

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. Fellecer*, 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. Fellecer*, 164 F.3d 706, 709 (1st Cir. 1999). In *Fellecer*, 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