

40 C.F.R. § 123.32(c)
Statement by Counsel for the Penobscot Nation

The Penobscot Nation proposes to establish an NPDES permit program for discharges into the Penobscot River originating from point sources and storm water located within Penobscot Indian Territory as defined by 25 U.S.C. § 1722(j). The surface waters at issue are the waters of the Penobscot River from Indian Island and northward thereof. At present there is only one such discharge facility, operating under NPDES permit ME 010311, the Penobscot Nation Pollution Control Facility (the "Facility").

The Facility is owned and operated by the Penobscot Nation to service tribal members and others residing at the Nation's principal reservation island, known as Indian Island, within the Penobscot River. Both the Facility and its discharge, which is located within the Penobscot River, are within the Penobscot Indian Reservation.

Background Principles

The federal government is firmly committed to tribal self-government. The Nation's request for an eligibility determination under 40 C.F.R. § 123.32(c) with respect to its own Pollution Control Facility is in furtherance of that goal. As the EPA readily understands, "[w]ater quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." EPA, 56 Fed. Reg. at 64,879.

The Nation appreciates the EPA's recognition of the importance of Indian nations' regulation of their environments and invokes the EPA's pronouncements in requesting recognition of its eligibility to obtain the delegation of federal authority under section 518(2)(e) of the Clean Water Act. *See, e.g., EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July, 1991) ("Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others."); 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (The EPA recognizes that "clean water, including critical habitat (i.e. wetlands, bottom sediment spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations."). These statements could not be more true for the Penobscot Nation, whose people have resided on and within the river for whom they are named from time immemorial.

The Penobscot Nation has inherent authority to regulate the Penobscot Nation Pollution Control Facility and its related discharge into the Penobscot River

Indian tribes have the “inherent powers of a limited sovereignty which has never extinguished.” *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979) (citation, quotations, and emphasis omitted). This includes “inherent sovereign authority over their members and territory.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). This inherent authority is retained by the Penobscot Nation unless expressly divested by Congress. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979).

The Penobscot Nation, like other Indian nations, has the inherent power to regulate environmental matters within its reservations. *E.g.*, *State of Montana v. U.S.E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 275; *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410. And this authority, like any other attribute of tribal sovereignty, remains intact unless expressly divested by Congress. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367; *State of RI v. Narragansett Indian Tribe*, 19 F.3d 685, 694, n.7 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994). Further, if Congress does not act to eliminate that authority, there remains, in the federal government, a fiduciary duty (of the highest order) to protect it. *See HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000).

In the Maine Indian Claims Settlement Act of 1980, Congress did not divest the Nation of this sovereign authority. On the contrary, Congress provided:

Except as otherwise provided in this subchapter, *the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine*, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. §1725(h) (emphasis added). The final Senate Committee Report on the Settlement Act explained that Congress recognized “the independent source of tribal authority, that is, the *inherent authority of a tribe to be self-governing*. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).” Senate Report at 29 (emphasis added). It

further explained that the Nation's qualified agreement to adopt certain State laws as their own (*see* 30 M.R.S.A. §6206(1)), would "*not violate the principles of separate sovereignty.*" Senate Report at 29 (emphasis added). The report continued, "[t]hough identical in form and subject to redefinition by the State of its laws, the laws are those of the tribes. *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P.2d 1085 (C.A. 1974)." *Id.*¹

Maine's Authority over the Penobscot Nation Pollution Control Facility is No Impediment to the Nation's Eligibility for the Delegation of the NPDES Program

While the United States Court of Appeals for the First Circuit has held that the State of Maine has jurisdiction to enforce Maine law with respect to the Penobscot Nation Pollution Control Facility, this does not preclude the Nation from also regulating the Facility pursuant to its inherent sovereign authority. The Nation's authority over its own Facility can operate side by side with Maine's authority without affecting or preempting Maine's law in any way. Nothing in the Settlement Act suggests that Maine has authority exclusive of the Nation's inherent authority to regulate the waste treatment and discharge into the Penobscot Indian Reservation generated by tribal members and others residing within the Penobscot Indian Reservation at Indian Island.

¹In *Wauneka v. Campbell*, 526 P.2d 1085 (Ariz. Ct. App. 1974), the Arizona Court of Appeals held that the State of Arizona could not enforce its Motor Vehicle Safety Responsibility Laws against Indians on the Navajo reservation, notwithstanding the fact that the Navajo Tribal Code required all Navajo Indians residing on the Navajo Reservation in Arizona to obtain an Arizona Driver's license. Noting that the Navajo Nation, within its reservation, had police power authority to govern the activities of tribal members, the court held that imposition of Arizona's Motor Vehicle Safety Responsibility Laws would interfere with the Nation's right to self-government. The Nation's adoption of the Arizona Driver's licensing requirements as its own did not prevent it from enacting laws more suitable to its territory and members, nor did it constitute consent to allow state jurisdiction over the reservation. *See id.* at 1088-89. As the court explained:

The Tribe in requiring its members who drive on the Reservation to be licensed by the state in which they live insures that those driving on the Reservation have demonstrated certain minimal skill and knowledge relative to the operation of motor vehicles. The tribal driver's license statute has not ceded either civil or criminal jurisdiction over Reservation events to Arizona courts or administrative agencies.

Id. at 1089.

EPA's Delegation of NPDES Authority to Maine over the Penobscot Nation Pollution Control Facility is No Impediment to the Nation's Eligibility for the Delegation of the NPDES Program

Under longstanding principles of federal Indian law and EPA policy reflecting that law, the Nation's inherent authority must be given primacy over Maine for the administration of the NPDES program. Thus, while Maine may continue to apply its state laws to the Nation's Pollution Control Facility, the NPDES program with respect to that facility must be administered by the Penobscot Nation, not Maine. *See EPA Policy for Administration for Environmental Programs on Indian Reservations* (Nov. 8, 1984); EPA, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July 10, 1991) at 3-4 (EPA will retain enforcement primacy for reservation pollution when tribe cannot demonstrate jurisdiction over certain sources). *See also HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction.").

Thus, upon approval of the Nation's application under section 518(e)(2), the EPA will have immediate "[g]rounds for program revision." 40 C.F.R. § 123.62(a).

The Facility, its Discharge, and the Water Resources at Issue are Located within the Penobscot Indian Reservation

Pursuant to the Settlement Act, Congress expressly reserved to the Penobscot Nation "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island . . . and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to [October 10, 1980]." 25 U.S.C. § 1722(i) (defining "Penobscot Indian Reservation") *ratifying* 30 M.R.S.A. § 6203(8). As a consequence of reserving the islands and by the plain language of the 1818 Treaty, the reservation includes the riparian rights to the beds and banks of the Penobscot River. *See* Letter from Deputy Solicitor Edward B. Cohen, United States Department of the Interior, to John P. DeVillars (September 2, 1997) ("Interior Letter of 9/2/97") at 6.² At the time of the Settlement Act, the State of Maine clearly understood this to be the case, for its own Joint Select Committee on Indian Land Claims reported that the reservation included "any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law." *Report of the Joint Select Committee on Indian Land Claims* at 3.³

² A copy of the Interior Letter of 9/2/97 is attached hereto.

³ A copy of the *Report of the Joint Select Committee on Indian Land Claims* is attached hereto.

In addition to confirming the reservation of the Penobscot River islands and related waters from Indian Island northward, Congress confirmed the Nation's right to "take fish . . . for sustenance" within the river. 25 U.S.C. § 1721(b), *ratifying* 30 M.R.S.A. § 6207(4).⁴ The final Committee Reports of Congress describe the Tribe's sustenance fishing right as an "expressly retained sovereign activit[y]" of the Tribe. S.Rep. No. 96-957 at 15; H.R.Rep. No. 96-1353 at 15, *reprinted in* 1980 U.S.C.C.A.N. at 3791.

Attendant to the Tribe's reserved sustenance fishing right is the right to water in sufficient quantity, and of sufficient quality, to preserve sustenance fishing. *See United States v. Adair*, 723 F.2d 1394, 1408-11 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). *See also Stanton v. Trustees of St. Joseph's College*, 254 A.2d 597, 600-01 (Me. 1969) (riparian owner has right to water quality). The Nation's reserved right to take fish "for sustenance" is more than a mere right of tribal members to dip their nets into the water in the hopes of catching a fish. *See Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658, 676, 679 (1979). Rather, it is (at the very least) a legally protected interest to have fish in the river of sufficient health and quantity to provide tribal members with a "moderate living." *Id.* at 686; *United States v. Adair*, 723 F.2d at 1414-15.

The Penobscot Nation Pollution Control Facility at Indian Island, its discharge within the Penobscot River, and the water resources impacted by the discharge are, therefore, within the Penobscot Indian Reservation and fully subject to the inherent regulatory authority of the Penobscot Nation.

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Mark A. Chavaree, Esq.

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Kaighn Smith Jr., Esq.

Counsel for the Penobscot Nation

⁴Section 6207(4) of the Maine Implementing Act provides that "Notwithstanding any rule or regulation . . . of the State, the members of the . . . Penobscot Nation may take fish, within the boundaries of their . . . reservation[] for their individual sustenance." 30 M.R.S.A. § 6207(4).