PENOBSCOT NATION

DEPARTMENT OF
NATURAL RESOURCES

JOHN S. BANKS, DIRECTOR

6 RIVER ROAD
INDIAN ISLAND
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January 19, 2000

Mr. Jim Sappier
Regional Indian Program Coordinator
US EPA
One Congress Street
Boston, Ma 02203

Dear Jim,

Chief Richard Hamilton has authorized me to represent the Penobscot Nation at the consultation meeting that the EPA has scheduled at Old Town for January 28, from 9:00 am to 12:00 pm. The issues of most concern to the Penobscot Nation for discussion at this meeting are attached. As you know, it is the Nation's position that NPDES permitting authority under the Clean Water Act should be retained by the EPA for the waters of the Penobscot River from Indian Island, northward. From discussions with the EPA to date, it is the Nation's understanding that resolution of this issue is purely a question of law.

We would like to learn the EPA's views on each of these topics and would ask that the EPA, after presentation, entertain questions from myself or from the Nation's attorneys, Mark Chavaree and Kaighn Smith. (We are attempting to invite a Penobscot Nation tribal member to provide the EPA with some background concerning the importance of the River to the Tribe's religion and culture.)

We want this meeting to be productive. Thus, we suggest that presenters be kept to a minimum. By copying this letter to the other tribal leaders, I ask that they endorse the proposed topics, but to broaden them, when appropriate, to include their application, not just to the Penobscot Nation, but to the other Maine tribes and Bands, as well.

Sincerely

John Banks
Director, DNR

P.S. If the EPA is convinced that the Nation's reservation and related resources, including sustenance fishing, can best be protected by delegating its NPDES permitting authority to the State of Maine, the Nation would like to hear those views at this meeting at the outset.

cc: Chief and Tribal Council, Penobscot Nation
Mark Chavaree, Esq.
Hon. Richard Stevens (Governor, Indian Township Passamaquoddy Reservation)
Hon. Rick Doyle (Governor, Pleasant Point Passamaquoddy Reservation)
Hon. Brenda Commander (Houlton Band of Maliseet Indians)
Hon. Billy Phillips (Aroostook Bank of MicMac Indians)
Kaighn Smith, Esq.
Gregory Sample, Esq.

JAN. 28 DISCUSSION TOPICS

1. **What is the EPA's understanding of the scope of the Penobscot Indian Reservation?**

(a) Does the EPA view the reservation to encompass the Penobscot River?

(b) Does the EPA view the reservation to encompass sustenance fishing?

(c) Would the EPA take issue with the Maine Attorney General Opinion (copy attached) that sustenance gill net fishing by tribal members in the waters surrounding Indian Island involves sustenance fishing, free from state regulation, within the Penobscot Indian Reservation?

2. **What is the EPA's understanding of its trust responsibility to the Penobscot Nation?**

(a) Does the EPA believe that it has a trust responsibility to protect the rights and resources of the Penobscot Nation?

3. **What is the current status of jurisdictional responsibility for the Clean Water Act programs in the Penobscot River?**

(a) What role is currently played by EPA?

(b) What role (if any) is currently played by the State of Maine?

4. **What is the EPA's position with regard to retaining federal jurisdiction over Clean Water Act programs in the Penobscot River above Indian Island?**

5. **What does the EPA believe are the 3 most significant issues that the Penobscot Nation must address to convince the EPA that it must retain federal jurisdiction over the NPDES program within the Penobscot River from Indian Island, northward, within the Penobscot River?**

    (a) In the EPA's view, what concerns or questions are raised by the State's application in this regard?

Office of the Governor and Council

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January 24, 2002

Hon. Angus King
State House Station
Augusta, Maine 0433-0001

Dear Governor King:

On December 7, 2001 at Pleasant Point Passamaquoddy Reservation, I met with you along with the elected leaders of the Passamaquoddy Tribe, the Houlton Band of Maliseets, and the Micmac Nation at the Maine Indian Tribal State Commission's annual gathering of Governors and Chiefs.

At the gathering, I presented a challenge to the collected group to initiate a dialogue between the leaders to promote improved relations. Through this plan, tribal and state leaders would establish an ongoing agenda to meet and review our common ground and our differences with a goal of improving tribal-state relations.

I firmly believe that improved communications among our elected leaders is the key to improved tribal-state relations. Regular, formalized communications should allow us to discuss and, if need be, negotiate our differences to amicable solutions, rather than through litigation.

In the spirit of a new millennium and at a time when all nations need to better understand one another, I am proposing to you, in the spirit of brotherhood, that we begin a new era of tribal-state relations as soon as possible. As good neighbors, who have common interests in doing what is best for all of Maine, its resources and its people, the tribes and the State should be able to work together.

In this light, and as a first step, I very much hope that the State will take seriously our interest in discussing the NPDES delegation issue as proposed in the attached communication to Attorney General Rowe. I would like to discuss this with you at your earliest convenience.

Sincerely,

Barry Dana

Barry Dana, Chief
Penobscot Indian Nation

Cc: Hon. Gov. Rick Doyle, Passamaquoddy
Hon. Gov. Richard Stevens, Passamaquoddy
Hon. Senator Olympia J. Snowe
Hon. Senator Susan Collins
Hon. Congressman John E. Baldacci
Hon. Congressman Tom Allen
Hon. Senate President Richard A. Bennett
Hon. Speaker Michael V. Saxl
Hon. Attorney General G. Steven Rowe
Hon. Representative Donna Loring, Penobscot
Hon. Representative Donald Soctomah, Passamaquoddy

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January 24, 2002

William Brown, PE
Maine Department of Environmental Protection
Water Quality Branch
17 State House Station
Augusta, ME 04333-0017

RE: Revolving Loan Funds

Dear Bill,

As we discussed the other day, my experience in working on the Penobscot Indian Nation's interim financing under the revolving loan fund for treatment plant improvements suggests that the state laws and rules governing the fund are, at best, difficult to apply. This is so even though the Passamaquoddy and Penobscot treatment plants have long been included in your project priority lists.

The difficulty, in short, is that nowhere that I found does the state law include "Indian tribes" among the entities eligible to obtain funds through the Clean Water Act revolving loan funds. This may well be an oversight, since the Clean Water Act provision making Indian tribes eligible is somewhat disguised. The federal act's definition of "municipality" for purposes of the revolving loan funds is:

> The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

33 U.S.C. § 1362(4). Since Indian tribes are not municipalities, or any other form of government organized under state law, this definition merely grafts Indian tribes and tribal organizations onto the definition of "municipality." As a result, when the Clean Water Act provisions refer to a "municipality" they also refer to Indian tribes.

At least two provisions of the state law make it clear that the state law is intended to be just as broad as the Clean Water Act. 30-A M.R.S.A. § 6006-A(1)(A)(3) specifies that one revolving fund "must be used" for "any actions authorized under the federal Clean Water Act, 33 United States Code, Sections 1251 to 1387." The legislature's intent to track the full scope of the Clean Water Act is also evident in 30-A M.R.S.A. § 5959(1)(B) which authorizes the Bond Bank and presumably DEP, to adopt any rules "necessary to ... ensure compliance with the Federal Water Pollution Control Act. Title VI [33 U.S.C. § 1381 et seq.]... and [its] amendments."

The difficulty is that the operative statutes for these programs, like § 5953-A, speak exclusively in terms of a "municipality," and the Maine statutory definition of "municipality" gives no indication that Indian tribes or tribal organizations would be included. 30-A M.R.S.A. § 5903(7-A). This definition, at least for purposes of the revolving loan funds, should be modified to follow the Clean Water Act definition verbatim, or perhaps incorporate it by reference.

This change would, of course, require legislation. In my view, it would be legislation that is needed to make the state program comply with the requirements of the Clean Water Act. In the interim, however, I would think that the rulemaking authority cited above is broad enough for either DEP or the Bond Bank, or both, to modify their program regulations to make clear that Indian tribes and authorized Indian tribal organizations are eligible applicants under the revolving loan programs. I note that Chapter 595 of the DEP regulations includes a definition of "eligible applicants," which could now be modified; the Bond Bank could also define eligible applicants for purposes of the revolving loan program by reference to the Clean Water Act definition of "municipalities" or by specifically referring to Indian tribes and Indian tribal organizations.

I would be happy to work with you on either rulemaking or legislation to give all Indian tribes in Maine the full benefit of the opportunities secured to them under the Federal Clean Water Act. Please feel free to call if I can assist.

Sincerely,

Gregory W. Sample

GWS/lld

cc: Robert Lenna
Karen Asselin

bcc: Chief Barry Dana
Mark Chavaree
Ralph Nicola
Rep. Donna Loring
Governor Richard Doyle
Governor Richard Stevens
Rep. Donald Soctomah

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4/23/02

NEPDES AGREEMENT WITH THE STATE
COMMENTS and THOUGHTS

It seems like 1980 all over again. We are giving up an awful lot and getting a little.
Maybe some "Good Will" with the State. "A new era of partnership" those very words were spoken by Cohen during the 1980 settlement Act negotiations. We must not let history repeat itself.
We are giving up our right to argue control of our waters. This is a huge concession.
We are giving up our right to appeal the NPDES permit. When we sign this agreement and six months or a year down the road we find that we cannot live with it . We will have no recourse because we would have agreed not to protest the NEPDES process now or in the future. Do we trust the state that much? The state is getting complete control over NEPDES and our waters. You can forget any claims you might think you have in the future.
What we are getting is a recognition that we actually eat fish and shell fish
Vague promises that the state will listen with words like intend, consider, goals etc.
We've lost the documents case. The law is in the books. Nothing we do now can change that. Now we are going to eliminate our arguments for our water rights. We use the excuse that Bush is in the White House but Bush will not always be in the White House. This agreement we are about to make with the state will have legal ramification forever. Why do you think Manahan started this case in the first place? We have failed to see the big picture and have focused only on the documents. Documents that they all ready have. I say give them the documents. Set up a place off the reservation and let Manahan go over them there.
Set up a wigwam with Indian Island police and Old Town police there or even State police. The control of our waters is too important to barter. We will have to submit legislation to fix this anyway no matter what we decide to do in this case. Maine will have a new governor for the next legislative session. One in my estimation that would be more cooperative than King.
We need to look at the bigger picture.

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DEPARTMENT OF
NATURAL RESOURCES

JOHN S. BANKS, DIRECTOR

6 RIVER ROAD
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MEMO

Date: 05/01/2002

To: Chief and Council

From: John Banks JB

RE: MOA Between PIN and Maine Regarding NPDES Permitting on Indian Island

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I believe that the MOA approved by the Tribal Council on April 10 is not in the best interest of the Nation and I urge the chief not to sign this agreement. Upon signing this agreement the Nation would hand over to the State the right to regulate pollution discharge permits within our territory with not much more oversight than we currently have. We would give up arguments we have developed since 1980 pertaining to the tribes' (and EPA's) authority to regulate our own environment and never be able to use these arguments, even if the MOA is terminated. At a time when all 3 governments (Federal, State, and Tribe) are looking into possible amendments to the 1980 Settlement Act, it makes no sense to agree with the States' interpretation of environmental regulatory authority by signing this agreement. We've already lost the documents case. The Maine Supreme Court has already ruled that the States' FOAA (Freedom of Access Act) applies to the Maine tribes. We would be better off to pursue a legislative change to fix the FOAA problem and continue to support tribal sovereignty over our waters. To sign the MOA now would be "throwing out the baby with the bath water".

Below is my response to each of the points raised at the April 10th Council meeting as "consequences of signing/not signing":

1. Govt to Govt -- We have been dealing with Maine on a govt-to-govt basis since Maine became a state in 1820. We're a government. They're a government. To suggest that this MOA somehow creates a

new govt-to-govt relationship is NONSENSE!! In fact, we have entered into 2 govt-to-govt agreements already with Maine: 1 in 1995 for fisheries management and 1 in 1992 for water quality monitoring, including the East and West Branches.

2. **Recognition of Unique Cultural Relation to Waters** – This is already recognized by the State. We have been working with all levels of State Gov't from this perspective for many years. To think that this MOA will somehow force the State to want to do more to protect the river is NONSENSE.

3. **New Positive Relationship** – The relationship between the State and the tribe is what the current political powers want it to be at any given time. The State has been and will continue to be highly influenced by the financial (and therefore political) strength of the Paper Industry. To think that this agreement will change that dynamic is ludicrous. We currently enjoy a very good working relationship with the State, especially at the technical level.

4. **State Agrees Water Quality Goals Include Safe Human Consumption of Fish** – Big Deal! This threshold was passed many years ago. The argument now is on the amounts of fish we should be able to consume in the exercise of our fishing rights. To think that the State is making a major concession by agreeing that "fishing" includes consumption is ridiculous. Maine DEP reports to EPA every 2 years on the status of all waters in the State. This report states that the Penobscot River is not meeting the goal of the Clean Water Act because of the presence of Fish Consumption Advisories. This shows that Maine recognizes the consumption of fish as a Clean Water Act requirement.

5. **Govt-to-Govt in Permits and Compliance** – The agreement sets out a formal process to involve the tribal government in the review of individual NPDES permits. This is a positive aspect of the agreement, however, I don't think we should have to give up our sovereignty and jurisdictional arguments to get involved in the review of permits. We already review all State issued licenses, including all discharge licenses within the entire Penobscot River Basin. DEP has also agreed to send us copies of all Kraft pulp and paper licenses outside of the Penobscot River Basin (copy of 3/29/01 letter attached).

6. **Pathways to Protect Other Tribal Uses, with EPA Help** – These already exist in both present State law and in EPA policy.

7. **Avoid Bad Precedent, Litigation Costs, Risks** – The worst precedent set by this MOA is to be the first tribe in the Country to willingly bring in a State to have environmental regulatory authority within a federally recognized Indian reservation. I agree that there are litigation risks if we proceed in court to argue against State Authority over environmental matters under the 1980 Settlement Act. There are always risks and costs associated with the exercise of sovereign authority. We have an opinion on the books by DOI that says that water quality is an internal tribal matter under the Settlement Act. Generally, courts give significant deference to federal gov't agencies when deciding these questions.

8. **End Documents Case** – As said earlier, FOAA applicability to the tribes is already decided as a matter of State law.

Other Issues

- **The Nation will be prevented from having our own regulatory authority over our reservation waters.**

  Once we sign this agreement, we will not be able to have our own regulatory authority over permitting under the CWA (Clean Water Act). Since the mid-eighties we have been building the internal capacity to eventually run our own permitting program. Two of our water resources staff are one training course shy from getting federal credentials from EPA that will allow us to conduct compliance inspections under federal policy. The EPA, especially since 1994, has been working with tribes to help them develop the capacity to run their own environmental programs (EPA Indian Policy attached). As stated earlier, DOI's official legal position is that water quality regulation is an internal tribal matter under the settlement act. Signing this MOA will be a major step backwards in these efforts.

- **This Agreement is Forever**

  At the beginning of this process I insisted on a sunset provision. Handing over permit authority to the State on our river should be viewed as an experiment.

  If the State could show after a five-year period (the average time frame for a NPDES Permit) that it has adequately protected this precious resource, then the agreement could be reauthorized. If not, the EPA would step in and reassume permitting authority.

  The State refused to include a sunset provision and our attorneys agreed not to include it.

- **I believe we can have adequate NPDES permit review and input without signing this MOA.**

  Whether the state gets authorized to run the NPDES Program in our waters or EPA retains that authority we will have an adequate voice in the process. We do not need to give up our jurisdictional/sovereignty position forever to have an adequate voice.

Section-by-Section Analysis

Article I **Preliminary Matters**

This section is general framework language that sets the tone for the Agreement and is used to establish intent. This particular language favors the States' legal and political views of the Penobscot River (with respect to the tribes' water rights). Since the 1980 Settlement Act was mostly silent on the issue of water rights, current understanding of each of the parties (Tribe & State) is important now, 20 years later.

This language is detrimental to the Nations' position because:

1. Doesn't mention tribal waters.
2. Doesn't include the West Branch, which includes three important discharges, which impact water quality in the entire upper section of the main stem, and directly impacts the West Branch.

The language is mostly "fluff".

Article II **Joint Purposes**

This section sets out the purposes for entering into the MOA.

This language is mostly "fluff" and provides no real benefits to the tribe.

Article III **Other Definitions**

This is just procedural language that makes it sure that the terms "facility, discharges, or applicant" only applies to those discharges on the Main Stem of the River (those discharges in Appendix A).

Article IV **Water Quality Standards**

Although this section is titled: "Water Quality Standards", nothing in this section provides for the establishment of standards needed to protect the tribal cultural/traditional uses beyond what's available now under existing state law. This section merely cites existing state law. Many of these provisions have already been used by the Nation to upgrade the classification of segments of the river and we will continue to do this with or without this MOA.

Article V **Maine Pollutant Discharge Elimination System (MEPDES) Permitting**

This section sets up a process for the tribe to become involved in the review and comment of individual discharge permits. This is a good

part of the agreement because it establishes in writing a meaningful role for the tribe.

The problem with this section is that it does not force the State to incorporate our concerns and recommendations in the final permit. If we ultimately disagree with any provision of a final permit, we are left with remedies under existing law, which are available to us without having this MOA in place.

Also, as stated earlier, I am confident that we will continue to have a strong voice in permitting regardless of who has permitting authority (state or federal EPA) and regardless of whether we enter into this MOA.

Article VI **Monitoring and Compliance**

This section outlines the process for communication between the State and Tribe regarding inspections and notifications of spills and monitoring data.

Most of this activity is already happening and this language simply states much of what has been in place for years.

We don't need this MOA to accomplish the communications processes contemplated here.

We have an on-going govt-to-govt agreement with DEP where we conduct the monitoring in the entire basin north of indian island. Signing this MOA will restrict our existing monitoring to the Main Stem, a major step backwards.

In the area of facilities inspection, three of our water resources program staff have been attending training to allow them to have federal credentials to conduct inspections under EPA authority. This will allow the Nation to inspect the discharges independent of the State.

Article VII **Previous Agreement**

This section references the existing agreement we have with DEP (copy attached) to receive copies of all permits in the drainage and all Kraft mill permits in the State. This language clarifies that the MOA (permit review section, Article V and Article VI, Monitoring and Compliance) only applies to those discharges on the Main Stem

Article VIII **Other Provisions**

This is the section where we withdraw our objections to the States' desire to have permitting authority within reservation waters.

The MOA would be OK if Article VIII A. were omitted. Note that language added at the last moment in Article VIII, "D" would prevent the tribe from ever using our previously developed arguments against State jurisdiction over our reservation, even if the MOA is terminated.

In Article VIII D "Amendment on Termination" the phrase "except that the provisions of Article VIII cannot be terminated" was added at the very end of the drafting process on the insistence of Matt Manahan. This language was not included in the version that was faxed to me on the morning of April 10

Apparently (according to Kaighn Smith) Matt Manahan insisted on this language as a condition for him supporting the 30-day extension.