

that are inconsistent with the CWA or that are free from potential EPA oversight.

Therefore, EPA concludes that MICSA and the CWA combine to charge EPA with the responsibility to ensure that permits issued by Maine address the southern tribes' uses of waters within the state, consistent with the requirements of the CWA. Fortunately, the state has recently taken actions that suggest Maine is beginning to consider the southern tribes' use of waters in the state and its bearing on how the state should regulate water quality. For example, the state Board of Environmental Protection has recently approved a recommendation for the Maine legislature to reclassify key segments of the Penobscot River and include language specifically requiring that the waters be "sufficiently free from pollutants so as to protect human health related to subsistence fishing."¹⁷ Although the Legislature has not made any final decisions on this issue, the proposal is consistent with MICSA's purpose to preserve tribal uses and is an important acknowledgment of those uses and their bearing on state water quality regulation.

But in the event Maine's approach to the tribes' uses shifts, EPA is in a position, consistent with MICSA, CWA, and our trust responsibility, to require the state to address the tribes' uses consistent with the requirements of the CWA. As with any state implementing the CWA for EPA, the state's authority to do so remains contingent on the state program meeting all the Act's requirements. EPA cannot now predict with any particularity how the CWA's requirements will govern particular permitting or implementation issues as they arise under the MEPDES program. Those issues will be ripe for decision when they are presented in the future, with a completely developed factual and administrative record to consider.

This approach to EPA's oversight role does not mean that the tribes will necessarily be completely satisfied with the conclusions EPA reaches about how the CWA applies to particular tribal uses. But it is the Agency's hope and expectation that in consultation with the southern tribes, and working collaboratively with them and the state, the parties over time can sort through the critical question of how best to protect these waters consistent with the

CWA and the tribes' right to use them under MICSA and MIA. In every meeting EPA had with the southern tribes or the state, all parties agreed that protecting these great rivers is the common goal we all share. EPA commits to both the southern tribes and the state that it will do what it can to promote that goal.

4. Remainder of Maine's Application to Administer Its MEPDES Program in the Trust Lands of the Micmac and Maliseet

EPA is not acting today on Maine's MEPDES program application as it applies to the trust lands of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. Therefore, EPA still retains the NPDES permitting program for these areas. As discussed in our prior action on Maine's application, our authority to issue or modify NPDES permits for discharges into waters in the northern tribes' trust lands remains suspended pursuant to CWA section 402(c)(1). See 66 FR at 12793. This suspension will remain in effect until the Agency takes final action in these areas or the state agrees to extend the Agency's deadline for action. Unlike the boundaries for the southern tribes' Indian Territories, there is no dispute of which EPA is aware concerning the exact boundaries of the northern tribes' trust lands. These lands were all acquired pursuant to either MICSA for the Maliseet or the Aroostook Band of Micmac Settlement Act for the Micmac. 25 U.S.C. 1724(d)(4); Public Law 102-171, 105 Stat. 1143, 25 U.S.C. 1721 *note*, section 5. Therefore, the boundaries of these trust lands are clearly delineated in recent conveyances noting the meets and bounds and recorded with the Bureau of Indian Affairs and in the appropriate registries of deeds. There are currently no sources holding NPDES permits for outfalls discharging into the northern tribes' trust lands, nor is EPA aware of any proposed facilities requiring such a permit in the near future.

D. Other Federal Statutes

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), an agency must consult with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation

Officer (THPO) (or Tribe if there is no THPO) on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. On January 12, 2001, EPA approved Maine to administer the NPDES program in areas of the state where the Maine tribes did not dispute state jurisdiction. Prior to that approval, EPA engaged in discussions with the Maine SHPO and sought public comment regarding EPA's determination that approval of the state permitting program would have no effect on historic properties. EPA also held discussions with Indian tribes in Maine regarding approval of the state's NPDES program and historic properties of interest to the tribes.

On July 7, 1999, EPA sought the Maine SHPO's concurrence with its determination that the Agency's approval of Maine's application would have no effect on historic properties in Maine. The Maine SHPO provided EPA with a determination that there would be "No Historic Properties Affected" or "No Adverse Effect" to historic properties in Maine from EPA's approval, on the condition that DEP provides relevant notice and information regarding draft permits to the SHPO and coordinates with the SHPO. On November 26, 2000, the SHPO and DEP entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive the requested notices. This MOU further provides for coordination between DEP and the SHPO to resolve any identified issues to ensure that MEPDES permits will comply with Maine water quality standards and Maine laws protecting historic properties. For those permits with the potential to adversely affect historic properties, DEP and the SHPO agreed to seek ways to avoid, minimize, or mitigate any adverse effects to historic properties stemming from the proposed permit.

During EPA's review of Maine's NPDES application with respect to Indian Territories of the southern tribes, EPA engaged in additional discussions with the southern tribes concerning EPA's view that this approval will have no effect on historic properties of interest to the tribes. During those discussions, and as set forth in a draft Memorandum of Agreement Regarding Tribal Historic Properties in Maine (MOA), EPA committed to use its CWA authorities to help ensure that these tribes will have an opportunity to participate in the consideration of historic properties during administration of the NPDES program by Maine. Subsequent to EPA's prior

¹⁷ Letter from R Wardwell, Chair, Maine Board of Environmental Protection to the Co-Chairs of the Maine Legislature's Joint Standing Committee on Natural Resources re: Reclassification of Waters of the State (December 6, 2002) forwarding "An Act to Reclassify Certain Waters of the State," sections 13 and 29.