

Muddying Tribal Waters: *Maine v. Johnson*, Internal Tribal Affairs, and Point Source Discharge Permitting in Indian Country

INTRODUCTION

*Maine v. Johnson*¹ represents the convergence of the paths of the Environmental Protection Agency (EPA), the Clean Water Act (CWA), and an agreement between a state and Native American tribes designed to protect the environment. Unfortunately, at the intersection of these paths lies a decision that threatens environmental health and Native sovereignty.

In *Johnson*, the First Circuit held that the EPA erred in exempting state permitting authority with respect to two Indian tribe-owned facilities that discharged pollutants into tribally-owned territorial waters. It further ruled that the EPA did not err in giving the State of Maine permitting authority over nineteen facilities that discharged pollutants into territorial waters of two Indian tribes.² The court further held that it lacked jurisdiction to review the issue of whether the EPA retained authority to review state-issued permits, after granting state permitting authority, because of a general trust relationship between the federal government and the two Indian tribes.³

Johnson was decided against the backdrop of congressional regulation, administrative decisionmaking, and tribal-state relations. The court aptly describes it as a “three-way dispute” among Indian tribes, the EPA and the State of Maine.⁴ The two tribes whose water is threatened are the Penobscot Nation and the Passamaquoddy Tribe (collectively, “the Southern Tribes”). The case also involves the intersection of two different statutory regimes: (1) the EPA-administered Clean Water Act,⁵ and (2) the Maine Indian Claims Settlement Acts⁶ and Maine Implementing Act (collectively, “the Settlement Acts”).⁷

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1. 498 F.3d 37 (1st Cir. 2007).
 2. *Id.* at 45, 48–49.
 3. *Id.* at 49.
 4. *Id.* at 39.
 5. 33 U.S.C. §§ 1251–1387 (2006).
 6. 25 U.S.C. §§ 1721–1735 (2006).
 7. ME. REV. STAT. ANN. tit. 30, §§ 6201–6214 (2007).

BACKGROUND

In this case, Maine sought point source discharge permits in twenty-one locations, all of which affect navigable water on tribal lands. The EPA issued permits for nineteen discharge sites located on non-tribal land, but upstream from tribal lands. They refused permits for two discharge sites located on tribal land that exclusively affected tribal waters, finding their regulation was an “internal tribal matter.”⁸

Maine and the Southern Tribes both appealed this EPA ruling, each arguing exclusive authority over all twenty-one sites. The Southern Tribes argued that the Settlement Acts reserve for them the authority to regulate pollution within tribal territory boundaries and in tribal waters, including the nineteen permitted discharge sites. Maine argued that the Southern Tribes do not have power over natural resources on their land, including the two discharge sites in question.⁹

THE ENVIRONMENTAL PROTECTION AGENCY

Since 1970, the mission of the Environmental Protection Agency has been to “protect human health and the environment.”¹⁰ The agency conducts environmental assessment, research, and education. It has the primary responsibility for setting and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. The standards which the EPA enforces are set out by statutes such as the Clean Air Act, the National Environmental Policy Act, and the Clean Water Act.

THE CLEAN WATER ACT

Congress adopted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹¹ The CWA’s ambitious goal, as drafted in 1972, was to eliminate the discharge of pollutants into navigable waters by 1985.¹² The Act provides that, unless in compliance with its strict standards, “the discharge of any pollutant [into navigable waters] by any person shall be unlawful.”¹³ Under the CWA, a “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source” and “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”¹⁴ “Point sources are discrete conveyances such as pipes

8. *Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007).

9. *Id.* at 41.

10. Environmental Protection Agency, About EPA, <http://www.epa.gov/epahome/aboutepa.htm>.

11. 33 U.S.C. § 1251(a) (2006).

12. *Id.* § 1251(a)(1).

13. *Id.* § 1311(a).

14. *Id.* § 1362(12).

or man-made ditches.”¹⁵ The CWA broadly defines “pollutant” to include, inter alia, substances such as solid waste, sewage, garbage, sewage sludge, munitions, chemical, and biological wastes.¹⁶

The mechanism for ensuring that point sources meet water quality standards and effluent limitations is the National Pollutant Discharge Elimination System (NPDES) permit.¹⁷ The statutory requirement that all discharges must have a NPDES permit is absolute—discharges without permits are thus illegal.¹⁸ Under normal circumstance, the NPDES permit is administered by the EPA.¹⁹ The Act entitles states to administer their own permitting programs in place of direct decisions by the EPA, provided they meet certain conditions.²⁰ A state desiring to do so must apply to the EPA, which will determine if the state has “adequate authority to carry out the described program.”²¹ In some cases, a tribe can qualify to receive treatment-as-a-state status, which would allow it to set its own standards for water quality in order to implement and administer the NPDES permit.

THE SETTLEMENT ACTS

The purpose of the Settlement Acts was to afford “a fair and just settlement”²² of the Maine Indian land claims.²³ According to these settlements, 150,000 acres of land is held in trust by the United States for each of the Passamaquoddy Tribe and the Penobscot Nation.²⁴ The tribes are federally recognized under the terms of the Settlement Act, with the responsibility to govern their own affairs; the tribal members occupying these lands are subject to the federal laws generally applicable to Indian lands.²⁵ These lands are also subject to the civil, criminal, and regulatory laws of Maine.²⁶

The Settlement Acts were supposed to “revive[] the Maine tribes; strengthen[] them; recognize[] them; give[] them economic leverage; reinforce[] their inherent sovereignty; craft[] ambiguous measures to deal with

15. Environmental Protection Agency, Summary of the Clean Water Act, <http://www.epa.gov/lawsregs/laws/cwa.html>.

16. 33 U.S.C. § 1362(6).

17. Mary Christina Wood, *EPA's Protection of Tribal Harvests: Braiding the Agency's Mission*, 34 *ECOLOGY L.Q.* 175, 184 (2007).

18. 33 U.S.C. § 1342 (2006); *see also* United States v. Tom-Kat Dev., Inc., 614 F. Supp. 613 (D. Alaska 1985).

19. The CWA empowers the EPA to issue permits to other entities for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a).

20. *Id.* § 1342(b).

21. *Id.*

22. 25 U.S.C. § 1721(a)(7) (2006).

23. *Id.* § 1721(b)(1), (3).

24. *Id.* § 1724(d).

25. *Id.* § 1725(h).

26. *Id.* § 1725. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 *UCLA L. REV.* 535 (1975).

the forever ambiguous question of how to reconcile tribal and state authority.”²⁷ One legislator stated that the settlement bolstered tribal sovereignty “by recognizing [the tribes’] power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters.”²⁸

The Settlement Acts provide a nonexhaustive list of internal affairs that are to be under exclusive control of the Southern Tribes. It includes tribal membership, residence in tribal territory, elections, and use of settlement funds.²⁹ As mentioned in an amicus brief filed on behalf of Georgia-Pacific Corporation and others, “internal tribal matter” is a “narrow sphere.”³⁰ In reality, the Settlement Acts concede to the state far more authority than is normal for Indian tribes. In relation to other states’ agreements, the Settlement Acts diminish tribal sovereign immunity. Maine holds unequivocal authority over tribal lands and natural resources and, with limited exception, the power to enforce the general and criminal law of Maine, even with respect to activities carried out on tribal land. The Acts go on to include provisions that exempt Maine and the Southern Tribes from any present or future statutes affecting other Indian tribes.³¹

In 1980, at the passage of the Settlement Acts, Maine demanded that the state environmental laws apply to tribal lands for fear that the Maine tribes would not adequately protect and regulate their waterways, which, in turn, would harm citizens of the state.³² In 1978, the Solicitor for the Department of the Interior wrote a letter to the Maine Attorney General asking him why the state could not let the tribes regulate their own property, considering the small amount of tribal land at stake.³³ The Attorney General responded that he was concerned that the tribes would exploit their exemption from state laws and ignore environmental regulations, asking:

What protections if any will exist for wild animals and fish which live across the acquired Indian lands? What protections will thou be for abutting landowners from such problems such as stream siltation, air pollution, or noise, which may result from the uncontrolled industrial and commercial activity on Indian lands?³⁴

27. William H. Rogers, *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 833 (2004).

28. ME. REV. STAT. ANN. tit. 30, § 6206(1) (2007).

29. *Id.*

30. Respondent State of Maine's Brief in Opposition to Petition for Writ of Certiorari, *Penobscot Nation v. Great N. Paper, Inc.*, 534 U.S. 1019 (2001) ((No. 01-0831) (quoting *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983)).

31. 25 USCS § 1725(h).

32. Douglas Luckerman, *The Role of Jurisdiction in the Quest for Sovereignty: Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635, 639 (2003).

33. *Id.* at 639–640.

34. *Id.* at 640 (quoting letter from Joseph E. Brennan, Maine Attorney General, to Leo Krulitz, Solicitor, Department of the Interior; Eliot Cutler, Office of Management and Budget; and A. Stephen Clay 2 (Mar. 2, 1978)).

Despite the Attorney General's concern, the tribes have demonstrated a history of caring for their land and waters. The Southern Tribes, especially the Penobscot Indian Nation, developed an aggressive and effective monitoring program. The tribe's Department of Natural Resources is well known by the EPA for its advocacy encouraging the regulation of dioxin in the water.³⁵ The tribal monitoring program set out to "ensure that water quality standards are met and that licensed discharges are in compliance with permits, gather data needed for the tribe's role in hydroelectric re-licensing, identify non-point sources of pollution, and upgrade river/tributaries classifications."³⁶

The Penobscot Nation extensively monitors lakes and ponds on trust lands with the help of eighty-four monitoring sites along the main Penobscot River and thirty sites on tributaries.³⁷ It has a program which monitors waters looking for dangerous chemicals which might threaten tribal interests.³⁸ In 2000, over four hundred miles of the Penobscot River watershed were "upgraded as a result of water quality data of the Penobscot Indian Nation."³⁹ The Penobscot Nation has not only monitored the waters but has "exerted its authority on water pollution issues."⁴⁰ Due to their studies' results on the impact polluters are having on important species, the tribe has been attempting to set stricter environmental conditions.⁴¹ Thus, the tribes have acted as stewards of the state's land.

The state's priorities, on the other hand, have changed. Instead of its earlier concern about pollution, Maine is now concerned that the limits placed by the tribes would be "too stringent." The state is concerned that there will be "too much environmental protection" and that business will suffer.⁴² Indeed, pulp mills have been revealed as illegal polluters due to the monitoring programs run by the Southern Tribes.⁴³ Maine has attempted to protect these polluting businesses by asserting there the traditional trust responsibility between the United States and the Maine tribes.⁴⁴ Maine businesses and Maine itself challenged the tribes on environmental issues, sought to reduce tribal land holdings, impinge on sovereignty, and undermine the federal trust responsibility.⁴⁵ The "mega-polluter" pulp mills accused the Indian tribes of

35. Rogers, *supra* note 27, at 833.

36. *Id.*

37. *Id.*

38. *Id.* at 834.

39. *Id.*

40. *See, e.g., In re Lincoln Pulp & Paper*, NPDES Appeal No. 00-8, Environmental Appeals Board, EPA, Order Dismissing Petition for Review (Oct. 25, 2000), available at <http://www.epa.gov/eab/orders/lincoln.pdf>.

41. Rogers, *supra* note 27, at 835.

42. Luckerman, *supra* note 32, at 639.

43. Rogers, *supra* note 27, at 834.

44. *Id.* at 835.

45. *Id.*

“trying to evade existing state regulation and avoid their responsibilities as municipalities.”⁴⁶

CONCLUSION

Granting permits to polluters of tribal waters flies in the face of the goals of the CWA, the Settlement Acts, and tribal sovereignty. *Johnson* serves the narrow interest of a handful of powerful businesses, who successfully muddied the issues at hand. The decision does little to clarify the jurisdictional questions involved in permitting under NPDES, but deals a serious blow to the health of a vital tribal natural resource.

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46. Brief for Plaintiff at 21, *Great N. Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001).