

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 (MICA), 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 MICA and MIA, the case law, and an administrative opinion interpreting MICA 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 MICA 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." MICA 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 MICA 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 MICA 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 MICA uses to describe the lands of the Penobscot Nation and Passamaquoddy Tribe because it is MICA that defines the jurisdictional status of those lands.