

1997), and *Penobscot Nation v. Fellencher*, 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 *Fellencher* 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 *Fellencher*, a non-Indian community nurse who worked for the Nation. After discharging her, *Fellencher* alleged that the Nation posted an opening for a community nurse with an express preference for Indian applicants. *Fellencher* sought to enforce state law prohibiting employment discrimination based on race or national origin. *Fellencher*, 164 F.3d at 707. If the Nation's decision to terminate *Fellencher*'s employment was an internal tribal matter, she had no claim under state law. As discussed below, applying the *Fellencher* 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.

Fellencher 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.'" *Fellencher*, 164 F.3d at 710, quoting *Stilphen*, 461 A.2d at 480. Thus, in the *Fellencher* 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.