

thousands of non-members might be potentially affected, falls well beyond the scope of the *Fellencer* court's delineation of internal tribal matters. Even if EPA only considers the direct effects, the group of non-member facilities is much larger than the single person affected by the tribal decision in *Fellencer*.

Moreover, the *Fellencer* court simplified its analysis of this factor by discounting the interests of the one non-member affected. In a telling footnote to its conclusion that the Nation's "employment decision has its immediate effect on only one non-tribal member," the court makes a cross reference to another of its analytical factors—the "interest of the State of Maine." *Id.* at 710 n. 1. As we discuss in more detail below, the state specifically declined to assert an interest in applying its nondiscrimination laws to protect Ms. Fellencer, which appears to have made it easier for the court to find that the Nation's interests outweighed hers. Where the state adamantly asserts its interest in regulating these dischargers, however, EPA cannot discount the interests of the non-members in the same way.

*Use of tribal lands and natural resources:* The *Akins* court next found that the stumpage dispute involved "the commercial use of lands acquired by the Nation with the federal funds it received for this purpose as part of the settlement agreement." 130 F.3d at 486. While MICSA in section 1725(b)(1) subjects the southern tribes' "natural resources," including "timber and timber rights," 25 U.S.C. 1722(b), to state jurisdiction "to the extent and in the manner provided in [MIA]," the court emphasized that the Act in section 1724(h) also provides that "natural resources" shall be managed in accordance with a self-determination contract with the Secretary of the Interior. Therefore, the court concluded that timber rights "involve[] the regulation and conservation of natural resources belonging to the tribe." *Id.* at 488.

EPA does not agree with DOI that this factor weighs "completely in favor of finding this activity to be an internal tribal matter." DOI Op. at 13 (emphasis added). The Penobscot and St. Croix Rivers are the waters that have been the focus of the dispute over the state's asserted authority to regulate discharges to Indian Territory waters. Depending on how one defines the boundaries of the Nation's reservation, these rivers originate in, or flow over, around, or through the southern tribes' Indian Territories, or possibly all four, but they also flow through the state. This stands

in contrast to *Akins* that concerned trees, which are stationary and clearly the property of the Penobscot Nation.

EPA recognizes that regulation of discharges into these rivers is vitally important to the southern tribes, but unlike the court's assessment of the timber interests at stake in *Akins*, water quality in these rivers is also vitally important to the state and its non-tribal member citizens. Along the stretch of the Penobscot River's main stem that appears to be at the heart of the Nation's reservation as determined by DOI, the river is a critical environmental resource for both the Nation, many of whose members live on Indian Island surrounded by the river, and the non-members who live or work on either side of the river's banks. Unlike the trees in *Akins*, these rivers are a shared resource for tribal members and non-members alike. The fourth factor in the *Akins* test, discussed further below, requires EPA to acknowledge the state's interest in a natural resource in the southern tribes' Indian Territories, at least in this case where the use and enjoyment of that natural resource has such obvious impacts outside the tribes' Indian Territories.

*Tribal control over their natural resources:* The *Akins* court's third factor appears to be an outgrowth of the second factor discussed above: "The control of the [stumpage] permitting process operates as a control over the growth, health, and reaping of that resource." 130 F.3d at 487. It is notable that the court introduced its detailed discussion of this factor with the following caveat: "Third, the subject matter, involving tribal lands, appears to have no impact on Maine's environmental or other interests." *Id.* at 488. And, as quoted above, the court goes on to observe that MIA section 6204 makes state laws regulating environmental protection applicable to tribal lands. Again, EPA agrees with DOI that the southern tribes have pressing environmental concerns over water quality within their Indian Territories. But the weight of those concerns is not sufficient basis to oust the state from the grant of authority Congress made in MICSA.

*Interest of the State of Maine:* The fourth *Akins* factor is whether the state has an interest in regulating the subject matter. Although the State of Maine and its municipalities regulate forestry, the *Akins* court made short work of this factor: "The [stumpage] policy, at least on its face, does not implicate or impair any interest of the state of Maine." *Id.* at 487. Maine was not a party to the *Akins* case, nor the *Fellencer* case. In *Fellencer*, the court assessed the state's

interest at greater length, noting that "Maine has a strong interest in protecting all employees against discrimination." \* \* \* *Fellencer*, 164 F.3d at 710. The court went on to summarize its understanding of how this factor applied in both cases:

In this case, however, the State is not attempting to apply its laws to the Nation's employment decision. To the contrary, the Maine Attorney General ruled long before this case that "the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the state[.]" \* \* \* Maine did not intervene to argue the contrary. In *Akins* we found this posture significant. Even though *Akins* alleged violations of Maine law, we noted that there was "not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws." \* \* \* The state disavows the very "state interest" that *Fellencer* seeks to invoke in support of her private cause of action.

*Id.* at 710–11 (emphasis in original). And as noted above, the absence of state interest in protecting *Fellencer* appears to have played a role in the court's assessment of the limited impact its holding had on non-members.

The state's expression of interest in this case is different in degree and kind from the facts in either *Akins* or *Fellencer*. Water quality regulation plays a critical role in how the state promotes the interests of environmental quality and economic development when deciding how to use and protect these major rivers. By its very application to EPA to administer the program, the state is asserting its interest in issuing discharge permits for these waters. EPA has on its record vigorous assertions of the state's interest from virtually every level of state government, including municipal officials, the Commissioner of the Department of Environmental Protection, the Maine Attorney General, and the Governor. In addition, each member of Maine's congressional delegation and several groups and businesses representing the interests of dischargers in the affected area submitted comments supporting the state's application. Further, the Maine legislature has retained direct control over many specific discharge permit requirements, implementing them through statute, rather than delegating most or all of the detailed decisions to the state's Department of Environmental Protection, as is the practice in most other states.<sup>12</sup> Finally, Maine has statutes that specifically address surface water quality classifications for stretches of rivers that may lie in the

<sup>12</sup> See e.g., 38 M.R.S.A. sections 414–A, B, and C, 417, 419, 419–A, and 420.