

territories. In addition, certain provisions in MICSAs 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 MICSAs. On May 16, 2000, DOI provided EPA with a legal opinion (DOI Op.) finding that Maine did not have adequate authority under MICSAs 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 MICSAs' 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 MICSAs 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 MICSAs 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.