

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 *ALAM 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.