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cc: N Silva (w/encl)
T Williamson
Caucus

October 16, 2000

Ms. Carol Browner
Administrator
United States Environmental Protection Agency
401 M Street SW
Washington, DC

RECEIVED
OCT 30 2000
OFFICE OF THE REGIONAL ADMINISTRATOR

Re: Maine's NPDES Application.

Dear Administrator Browner,

We are writing to you regarding the State of Maine's application to operate the federal NPDES program over our ancestral lands and territories. We respectfully request that EPA maintain the NPDES permitting status quo on our ancestral lands in order to protect our Tribal waters and our environment from further degradation. Retention of NPDES permitting authority by EPA would affect less than one-tenth of one percent of the land of the State of Maine and would provide a mechanism to protect the Tribe from acculturation.

We represent proud and sovereign Tribes. We have been fighting to retain, rebuild and protect our ancestral ways for over 400 years. Congress, in the both the 1980 and 1991 Settlement Acts, intended to protect our culture and our traditions. These Acts specifically provide for the protection of our culture by clearly not allowing State regulation without Tribal consent. The Settlement Acts do not grant the State unilateral authority to affect the environment in a manner that will negatively impact our culture and traditions. In negotiating the 1980 land claims settlement and in the Congressional hearing on the Act, the Maine Tribes insisted that their most basic and precious rights be preserved and their Tribal culture and traditions be protected by the Act. Congress agreed and stated the following:

> Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. To the contrary, the settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all internal matters. (Sen. Melcher, Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829), Report Number 95, 95th Cong., 2nd Sess.17, (September 17, 1980).

In light of this commitment to the Tribes and federal Indian law, we believe that EPA must use its Trust authority to ensure that Tribal concerns and values be addressed when making a decision that may have a severe negative impact on our Tribes. As a federal trustee, EPA has a fiduciary duty to act in the best interests of federally recognized Tribes and in a manner that will ensure the protection of our Tribes' environment, health and culture.

In 1992, under your leadership, EPA lead the nation in determining that Native Americans are a unique racial group that merit special consideration because of their relationship to, and reliance on, the environment. In 1995, one year after President Clinton issued an Executive Order to address the problem of disproportionate environmental impacts on minorities and Tribes, you issued EPA's own Environmental Justice Strategy. You correctly recognized that Tribal cultures are inextricably bound to the environment, and you directed EPA employees to take this fact into account when making decisions that might impact upon Tribes:

> ... Human health and environmental research and other activities involving Tribal and indigenous environments and communities will take into account the cultural use of natural resources. These activities will seek contributions from Tribal governments and indigenous people in order to incorporate their traditional understandings of, and relationships to, the environment. "The EPA's Environmental Justice Strategy" April 3, 1995.

We believe that pursuant to its Trust responsibility, EPA should not now ignore the direct relationship between Tribal culture, the environment and the health of Tribal members, when making a decision on the State's NPDES application. The repeated assertions by the State that its environmental programs protect all Maine residents do not withstand scrutiny. The State of Maine has no law, policy or guidance incorporating Tribal concerns into the environmental regulatory process, or acknowledgment of the Tribes unique relationship with the environment. For example, neither Maine's Water Quality Standards, nor its Risk Assessment Methodology, address Tribal cultural values or require Tribal concerns be incorporated into the process.

The State argues that in 1980 it obtained jurisdiction over the Maine Tribes. However, during the past twenty years, the State has failed to take any actions to address the disproportionate environmental and health impacts that state decisions have had on its Tribal citizens. Furthermore, the Maine Natural Resources Council, in comments recently submitted to EPA, described a "pattern of inadequate enforcement by [Maine] DEP of state and federal environmental laws." Due to the State's inaction, the rivers and water systems that Maine Tribes rely on for food, ceremonies and medicines are contaminated by dangerously high levels of PCBs, DDT, lead, mercury, dioxin and other toxic chemicals. There are fish advisories along all the waters that Tribes traditionally fish.

The Maliseet name means "The People of the Beautiful, Flowing River"; however, State Fishing Advisories inform us that our "River", the Meduxnekeag, is contaminated and we should limit eating fish to ***"2 fish meals a month."*** This allowance is not enough to maintain a traditional fish diet. (The Meduxnekeag River does not even meet current State Water Quality Standards.)

Tradition runs deep in our Tribes, so despite the warnings, some of our members continue to follow their traditional eating and gathering patterns. Moreover, as the traditional rivers and gathering places become contaminated or remain contaminated from lack of state action, the diet of some of our Tribal members is changing from healthy natural foods like fish and plants, to a less healthy, more typical American high fat, high starch and high salt diet. The result of these two trends is that the incidence of cancer, asthma, diabetes and other illness among Tribal members has skyrocketed during the past 20 years. Between 1982 to 1997 the average life span of Maine's Indians was 60.1 years compared to 74.1 years for the non-Indian population.

Another important consequence if the EPA delegates the NPDES program to the State, is that EPA, and other federal agencies, will lose the ability to protect the Tribes from the potential adverse impact of the State's environmental regulations, permitting and licensing. Currently, pursuant to its Trust responsibility, EPA now consults with Tribes and other federal agencies working under various federal statutes, to protect the environment and health of our Tribes. This significant consultation process, and the protections it provides to our Tribal members, will be lost. Even the US Fish and Wildlife Service, in its comments to EPA, doubts that once EPA delegates the NPDES program to Maine, it can maintain the same level of protection for salmon, and other Tribal resources, currently available to the Tribes under the Endangered Species Act.

Furthermore, if EPA delegates the NPDES program over our lands, business interests such as the lumber and paper industry will be the dominant voice heard on environmental matters. Additionally, the State's spotty record of environmental enforcement will also place the Tribes' health and welfare at great risk in the future as Maine's Governor, legislature, state agencies and State Attorney General have steadfastly refused to address or incorporate Tribal environmental or cultural factors into state environmental decision-making.

In 1974, the US Commission on Civil Rights found that "Indians in Maine have seldom been included in the planning or decision making process which effects their lives." Unfortunately, this situation has not improved since then. In 1996, the 117th Maine legislature created "The Task Force on Tribal-State Relations." Among its recommendations were the following: 1) The state should create an advisory committee on Tribal-State relations "to provide a forum for discussing any aspect of Tribal-State relations and concerns…"; 2) The Governor of Maine should issue an Executive Order requiring Executive Branch agencies to take into account tribal needs and concerns in the development of legislation, rules polices and programs; and 3) The "Micmacs and Maliseet each should have a non-voting representative in the Legislature", on par with the Passamaquoddy and Penobscot. The State has disregarded all three recommendations.

Richard Cohen, the former State Attorney General who helped negotiate the 1980 Settlement Act for Maine, agreed with the Task Force recommendations and wrote a letter to Governor King urging him to issue the Executive Order. The Governor still refused. Additionally, when a bill came before the Maine legislature requiring the State Department of Environmental Protection to provide "reasonable notice" to Tribes about matters affecting the Tribe, the legislature turned it down.

The State's support of industry practices and proposals and its exclusion of the Tribes from the State's decision-making process, have already threatened and/or endangered the Tribes environment, their health and their cultural traditions. For example: Without ever consulting the Penobscot Indian Tribe, the State approved a plan that closed the last free flowing section of the Penobscot River between the Penobscot Indian Reservation and the Atlantic ocean that also required the removal of migrating Atlantic salmon from reservation waters,. The project was eventually rejected by FERC. EPA gave this project its lowest environmental rating possible.

Furthermore, in 1997, the Penobscot Indian Nation appealed a NPDES permit issued by EPA to the Lincoln Pulp and Paper Company, which discharges dioxin and other toxic chemicals directly upstream from the Nation. Maine's discharge permit to Lincoln mirrored the federal NPDES permit. Both permits required the company to monitor the health impacts of its discharges on eagles. (The Tribe had even offered to pay for the Study.) But when the Nation appealed the federal permit, thus suspending the new license conditions until the appeal was resolved, Lincoln asked the State DEP to remove the eagle monitoring requirement. The DEP, which will issue NPDES permits if EPA approves the delegation, complied with Lincoln's request without providing the Tribe with any notice of the pending modification request.

Under State regulations, the DEP must notify an adjacent landowner prior to the modification of a State permit. However, in this case, even though Lincoln discharges dioxin directly into Tribal waters and those waters directly impact on the Tribes environment and the health of its members, the Maine DEP determined that it was not required to notify the Tribe because it was not an adjacent landowner.

Unfortunately, the State has shown no interest in working with Tribes to resolve environmental disputes. The Maine Indian Tribal State Commission (MITSC) was created by the 1980 Settlement Act to address disputes between Tribes and the State and to recommend resolutions to the Maine legislature. Representatives of MITSC have appeared before the Maine legislature every year since 1985 to present testimony and to provide information about legislation relating to trust lands, tribal courts, taxation, jurisdiction and state environmental matters. However, the Task Force on Tribal-State Relations found that "state policy makers do not listen to them [MITSC]". The Task force also found that bills on land use regulation and environmental decisions that address Tribal concerns that are proposed or supported by MITSC, are routinely opposed by the legislature and the Governor. (In 1994, Governor King appointed Matthew Manhattan, an attorney with the law firm of Pierce Atwood, to sit on the Maine Indian Tribal-State Commission. While on the Commission, Mr. Manahan continued to represent clients whose interests were in direct conflict with those of the Maine Tribes. Although this was of great concern to the other Tribal and non-Tribal members of the Commission, Governor King took no action to address this situation. The Task Force subsequently recommended that a conflict of interest policy be created for MITSC. This recommendation was also disregarded by the State.)

Moreover, attempts to directly negotiate with the State over the NPDES delegation and other environmental issues have floundered because of the State's intractable position that it has no reason to negotiate with us on any issue addressed by the Settlement Acts. While the State did not solicit comments from the Tribes prior to applying for the NPDES delegation, the State did request input from the timber and paper industry. EPA Region I employed the services of a mediator to bring the State and Tribal parties together to discuss the NPDES delegation issue. The State was the only party

who declined to participate. The Tribes are frustrated and concerned by the lack of willingness on behalf of the State to take them or their concerns seriously.

Our Settlement Acts and our historic relationship with the federal government require that steps be taken to ensure that our ancestral ways are not unilaterally eradicated by government actions. If EPA delegates the NPDES program over our ancestral lands to Maine, we will no longer be guaranteed a role in the environmental decisions that may adversely impact the health, safety and welfare of our people. Without the full range of federal Trust supervision, the State will be free to continue to degrade our environment and consequently force us to abandon our Tribal culture and traditions.

Environmental protection for the Maliseet and the Micmac is a matter of cultural survival. Our history, legends, tradition, and culture are deeply rooted in nature. John Banks, the Director of Natural Resources for the Penobscot Indian Nation, has eloquently expressed what is in our hearts today: "Our elders have taught us a set of values that govern our lives. The traditional cultural activities that our ancestors have practiced for more that 12,000 years are coming to an end: hunting, fishing, collecting plants for food and medicine, learning when and where to pick certain types of berries, when and where fish are running, and respect for the inter-relatedness of the natural environment. We already cannot pass many of these values on to future generations. Our people are afraid of getting sick or dying from engaging in our traditional Tribal activities."

Hunting, fishing and gathering native foodstuffs and medicines for sustenance and ceremony play a crucial role in our Tribal culture and tradition. Our Tribal members consider these acts a part of the "web of life" that nourishes and protects them. When contamination makes it impossible to hunt, fish or gather food stuffs and medicine in accordance with our traditions, we cannot pick up and go elsewhere. We must stay on our ancestral lands and suffer the consequences. Therefore, when our natural resources are adversely impacted or damaged by influences beyond our control, a vital part of the Tribes cultural link is broken. Accordingly, preservation and protection of natural resources is preservation and protection of Tribal health and culture.

Thus, given the State's historic disregard for Tribal concerns, the lack of State protection for Tribal values and the lack of a State decision-making process that incorporates Tribal concerns, we believe the health of our Tribal members will be put at further risk if EPA delegates the NPDES program to the State. Therefore, in order to protect our Tribes, EPA should deny the State any authority to regulate, or adversely impact, water quality on our lands.

Furthermore, we ask that in making your decision you consider the State's long record of excluding Tribal representatives and Tribal concerns from state decision-making that directly affects the environment and health of our Tribes.

Significantly, Maine has proposed that State NPDES permits be issued by the DEP and a Board of Environmental Protection (Board). Under Maine law, the Board will have the authority to issue any permit that involves important policy or legal issues or that has generated substantial public interest. (38 M.R.S.A Sec. 341-D(2)) Any party may request the Board assume jurisdiction over a permit application or modification, or the Board may vote to take over the permitting process for a discharger. While the Board is labeled under the law as part of the DEP, its members are appointed by the Governor for four year terms. (38 M.R.S.A Sec. 341-C) No Indian has ever been appointed to the Board. Furthermore, the Board is not required to consult with the DEP prior to making a determination. Based on the State's record, and its position on Tribal issues, there is little chance that a Governor appointed Board will act to protect Tribal interests that are at odds with those of the Governor or the Maine business community.

We ask that in making a decision on the State's NPDES application, EPA consider the fact that if Maine's NPDES application is approved, Micmac and Maliseet children will suffer disproportionately to other children in Maine. Furthermore, our Tribes will not have a significant role in the State decision-making process that will create these disparate impacts. Moreover, there is no evidence that the State's historic antagonism to Tribal environmental concerns, and its long standing refusal to include Tribes into the State decision-making process, will change anytime soon.

During your tenure as EPA Administrator you have provided Native American communities around the country with the leadership and support they desperately needed to safeguard their environment, health and culture. You also opened America's eyes to the fact that a direct link exists between environmental protection, Tribal culture and Tribal health. This is an opportunity for EPA to honor the polices and Executive Orders that have been issued over the last eight years to protect the government to government relationship and the federal trust responsibility that has been recognized by this administration. By honoring this trust responsibility, EPA can be proud of protecting the right of our Tribes to continue into perpetuity and for not allowing acculturation to occur in Maine. Continue your legacy of providing support and protection for Native American lives and values by counseling Region I to retain authority for the NPDES program over our ancestral lands.

Woliwon
(Thank you)

Brenda Commander

Brenda Commander
Tribal Chief
Houlton Band of Maliseet Indians

Wulalin
(Thank you)

William W. Phillips

William W. Phillips
Tribal Chief
Aroostook Band of Micmacs

cc: Bruce Babbit, Secretary of the Interior
Kevin Gover, Assistant Secretary, Indian Affairs
John Leshy, Solicitor, DOI
Mindy Lubber, EPA Regional Administraton, Region 1
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Administrator
United States Environmental Protection Agency
401 M Street SW
Washington, DC

Re: Maine's NPDES Application.

Dear Administrator Browner,

Below please find corrections to the October 16, 2000 letter we faxed you regarding Maine's NPDES Application. On page four the phrase "directly upstream from the Nation" (second paragraph, first sentence) should say "directly into reservation waters." Also on page four, the word "Manhattan" (fourth paragraph, sixth sentence) should read Manahan. We apologize for these errors.

Woliwon
(Thank you)

Brenda Commander

Brenda Commander
Tribal Chief
Houlton Band of Maliseet Indians