve the members of each tribe. Therefore, to the extent the conditions EPA places on the discharge affect the users and operators of these facilities, those effects are borne entirely by each of the tribal governments and the tribal members.

To the extent that the conditions EPA places on the discharge affect in-stream water quality downstream of the discharge, including water quality around and downstream from the southern tribes' Indian Territories, EPA acknowledges there is the potential for an impact on non-members outside the Indian Territories. The Agency finds, however, that the discharges from these facilities are quite small, especially in relation to the total volume of the major water ways that receive the discharges.[15] There is one tribal discharge permitted on each of two different reservations, so there is no cumulative effect from a cluster of tribal point sources. Therefore, the likely impact on downstream water quality is extremely limited. In any case, EPA must assure that the discharge permits for these facilities meet the requirements of the CWA, and any downstream impacts will be bounded by those requirements. In the future, if EPA is confronted with a proposed new

[14] The dispute over the ''length'' of the Penobscot reservation includes a disagreement over the status of certain islands upstream from Indian Island. The Nation has submitted arguments and documentation asserting that islands in the west branch of the Penobscot River and in the Piscataquis River, a tributary north of Indian Island, remain in the reservation. Ad. Rec. 5c-30 at 27–30 and Section 10, Ex. 1–6. Theoretically, a future facility located on those islands could lie within the Penobscot reservation. The current prospects for this possibility appear so remote that EPA does not believe it would be appropriate to force a decision about these boundaries to resolve a hypothetical dispute.

[15] See Memorandum from Phil Colarusso re: Review of Discharge Permits for the Passamaquoddy Tribe and Penobscot Indian Nation (Jan. 28, 2003) Ad. Rec. section 4.

tribal discharge that may have substantial effects on water quality beyond the southern tribes' Indian Territories, EPA will assess at that time whether the potential impacts of the new discharge would be sufficiently confined to remain an internal tribal matter.

Use of tribal lands and natural resources and tribal control over their natural resources: The operations of these facilities are entirely contained within the lands of the tribes. The small discharges from these facilities have their most immediate effect on the waters either within or directly adjacent to the southern tribes' reservations. Therefore, managing the impact of those discharges on their Indian Territories is of most immediate concern to the tribes.

Interest of the State of Maine: While Maine has applied to administer the MEPDES program for all the discharges in and around the southern tribes' Indian Territories, *Akins* and *Fellencer* require us to weigh the state's interest in these two permits against the tribes' interests. The practical effect on the state of EPA withholding authority for these permits from the state program is negligible because the environmental impact of these facilities discharges is comparatively immaterial. We have approved the state to issue nearly all of the existing NPDES permits that discharge in or around the southern tribes' Indian Territories. But far more important than the simple number of permits, we have approved the state to issue the permits with the largest discharges that account for the overwhelming bulk of the water quality impacts from point sources in these waters. So we believe the state's remaining interest in securing the issuance of these last two minor discharge permits is relatively slight.

In contrast, the southern tribes' interest in regulating these tribal facilities that provide governmental services to tribal members is enormous. Congress made it clear under MICSA that it was preserving the sovereignty of the southern tribes to a certain extent:

> 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. at 29. The facilities attendant to these two remaining discharge permits function as part of the governmental infra-structure on which the southern tribes rely to support the very existence of their communities as independent cultures. It impairs the state's interest in water quality regulation very little to respect the tribes' vital interest maintaining their direct relationship with the federal government in regulating these two operations.

Prior legal understandings: Finding that the regulation of the tribal facilities located in the Indian Territories that discharge to what may be Indian Territory waters is an internal tribal matter is strongly supported by the *Akins* court's presentation of federal Indian law. The court found that general federal Indian law stood for the proposition that the state would generally be preempted from regulating on tribal lands because of the strong federal interest in tribal self-determination. 130 F.3d at 490. These two facilities are owned and operated by the tribal governments and non-members are not involved, so the federal interest in promoting tribal self-determination is very high and is not tempered by any substantial impacts on non-members.

Ambiguity and assessing environmental impacts: EPA concluded that Congress's decision to authorize the state to regulate the environment in the southern tribes' Indian Territories was unambiguous, and that the reservation of internal tribal matters does not reach discharge permits with substantial effects on non-members. But in assessing the status of these two tribal facilities and their discharges, we have concluded that their impacts outside the southern tribes' Indian Territories are so immaterial that the permits fit within the internal tribal matters exception. While there might be some debate over the scope of that impact, in this situation, EPA believes it is appropriate to invoke the doctrine directing us to resolve ambiguities in the meaning of a statute relating to Indian sovereignty in favor of Indian tribes.

Moreover, EPA believes that the Agency's judgment about the scope of the environmental impacts from these facilities is important. While EPA is not assigned the role of implementing MICSA, we are the agency delegated to implement the CWA and, therefore, serve as the federal government's expert on surface water quality regulation and discharge permitting. Thus, EPA believes it falls to us to weigh the environmental effects of these two minor discharges as we sort through the factors the First Circuit has developed to apply the concept of internal tribal matters under MICSA.

Based on a thorough review of MICSA and MIA, their legislative histories, relevant judicial precedent, and the many comments EPA received from all sides of this issue, the Agency concludes that MICSA unambiguously grants the State of Maine adequate authority over discharges to tribal waters to support administration of the MEPDES program in the Indian Territories of the Penobscot Nation and Passamaquoddy Tribe, with the exception of any permits for facilities with discharges that EPA determines are internal tribal matters. EPA has determined that there are currently two tribal facilities that the state cannot adequately regulate, and EPA will retain the NPDES permits for discharges from those facilities.[16]

3. Federal Indian Trust Responsibility in Maine

EPA has received almost as many comments about the nature of our trust responsibility to the Maine tribes as about jurisdiction under MICSA. Again, EPA responds in detail to all those comments in our response to comments document. But we offer here an overview of our analysis because we believe it is an important complement to our conclusion that Maine has adequate authority to administer the MEPDES program in the southern tribes' Indian Territories.

a. Dispute Over the Applicability of the Trust in Maine

The state and some commenters argue that MICSA's savings clauses prevent the trust from applying in Maine. The trust is a doctrine developed under federal common law, and the Maine Supreme Judicial Court has held that the federal law which the savings clauses exclude from Maine includes federal common law. *Stilphen,* 461 A.2d at 488; *but see, Penobscot Nation* v. *Fellencer,* 164 F.3d 706, 709 (1st Cir. 1999) (finding that the trust responsibility compels the application of the canons of Indian treaty construction to MICSA). According to this argument, to the extent the trust doctrine operates for the benefit of Indians, it would violate the savings clauses and cannot apply in Maine.

On the other hand, many parties argue that the trust doctrine requires EPA to protect the Maine tribes and their natural resources. This responsibility cannot be delegated to the state, but is an obligation the federal government must carry out on a government-to-government basis directly with the

[16] EPA will determine whether future point source discharges in the Indian Territories of the southern tribes, including the disputed territories, qualify as internal tribal matters using a case-by-case review of individual permit applications or proposed state permits. This approach will allow the Agency to base its decision on a fully developed administrative record with particularized attention to the facts surrounding each permit application.

affected tribes. According to this argument, it would be inconsistent with the trust doctrine for EPA to authorize the state to assume the NPDES program.

b. Continued Operation of the Trust in Maine

EPA believes that neither set of arguments is completely correct, and the answer lies somewhere in between. As a threshold matter, the argument that the trust doctrine finds no application in Maine defies the terms of MICSA. The statute specifically provides for the federal government to hold land, natural resources, and settlement funds in trust for the southern tribes. See generally 25 U.S.C. 1724. Congress specifically recognized the tribal governments of the Passamaquoddy Tribe and the Penobscot Nation in MICSA. 25 U.S.C. 1721(a) (3) and (4), 1722(h) and (k), and 1726. Therefore, MICSA itself establishes trust resources for which the federal government is responsible and identifies tribal governments with which agencies such as EPA should work on a government-to-government basis consistent with that trust responsibility. This analysis, for example, provides the basis for EPA's extensive consultations with the southern tribes concerning Maine's application. Meeting this general element of our trust responsibility to the Maine tribes in no way affects or preempts the state's jurisdiction under MICSA, and therefore, does not run afoul of any limits in the savings clauses. *See Nance* v. *EPA,* 645 F.2d 701, 710–11 (9th Cir.), cert. denied 454 U.S. 1081 (1981).

Finding that the federal government has a trust responsibility to the southern tribes under MICSA, however, does not compel the conclusion that EPA must withhold the NPDES program approval from Maine pursuant to that responsibility. Indeed, if EPA were to rely on the trust responsibility as a basis for denying Maine's application in the southern tribes' Indian Territories, the state may well be correct that MICSA's savings clauses would prohibit the application of the trust doctrine in such a manner. Under that interpretation, the trust would act as a federal law that ''affects or preempts'' the jurisdiction we believe Congress granted the state under MICSA, precisely the class of federal Indian law the savings clauses are designed to block. When deciphering the more specific content of the trust responsibility in Maine, EPA must apply the trust consistent with applicable federal law, which includes MICSA and its grant to the state of authority in the southern tribes' Indian Territories. *See Shoshone-Bannock Tribes* v. *Reno,* 56 F.3d 1482 (D.C. Cir. 1995); *State of California* v. *Watt,* 668 F.3d 1290, 1324 (D.C. Cir. 1981).

c. The Trust, MICSA, and CWA

Thus, EPA is left to reconcile how to protect the southern tribes' natural resources consistent with the jurisdictional relationship which Congress established in MICSA among the southern tribes, the state, and the federal government. Those natural resources include water and water rights, and this decision involves the NPDES program under the CWA. Therefore, EPA will focus on the interplay between MICSA and the CWA to sort through how the trust applies to those resources.

Although EPA does not agree with DOI's ultimate conclusion about the state's jurisdiction under MICSA, DOI's opinion and the parallel comments from the Maine tribes make an important contribution to our analysis. As DOI points out, MICSA's legislative record is abundantly clear that Congress was not terminating the southern tribes or completely abrogating their sovereignty. Indeed, both committee reports devote entire identical chapters to a discussion of how MICSA is designed to preserve the tribes' culture and to avoid their assimilation into the general population. S. Rep. at 14–17; H.R. Rep. at 14–17.

It is also clear from the terms of MICSA and MIA that the southern tribes' riverine cultures and the natural resources on which they rely are part of the cultural heritage Congress intended to preserve. S. Rep. at 11. MIA specifically reserves the southern tribes' right to take fish within their reservations for their individual sustenance, consistent with that cultural practice. 30 M.R.S.A. section 6207(4). MIA generally leaves it to the southern tribes to regulate their own fishing practices, and establishes a carefully balanced regulatory framework for joint state and tribal regulation of fish and wildlife on the southern tribes' Indian Territories and in certain waters where there are off-reservation impacts. 30 M.R.S.A. sections 6207(3) and (6), and 6212. Moreover, as to ponds under ten acres in surface area and entirely within their Indian Territories, the southern tribes have exclusive jurisdiction to regulate fishing. 30 M.R.S.A. section 6207(1).

Therefore, EPA concludes that both MICSA and MIA reserve to the southern tribes uses of natural resources consistent with the preservation of their culture. In the context of surface water quality regulation, it is especially notable that the statutes specifically protect the tribes' fishing practices. Some commenters, including the state, have suggested that the tribes' right to take fish is essentially unrelated to the water quality on which that fishing resource depends. Ad. Rec. 5a-75, ex. B at 1–6. This argument maintains that the tribes are freed from creel or bag limits when exercising their statutory right, but that right has no implications for the regulation of the natural resources, including the water, which determine the quality of whatever fish an Indian might catch. EPA cannot accept this suggestion for obvious reasons; the right to take fish must mean more than ''the right to dip one's net into the water * * * and bring it out empty.'' *United States* v. *Washington-Phase II,* 506 F.Supp. 187, 203 (W.D. Wa. 1980), aff'd in part and rev'd in part on other grounds 759 F.2d 1353 (9th Cir. 1985), cert. denied 474 U.S. 994 (1985). Correspondingly, the right to take fish for individual sustenance must mean more than the right to reel in fish that expose the tribe to unreasonable health risks. MICSA and MIA make this fishing right a matter of federal law that must be addressed by any authority, be it EPA or the state, charged with regulating the natural resources on which that right depends. *United States* v. *Adair,* 723 F.2d 1394, 1408–11 (9th Cir. 1983), cert. denied 467 U.S. 1252.

The question that remains is what tools are left to EPA under MICSA and the CWA to protect that right? The CWA reserves substantial authority to EPA in states authorized to administer the NPDES program so that the Agency can oversee the state program and ensure its consistency with the CWA. The most obvious authority EPA retains is the ability to object to proposed state NPDES permits that EPA determines violate the CWA. Following an EPA objection, the state must either address EPA's concerns or EPA ultimately takes over issuance of the permit. 33 U.S.C. 1342(d)(2). Where states have authority to promulgate water quality standards, EPA is also charged with reviewing those standards and can object to any standards that do not meet the requirements of the CWA. Again, if the state does not address EPA's objection, EPA ultimately has authority to take over promulgation of such standards. 33 U.S.C. 1313(c)(3). These oversight mechanisms attach to any state program implementing the CWA. They are not unique to programs in Indian country, and EPA's exercise of these oversight mechanisms in no way affects or preempts the jurisdiction or authority Maine has under MICSA and the CWA. No state can claim to have jurisdiction under the CWA to issue NPDES permits

that are inconsistent with the CWA or that are free from potential EPA oversight.

Therefore, EPA concludes that MICSA and the CWA combine to charge EPA with the responsibility to ensure that permits issued by Maine address the southern tribes' uses of waters within the state, consistent with the requirements of the CWA. Fortunately, the state has recently taken actions that suggest Maine is beginning to consider the southern tribes' use of waters in the state and its bearing on how the state should regulate water quality. For example, the state Board of Environmental Protection has recently approved a recommendation for the Maine legislature to reclassify key segments of the Penobscot River and include language specifically requiring that the waters be ''sufficiently free from pollutants so as to protect human health related to subsistence fishing.''[17] Although the Legislature has not made any final decisions on this issue, the proposal is consistent with MICSA's purpose to preserve tribal uses and is an important acknowledgment of those uses and their bearing on state water quality regulation.

But in the event Maine's approach to the tribes' uses shifts, EPA is in a position, consistent with MICSA, CWA, and our trust responsibility, to require the state to address the tribes' uses consistent with the requirements of the CWA. As with any state implementing the CWA for EPA, the state's authority to do so remains contingent on the state program meeting all the Act's requirements. EPA cannot now predict with any particularity how the CWA's requirements will govern particular permitting or implementation issues as they arise under the MEPDES program. Those issues will be ripe for decision when they are presented in the future, with a completely developed factual and administrative record to consider.

This approach to EPA's oversight role does not mean that the tribes will necessarily be completely satisfied with the conclusions EPA reaches about how the CWA applies to particular tribal uses. But it is the Agency's hope and expectation that in consultation with the southern tribes, and working collaboratively with them and the state, the parties over time can sort through the critical question of how best to protect these waters consistent with the CWA and the tribes' right to use them under MICSA and MIA. In every meeting EPA had with the southern tribes or the state, all parties agreed that protecting these great rivers is the common goal we all share. EPA commits to both the southern tribes and the state that it will do what it can to promote that goal.

4. Remainder of Maine's Application to Administer Its MEPDES Program in the Trust Lands of the Micmac and Maliseet

EPA is not acting today on Maine's MEPDES program application as it applies to the trust lands of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. Therefore, EPA still retains the NPDES permitting program for these areas. As discussed in our prior action on Maine's application, our authority to issue or modify NPDES permits for discharges into waters in the northern tribes' trust lands remains suspended pursuant to CWA section 402(c)(1). *See* 66 FR at 12793. This suspension will remain in effect until the Agency takes final action in these areas or the state agrees to extend the Agency's deadline for action. Unlike the boundaries for the southern tribes' Indian Territories, there is no dispute of which EPA is aware concerning the exact boundaries of the northern tribes' trust lands. These lands were all acquired pursuant to either MICSA for the Maliseet or the Aroostook Band of Micmac Settlement Act for the Micmac. 25 U.S.C. 1724(d)(4); Public Law 102–171, 105 Stat. 1143, 25 U.S.C. 1721 *note*, section 5. Therefore, the boundaries of these trust lands are clearly delineated in recent conveyances noting the meets and bounds and recorded with the Bureau of Indian Affairs and in the appropriate registries of deeds. There are currently no sources holding NPDES permits for outfalls discharging into the northern tribes' trust lands, nor is EPA aware of any proposed facilities requiring such a permit in the near future.

D. Other Federal Statutes

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), an agency must consult with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) (or Tribe if there is no THPO) on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. On January 12, 2001, EPA approved Maine to administer the NPDES program in areas of the state where the Maine tribes did not dispute state jurisdiction. Prior to that approval, EPA engaged in discussions with the Maine SHPO and sought public comment regarding EPA's determination that approval of the state permitting program would have no effect on historic properties. EPA also held discussions with Indian tribes in Maine regarding approval of the state's NPDES program and historic properties of interest to the tribes.

On July 7, 1999, EPA sought the Maine SHPO's concurrence with its determination that the Agency's approval of Maine's application would have no effect on historic properties in Maine. The Maine SHPO provided EPA with a determination that there would be ''No Historic Properties Affected'' or ''No Adverse Effect'' to historic properties in Maine from EPA's approval, on the condition that DEP provides relevant notice and information regarding draft permits to the SHPO and coordinates with the SHPO. On November 26, 2000, the SHPO and DEP entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive the requested notices. This MOU further provides for coordination between DEP and the SHPO to resolve any identified issues to ensure that MEPDES permits will comply with Maine water quality standards and Maine laws protecting historic properties. For those permits with the potential to adversely affect historic properties, DEP and the SHPO agreed to seek ways to avoid, minimize, or mitigate any adverse effects to historic properties stemming from the proposed permit.

During EPA's review of Maine's NPDES application with respect to Indian Territories of the southern tribes, EPA engaged in additional discussions with the southern tribes concerning EPA's view that this approval will have no effect on historic properties of interest to the tribes. During those discussions, and as set forth in a draft Memorandum of Agreement Regarding Tribal Historic Properties in Maine (MOA), EPA committed to use its CWA authorities to help ensure that these tribes will have an opportunity to participate in the consideration of historic properties during administration of the NPDES program by Maine. Subsequent to EPA's prior

[17] Letter from R Wardwell, Chair, Maine Board of Environmental Protection to the Co-Chairs of the Maine Legislature's Joint Standing Committee on Natural Resources re: Reclassification of Waters of the State (December 6, 2002) forwarding ''An Act to Reclassify Certain Waters of the State,'' sections 13 and 29.

approval on January 12, 2001 of Maine's program outside the disputed areas, DEP has consistently provided to the tribes copies of proposed permits that may be of interest to them; if needed, EPA will exercise appropriate oversight authority to help ensure that DEP continues this practice. Where a tribe raises concerns to EPA regarding the potential effects of a proposed permit on historic properties, EPA will follow the procedures described in the draft MOA, or any subsequently negotiated MOA that is acceptable to both EPA and the tribes, to consider potential effects. A copy of this draft MOA is included in the record. As described in the draft MOA, EPA will exercise its CWA authorities to object to proposed permits, or take other appropriate action, in order to address tribal concerns regarding effects on historic properties where EPA finds (taking into account all available information, including any analysis conducted by the tribe) that a proposed permit is inconsistent with the CWA, including water quality standards designed to protect tribal uses. Where EPA objects to a permit, the Agency will follow the permit objection procedures outlined in 40 CFR 123.44 and will coordinate with the appropriate tribe in seeking to have DEP revise the permit. DEP cannot issue a final MEPDES permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a specific permit, it will further consult with the tribe prior to issuing any permit.

EPA has determined that the approval of Maine's application will have no effect on historic properties in Maine. EPA believes that the agreement between DEP and the SHPO as well as the Agency's commitment to follow the procedures in the draft MOA are consistent with and support EPA's determination. In accordance with the ACHP's regulations at 36 CFR 800.5, EPA proposed a No Adverse Effect finding to the southern tribes on July 25, 2003. In a September 3, 2003 letter to EPA, the Penobscot Nation disagreed with EPA's proposed finding. As a result of this disagreement, EPA met with the ACHP to discuss the No Adverse Effect finding, and, on October 8, 2003, transmitted this finding to the ACHP. EPA's October 8, 2003 submission to the ACHP included documents relied upon by the Agency in making its No Adverse Effect finding and responded to the comments made by the Penobscot Nation in its September 3, 2003 letter to EPA. A copy of the October 8, 2003 submission to the ACHP is included in the record. Pursuant to the ACHP's regulations, the ACHP had 15 days from receipt of EPA's finding to review and comment upon the Agency's finding. On October 24, 2003, the ACHP provided comments to EPA. The ACHP's comments express certain disagreements with EPA's approach to analyzing the effects of this action and note that, in addition to considering the effects of the administrative act of approval and transfer of the NPDES program to DEP, EPA should also consider the potential effects flowing from implementation of the approved program itself. The ACHP notes its view that EPA should negotiate a programmatic agreement under the ACHP regulations as an appropriate resolution. A copy of the ACHP's October 24, 2003 comment letter is included in the record.

EPA has carefully considered the ACHP's comments in reaching its decision to approve the state's application as described in this notice. Notwithstanding any difference in EPA's and the ACHP's views regarding the effect of this approval on historic properties, EPA notes that the Agency has, in consultation with the tribes, considered any potential that the administration of the program by DEP might have impacts on such properties. As detailed above, EPA has proposed, and is committed to following, the procedures of the draft MOA which include commitments by EPA to utilize the full extent of its CWA oversight authorities to help ensure appropriate consideration of historic properties, including tribal views, during implementation of the program by DEP. EPA does not believe that resolution of this matter calls for execution of a programmatic agreement. Programmatic agreements are not required under the ACHP's regulations but may be used in certain circumstances described therein. In this case, EPA believes that the procedures and commitments of the draft MOA provide the best means of addressing any concerns regarding the consideration of historic properties during implementation of the program by DEP within the confines of EPA's CWA authority and that a programmatic agreement, which would not provide EPA with any additional oversight authority to act with respect to any particular state permit beyond what is already described in the draft MOA, is unnecessary. In addition, EPA notes that pursuant to the decision of the D.C. Circuit in *National Mining Association* v. *Fowler,* 324 F.3d 752 (D.C. Cir. 2003), individual permitting actions by DEP under the approved program would not trigger NHPA section 106 responsibilities. Having considered the potential impacts of this action on historic properties, consulted with the tribes, provided the ACHP an opportunity to comment and considered those comments, EPA has fulfilled its obligations under the NHPA and the ACHP regulations.

Today's program approval does not include Maine's application as it relates to facilities discharging into the lands of the northern tribes. EPA will address the NHPA in the context of making a final decision on Maine's application as it relates to facilities discharging into the lands of the northern tribes.

Regulatory Flexibility Act

Based on General Counsel Opinion 78–7 (April 18, 1978), EPA has long considered a determination to approve or deny a state NPDES program submission to constitute an adjudication because an ''approval,'' within the meaning of the APA, constitutes a ''license,'' which, in turn, is the product of an ''adjudication.'' For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule.

Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the state's proposed MEPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of state law; it would, therefore, impose no additional obligations upon those subject to the state's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.

E. Notice of Decision

EPA hereby provides public notice that the Agency has taken final action authorizing Maine to administer the MEPDES program in the territories of the Penobscot Nation and Passamaquoddy Tribe, with the exception of facilities with discharges that qualify as internal tribal matters, and review of the issues related to this action is available as provided in CWA section 509(b)(1)(D). EPA has not taken final action Maine's application with respect to the issues related to the state's jurisdiction and the applicability of state law in the lands of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs, and review of those issues is not available until EPA takes final action on Maine's program as it applies in those areas.

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: October 31, 2003.

Robert W. Varney,

Regional Administrator, Region I.

[FR Doc. 03–28653 Filed 11–17–03; 8:45 am]

BILLING CODE 6560–50–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Meeting of the President's Council of Advisors on Science and Technology

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for a meeting of the President's Council of Advisors on Science and Technology (PCAST), and describes the functions of the Council. Notice of this meeting is required under the Federal Advisory Committee Act (FACA).

Dates and Place: December 2, 2003, Washington, DC. The meeting will be held in the Monticello Ballroom (lower level) of the Wyndham Washington Hotel, 1400 M Street, NW, Washington, DC 20005.

Type of Meeting: Open. Further details on the agenda will be posted on the PCAST Web site at: *http://www.ostp.gov/PCAST/pcast.html.*

Proposed Schedule and Agenda: The President's Council of Advisors on Science and Technology is scheduled to meet in open session on Tuesday December 3, 2003, at approximately 9 a.m. The PCAST is tentatively scheduled to: (1) Discuss and, pending the discussion, approve a draft report from its information technology manufacturing-competitiveness subcommittee; (2) discuss the preliminary observations and draft recommendations of its workforce-education subcommittee; and (3) continue its discussion of nanotechnology and its review of the federal National Nanotechnology Initiative. This session will end at approximately 4 p.m. Additional information on the agenda will be posted at the PCAST Web site at: *http://www.ostp.gov/PCAST/pcast.html.*

Public Comments: There will be time allocated for the public to speak on the above agenda items. This public comment time is designed for substantive commentary on PCAST's work topics, not for business marketing purposes. Please submit a request for the opportunity to make a public comment five (5) days in advance of the meeting. The time for public comments will be limited to no more than 5 minutes per person. Written comments are also welcome at any time following the meeting. Please notify Stan Sokul, PCAST Executive Director, at (202) 456–6070, or fax your request/comments to (202) 456–6021.

FOR FURTHER INFORMATION CONTACT: For information regarding time, place and agenda, please call Cynthia Chase at (202) 456–6010, prior to 3 p.m. on Monday, December 1, 2003. Information will also be available at the PCAST Web site at: *http://www.ostp.gov/PCAST/pcast.html.* Please note that public seating for this meeting is limited and is available on a first-come, first-served basis.

SUPPLEMENTARY INFORMATION: The President's Council of Advisors on Science and Technology was established by Executive Order 13226, on September 30, 2001. The purpose of PCAST is to advise the President on matters of science and technology policy, and to assist the President's National Science and Technology Council in securing private sector participation in its activities. The Council members are distinguished individuals appointed by the President from non-Federal sectors. The PCAST is co-chaired by Dr. John H. Marburger, III, the Director of the Office of Science and Technology Policy, and by E. Floyd Kvamme, a Partner at Kleiner Perkins Caufield & Byers.

Stanley S. Sokul,

Executive Director, PCAST, and Counsel, Office of Science and Technology Policy.

[FR Doc. 03–28854 Filed 11–17–03; 8:45 am]

BILLING CODE 3170–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 15, 2003.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Bank of America Corporation, Charlotte, North Carolina; to merge with FleetBoston Financial Corporation, Boston, Massachusetts, and thereby indirectly acquire Fleet National Bank, Providence, Rhode Island, and Fleet Maine, National Association, South Portland, Maine.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. DCB Financial Corp., Dallas, Texas, and DCB Delaware Financial Corp., Wilmington, Delaware; to become bank holding companies by acquiring 100 percent of the voting shares of Dallas City Bank, Dallas, Texas.