

governmental nature that may have a meaningful effect on members of the public who are not members of the Tribes, the provisions of the Freedom of Access Act apply to those actions.

Id. at 590. In its decision, the First Circuit made no findings whatsoever with regard to the scope of internal tribal matters exception to state authority. The federal court refused on grounds of issue preclusion to disturb the decision of the Maine court, stating “[c]ertainly, nothing in *this* state decision is so implausible as to suggest the need for independent federal reexamination.” 254 F.3d at 324 (emphasis in original).

v. Existing Tribal Facilities as Internal Tribal Matters

Although EPA cannot embrace the ultimate conclusion of DOI’s internal tribal matters analysis, the Agency believes it is important to assess with great particularity how this reservation of the southern tribes’ sovereignty applies. As both the Supreme Court and the First Circuit have noted, generalizations on the subject of Indian jurisdiction are “treacherous.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980); *Akins*, 130 F.3d at 487 (“We tread cautiously and write narrowly, for the problems and conflicting interests presented by this case will not be the same as the problems and interests presented by the next case.”) EPA has concluded that regulating the non-member discharges to water with substantial effects on non-members is not an internal tribal matter, but our conclusion is quite different when we analyze the regulation of two existing tribal facilities located within the southern tribes’ Indian Territories.

We note at the outset that this analysis is limited to these two existing facilities only. As is common in matters involving tribal jurisdiction, EPA must undertake a careful case-by-case assessment. Based on the facts we have available on this record, we conclude that the *Akins* court’s internal tribal matters factor analysis weighs in favor of excluding these two existing tribal discharges from Maine’s MEPDES program.

EPA reiterates that it is finding that Maine has adequate authority to implement its MEPDES program in the Indian Territories, including the existing discharges we are assuming lie within those Territories from non-member facilities which do not. Therefore, EPA does not believe it is necessary to delve into the boundary disputes that surround these Indian Territories. Maine’s authority within the southern tribes’ Indian Territories is

limited, however, and cannot reach permits for facilities with discharges that qualify as an internal tribal matter.

While we are not announcing immutable rules for future permitting scenarios, we nevertheless believe that it is possible to suggest some general guidelines that the Agency will employ when assessing whether individual facilities with discharges to waters within the southern tribes’ Indian Territories fall within the internal tribal matters exclusion and therefore outside of Maine’s approved MEPDES program. EPA expects that permitting facilities owned and operated by non-members, when those facilities have their operations located outside of the southern tribes’ Indian Territories, will not be internal tribal matters even where the discharge is to Indian Territory waters. For example, the state has inquired about the status of its general permit program for storm water discharges on lands surrounding the southern tribes’ Indian Territories. EPA believes that non-member activities around the southern tribes’ Indian Territories would be included in the state’s program, both for discharges to non-Indian Territory waters and any discharges of storm water run-off that may reach the southern tribes’ Indian Territories.

EPA is not aware of any non-member facilities located entirely within the Indian Territories. EPA expects any possible future non-member activity in the southern tribes’ Indian Territories will be subject to negotiated consensual arrangements between the parties for access to the tribes’ lands. Therefore, EPA will not present any presumption that might affect such negotiations.

As to tribal or tribal-member facilities located in the Indian Territories that discharge to what may be Indian Territory waters, EPA will carefully assess their impact on non-members and their importance to the tribe involved, as illustrated in the following discussion of the *Akins* factors. For example, if EPA were to conclude that a proposed construction project within a southern tribe’s Indian Territory has impacts that are internal to the tribe, EPA would issue the storm water permit for that activity. In any case, EPA believes it can undertake this assessment without defining the boundaries of the southern tribes’ Indian Territories, at least with respect to existing dischargers and any likely future activity in or around the tribes’ Indian Territories.¹⁴ Our analysis of the

effects of the tribal discharges focuses on their environmental impacts on the waters surrounding that discharge regardless of any territorial claim to that water. Here we find the impact so minimal that it matters little whether the tribal outfall lies within or just outside of the tribes’ Indian Territories.

EPA has carefully analyzed the First Circuit’s factor test as it applies to these two tribal facilities as follows:

Effects on tribal members and non-members: The impacts on non-members from the permitting of these two facilities’ discharges are minimal. The two discharges come from waste water treatment facilities serving the Penobscot Nation on Indian Island and the Passamaquoddy Tribe at their Pleasant Point reservation. They are owned by the Penobscot and Passamaquoddy tribal governments, and they exclusively serve the members of each tribe. Therefore, to the extent the conditions EPA places on the discharge affect the users and operators of these facilities, those effects are borne entirely by each of the tribal governments and the tribal members.

To the extent that the conditions EPA places on the discharge affect in-stream water quality downstream of the discharge, including water quality around and downstream from the southern tribes’ Indian Territories, EPA acknowledges there is the potential for an impact on non-members outside the Indian Territories. The Agency finds, however, that the discharges from these facilities are quite small, especially in relation to the total volume of the major water ways that receive the discharges.¹⁵ There is one tribal discharge permitted on each of two different reservations, so there is no cumulative effect from a cluster of tribal point sources. Therefore, the likely impact on downstream water quality is extremely limited. In any case, EPA must assure that the discharge permits for these facilities meet the requirements of the CWA, and any downstream impacts will be bounded by those requirements. In the future, if EPA is confronted with a proposed new

Nation has submitted arguments and documentation asserting that islands in the west branch of the Penobscot River and in the Piscataquis River, a tributary north of Indian Island, remain in the reservation. Ad. Rec. 5c-30 at 27–30 and Section 10, Ex. 1–6. Theoretically, a future facility located on those islands could lie within the Penobscot reservation. The current prospects for this possibility appear so remote that EPA does not believe it would be appropriate to force a decision about these boundaries to resolve a hypothetical dispute.

¹⁵ See Memorandum from Phil Colarusso re: Review of Discharge Permits for the Passamaquoddy Tribe and Penobscot Indian Nation (Jan. 28, 2003) Ad. Rec. section 4.

¹⁴ The dispute over the “length” of the Penobscot reservation includes a disagreement over the status of certain islands upstream from Indian Island. The