The Inclusion of Indian Tribes in the
U.S. Environmental Protection Agency's
Policy Decisions That Affect Tribal Lands

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Submitted to the Department of Urban Studies and Planning
in Partial Fulfillment of the Requirements for the
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ABSTRACT

The goal of the research was to assess EPA’s efforts to meaningfully involve tribes in Agency decision making that affects tribal lands and interests. Given the assessment, the next goal was to make policy recommendations that would facilitate greater tribal inclusion in Agency decision making, thereby ensuring more sound, more culturally informed environmental protection programs on tribal lands. In 1984, the U.S. Environmental Protection Agency published its “EPA Policy for the Administration of Environmental Programs on Indian Reservations”. EPA’s Indian Policy, like the Federal Indian Policy, specifically supports tribes as primary participants in governmental decision-making affecting tribal lands. The Agency policy asserts that the Agency will weigh tribal interests when formulating and implementing policy and that the Agency will seek to include tribal governments as partners in environmental program management, similarly to the way states are included.

The relationship between EPA Region I (New England) and the Penobscot Nation of Maine is the case around which research was conducted. By examining the history of interaction (1986-1994) between the tribe and EPA Region I, the research highlights the Penobscot’s desire and efforts to protect and clean up the Penobscot River. The Penobscot River, in some areas, is considered to be reservation waters as the Penobscot reservation lies on nearly 200 islands scattered up and down the river.

The Lincoln Pulp and Paper Case, introduced in Chapter 3, reveals shortcomings in the Agency’s implementation of its Indian Policy. Lincoln Pulp and Paper, in the fall of 1992, applied to renew their National Pollution Discharge Elimination System (NPDES) permit. EPA staff, in formulating the draft permit, did not specifically involve the tribe in the process. The Penobschts, however, would have been acutely affected by discharge from the mill as it contained dioxin. EPA staff simply did not understand that the tribe would be affected by discharge from the mill because they did not know that the tribe was, in essence, living in the middle of the river. Even if they had known, they were not aware of EPA’s federal trust responsibility to consider the best interests of the tribe. The Lincoln Pulp and Paper case and more broadly, the relationship
between Region I and the Penobscot Nation demonstrate how states and tribes have been treated differently.

In research that drew primarily on interviews with tribal and Agency staff, and documents exchanged between EPA and the Penobscot Nation, two primary reasons for the non-inclusion of tribes have emerged: First, and most importantly, EPA Headquarters and, in a lesser sense--the Region, have allocated insignificant staff and very few dollar resources to tribal activities. Secondly, EPA staffers have not received direction from Headquarters that building environmental management partnerships with tribes is an Agency priority. Region I staff and managers have predominantly, been unaware that the political status of tribes and the Agency's Indian Policy demand tribal inclusion. The lack of commitment by the Agency's power structure became obvious as the lack of knowledge by Agency staffers was confirmed during research.

EPA's past lack of commitment to meaningfully involve tribes in Agency decision processes, however, can be remedied through resource-intensive and non-resource intensive policies. Resource intensive policies and policies that require changes in environmental law and regulations are primarily the domain of EPA Headquarters in Washington. Such policy recommendations are directed at this level of the Agency and include: advocacy by EPA's top administrators in Washington for changes in statutory and regulatory language that will facilitate greater participation by tribes in environmental grant and management programs; review and revision of the tribal-state comparison around which the Indian Policy is centered, thereby reaffirming and clarifying the sovereignty of tribes; and most importantly allocating dramatically increased staff and funding to EPA grant and environmental management programs for tribes.

Finally, the thesis turns to recommendations for the Region that include primarily non-resource intensive policies for inclusion of tribes. While increased staff and funding resources are imperative to finance a truly effective tribal program, EPA Headquarters is primarily responsible for acquiring these funds and allocating them to the Region. The primary role the Region can take, in increasing their commitment to tribes is: To advocate with Headquarters for increased staff and greater eligibility of tribes for single-media and multi-media grants; to increase outreach activities to tribes; and, to educate Region I staff, through various means, about the status of tribes, tribal rights to inclusion, and the Agency's responsibility--as an arm of the federal government--to ensure that tribes are meaningfully involved in decision-making.
DEDICATION

To my grandmother, Arlene Heminger Lamb, who passed away March 20, 1994. She was not an environmentalist "activist". Rather, she lived her life in acceptance of the natural, inevitable ways of the earth and revered equally, all the life, plant, animal, and human that grow from her. We who attempt environmental policy will do better, have we, the ecological understanding of such an individual.
The Inclusion of Indian Tribes in the U.S. Environmental Protection Agency’s Policy Decisions That Affect Tribal Lands

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CHAPTER 1
Introduction: The Goals of Research, the Case, Methodology, and Summary of Chapters

Goals of the Thesis Research
This thesis has examined why, despite the promulgation of the EPA Indian Policy, tribes have not been involved as partners in Agency decision making and program management on reservation lands similarly to the way states are involved off-reservation. After examining the current status of tribal inclusion, the thesis recommends policies by which the Agency could move towards greater inclusion of tribes in Agency decision making and more effective environmental management partnerships with tribes. EPA Region I and the Penobscot Nation, one of four tribes in the State of Maine, were the parties around which the case for examination was centered.

The level at which states are included in EPA decision making and program management, is the Agency’s goal for inclusion of tribes. Thus, the inclusion of tribal governments in Region I was compared to actual inclusion of state governments in the region. In addition, because the unique political status of tribal governments is often misunderstood by the American people, the thesis examined the understanding of staff, within EPA, of the political status of tribes.

The Case: The Inclusion of the Penobscot Nation in EPA Region I Decision-making and Program Management
The relationship between EPA Region I and the Penobscot Nation (The Nation) in Old Town, Maine will be the primary case around which questions will be researched and analyzed. This tribe was chosen because it has the oldest formally organized natural resources department of the New England tribes. The tribe has also actively pursued inclusion in Agency decision-making processes. Within the Penobscot Nation case, the thesis presents a brief examination of how the tribe is included in a National Pollutant Discharge Elimination System Permit (NPDES) permit process for a paper mill upstream from the reservation. The paper mill discharges dioxin contaminated wastewater into the Penobscot River.
Methodology

Data has been collected from an array of sources: books on the federal-tribal trust relationship and the history of U.S. Indian policy; teaching materials from an Indian law course taught by Kirke Kickingbird of Oklahoma City University; many government documents from the Penobscot Nation, EPA, and the Department of Interior; correspondence between the Penobscot Nation, the State of Maine, and EPA, Region I; the Maine Indian Claims Settlement Act; and journal and newspaper articles.

In addition, I was fortunate to have interviewed several people who provided not only information but also provided insight, from all sides, into why tribes are not included adequately in Agency decisions. Specifically, John Banks of the Penobscot Nation, in interviews and all conversations I have had with him, has been critical of EPA, but constructively. He has consistently pushed EPA, the State of Maine, and the paper mill to include the Penobscot Nation as an equal partner in decision-making concerning the Penobscot River. Doug Luckerman of the EPA Region I Office of Regional Council, and Eric Hall and Dave Turin of the Region I Water Quality Management Section have provided perspectives from within the Agency. Conversations I have had with these people have given me a more complete understanding of why tribes have been excluded or forgotten by Agency staff unaware of EPA’s responsibility to tribes. Conversations with Patricia Meaney, Acting Deputy Regional Administrator and Anne Fenn, Indian Program Manager have contributed to my understanding of how difficult it is to work meaningfully with tribes regionally, when tribes have not been an Agency-wide priority handed down from EPA Headquarters in Washington. They shared with me their more universal understanding of these difficulties, thus informing my assessment of the Agency’s treatment of tribes and the recommendations I will suggest for greater inclusion of tribes.

Finally, I was fortunate to have gathered a wealth of information and valuable experience in the eighteen months that I was employed as the Indian Program Liaison in Region I. While I have tried to represent accurately, the viewpoints of those I interviewed and those in the correspondence I relied on, the conclusions I reach in Chapter Five are based on my interpretations of the information I have gathered.
Summary of Chapters

Chapter One is briefly presents the goals of the thesis research and describes the case around which the research was centered. The methods of research and summary of chapters are also presented.

Chapter Two briefly discusses EPA’s history of working with tribes, which for all practical purposes, began in a consistent way with the publication of the 1984 Indian Policy. The Indian Program, nationally and in Region I, is one component of the implementation of that policy and is discussed briefly. The federal/tribal trust relationship, on which the Indian Policy is based, is discussed along with the effects the Maine Indian Claims Settlement Act has had on this relationship. The Indian Policy principles that define the inclusion of tribes are outlined in this chapter in order to lay the foundation for the assessment of the Penobscot Nation’s actual inclusion in Region 1 decision-making.

In Chapter Three inherent tribal sovereignty and the legislative history of federal-tribal treaties that have defined the current federal-tribal trust relationship, are discussed at length. EPA’s Indian Policy and goal of tribal inclusion, is based on this history of political status and legislation. In addition, the Maine Indian Claims Settlement Act is examined insofar as it impinges on the federal-tribal relationship defined by this legal history and held between the Penobscot Nation and EPA. This chapter should fully explain to the reader, why tribes should by right, be included as partners in environmental program management.

Chapter Four assesses the extent to which the Penobscot has been included in decision making and program management. Efforts, by Region I to involve states is compared to the region’s efforts to involve tribes. The case of the Lincoln Pulp and Paper NPDES permit is presented to show the discrepancy in the inclusion of an affected state and the inclusion of an affected tribe in one decision making process. The examination of the Penobscot case also reveals that one tribe, through substantial effort, can successfully push EPA to include that tribe in deciding an issue in which the tribe is a major stakeholder. The lack of direction and resources received by the region from EPA Headquarters will be considered in the assessment.

Finally, Chapter Five closes the thesis with a series of recommendations that could remedy the lack of involvement of tribes in Region I decision making processes. Two phenomenon emerged repeatedly during research that explained why Region I has not been committed to tribes and to forming
program management partnerships with tribes. The first contributing factor is widespread misunderstanding or simple lack of knowledge, by Agency staff, of the political status of tribes and the Agency’s responsibility to work with tribes as it works with states. The second, and most important factor leading to non-inclusion of tribes, is the lack of program direction and sense of priority received by regional program staff from EPA Headquarters, along with a tremendous lack of dollar and staff resources for tribal programs.
CHAPTER 2
The Case: The Relationship Between the U.S. Environmental Protection Agency and the Penobscot Nation of Maine in Light of the U.S. EPA Indian Policy

Reagan's Indian Policy

On January 24, 1983 President Reagan signed his Indian Policy, reaffirming self-determination for tribes. The policy drew on principles of tribal sovereignty and the "self-determination through economic development and self-government" philosophy laid down during the Kennedy, Johnson, and Nixon administrations. By addressing the political status of tribes in this way Reagan reaffirmed the federal government's policy of working with tribes in a "government-to-government" relationship. This is the policy of working directly with tribes as separate governments and not as political subdivisions of states or other governmental units.

Just as the federal government deals with states and local governments in meeting the needs of other citizens, so should the federal government deal with tribal governments in promoting the well-being of American Indians...by removing obstacles to self-government and by creating a more favorable environment for development of healthy reservation economies

The 1984 EPA Indian Policy and the Principles of Tribal Inclusion

On November 8, 1984, the U.S. Environmental Protection Agency (EPA) followed Reagan's Indian policy and adopted the "EPA Policy for the Administration of Environmental Programs on Indian Reservations". The foundations of EPA's policy are the principles of tribal "self-government" and the "government-to-government" relationship established between the federal government and tribal governments. Like the federal policy, which has been reaffirmed by subsequent administrations, the EPA policy specifically supports tribal governments as primary participants in governmental policy processes

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affecting tribal lands. The Indian Policy instructs EPA staff to consider tribal interests when making Agency policy and to include tribal governments as partners, similarly to the way states are included, in decision making and in managing environmental programs affecting reservation lands. The Agency's specific objectives for inclusion of tribes, detailed in the Indian Policy, will be discussed in greater depth in Chapter Three.

Region I Indian Program: The Beginnings

In November, 1984 the National Indian Work Group was established along with the publication of EPA's Indian Policy issued by then Administrator William Ruckelshaus. This workgroup, which consisted of EPA representatives from each of the nine regions with tribes and headquarters media program staff, marked the beginning of EPA's Indian Program nationally.²

Before the Indian Policy the Agency had dealt with tribal environmental issues on a case by case basis. In contrast, state environmental protection programs had developed extensively with funding and guidance from EPA and were assuming environmental regulatory authority within their boundaries. Given EPA's greater attention to states and the demands Tribes were beginning to place on EPA, some within the Agency realized that this case by case method of addressing environmental protection of reservations was inadequate to ensure the protection of reservation lands.³

In 1983 the EPA Office of Federal Activities issued a discussion paper by a fledgling Indian Work Group made up of representatives from the EPA regional offices. "The Administration of Environmental Programs on Indian Lands" outlined the breadth of existing environmental problems on reservation lands. Central to this discussion were the problems of jurisdiction and program management encountered by all parties involved.

Before the 1984 Indian Policy, tribes were requesting assistance from EPA Headquarters to establish environmental programs to address potential and existing environmental threats on tribal lands. However, EPA was limited by the lack of detailed Agency policy that could direct staff and funding responses.

² EPA Region 3, headquartered in Philadelphia, has no federally recognized tribes.
Existing environmental laws, regulations, and guidelines also failed to clearly address the status of Indian lands.  

Environmental statutes assume a Federal/State/Territorial federalist system under which the statutes establish a regulatory scheme. Typically, the federal government has established national standards and delegated to state or territorial governments the responsibility to manage environmental programs and enforcement and maintain, or modify with justification, national standards. This regulatory scheme, however, assumes that state governments have authority to regulate pollution sources everywhere within their boundaries, including reservation lands and resources. The separate and distinct Constitutional status of tribal governments and their lands is not accounted for. This status seriously limits state authority over pollution sources on reservations. It was becoming increasingly obvious that with increasing development on reservations would come increased environmental problems. A policy which guided the Agency to administer reservation environmental programs or delegate administration of these programs to tribes was necessary. 

EPA, as an arm of the federal government, was also given the responsibility of adhering to the federal government's policy of pursuing the principle of tribal self-government and its policy of working directly with tribal governments on a government-to-government basis. The EPA Indian Policy and the National Indian Program were designed to guide EPA in assisting the over 500 federally recognized tribes across the nation to develop and administer their own environmental programs. For the past 23 years, since 1971, EPA has provided funds and technical assistance to states to aid them in assuming environmental regulatory and program management responsibility. The Indian Program, nationally and regionally, seeks to do the same for Tribes. 

Following the lead of the Agency headquarters, the regional offices established Regional Indian Program Manager positions and Regional Indian Workgroups. Regional workgroups were created to assist the federally recognized tribes within their regions, through technical assistance and other informational activities. This assistance would aid tribes in developing their environmental program capacity so that they might create tribal environmental

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5 Ibid., p. 8-9.
infrastructures with the expertise to set and enforce environmental standards on reservations.

The tribes within the Region I states are distinct from tribes in the western U.S. The New England tribes, unlike most tribes, have all been federally recognized in the years from 1976 to 1991. Despite the fact that the New England tribes have endured as tribes with organized governments since before recorded history they do not share with western tribes the history of making treaties with the U.S. government. It is largely this history of Federal/Tribal treaty-making that determined which tribes were recognized as "domestic dependent nations" and thus became federally recognized tribes under the Indian Reorganization Act (IRA) of 1934. The New England tribes were not covered under IRA although some were already deemed "state recognized" tribes.

It was not until the 1970's and 1980's that the newly federally recognized New England tribes completed federal recognition processes and several tribes successfully sued for the return of portions of their original lands. The tribes had the immediate priority of responding to the radical changes in their legal status and land holdings, and internal organizational needs. Thus, there was little pressure on EPA from the tribes during the first few years of the Indian Policy to build an active regional Indian Program. In addition, none of the individuals who occupied the Indian Program Manager position in the years from 1985 through 1989 remained in the position for more than one year. Furthermore, the position was largely voluntary (assigned only 1/10 FTE). The Program Manager added this responsibility to her already existing, primary position. The program's very existence relied on the personal, largely uncompensated commitment and willingness to work overtime of the Indian Program Manager. Thus, the alternate pressures that the tribes were coping with and the lack of Agency commitment and the resulting shortage of resources delegated to the Indian Program, ensured a "bare-bones" program during the first years after the Indian Policy's publication.

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6 A previously "unrecognized" tribe is deemed "federally recognized" by the United States government after the tribe has fulfilled the requirements of the lengthy recognition process, overseen by the Department of Interior. Some of these requirements include: proving that the present day tribe is descended from the original inhabitants of the land on which the tribe now resides and proving, through historical, anthropological, and legal evidence that the tribe has existed continuously as a cohesive community. This process can take years and extensive financial resources to complete. A tribe can also be federally recognized by an Act of Congress. However, this happens rarely.
In 1989 current Indian Program Manager, Anne Fenn was assigned as Indian Program Manager in Region I. Like those before her, she was officially allocated only 10% of her work time to perform the Indian Program Manager duties. There was, at that time, no additional staff allocated to the Indian Program. Shortly after Fenn's arrival the Agency's Water Management Division Coordinator and one attorney from the Office of Regional Council began working with tribes on an as needed basis.

Under Fenn, the Regional Indian Workgroup was established. Consisting of representatives from regional media programs, the primary function of the workgroup is to serve as an information source on tribal needs and issues within the media divisions. Indian Work Group members also serve as volunteer technical advisors to tribal environmental protection employees and tribal government.7 The Indian Work Group will be discussed further in Chapter Three.

The Penobscot Nation and EPA: A Brief History of the Relationship

Although the Indian Policy was published in 1984 there was a minimal exchange between EPA and the Penobscot Nation until several years later when the tribe began to apply for and receive EPA grant funds to protect the Penobscot River.

In 1986 the Penobscot Nation received their first EPA grant. A $40,000 technical assistance interagency grant was awarded to the Tribe by the Department of Energy and EPA. The grant was targeted for the performance of a water quality management analysis in the Penobscot River waters that are part of reservation land. Although the Tribe had more informal dealings with EPA in the 1970's and early 1980's, this grant and project marked the beginning of the official relationship which has centered on the tribe's chief concern, the water quality of the Penobscot River.

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7 Interview with Anne H. Fenn, Indian Program Manager, EPA Region I, Boston, Massachusetts, 28 March 1994.
Highlights of the Penobscot Nation and Region I EPA Relationship

1986  $40,000 grant awarded by DOE/EPA for Penobscot River water quality analysis.
1990  Results of Tribal Penobscot River Fish Tissue Study issued reaffirm tainted fish.
     • Results of Penobscot River Fiddlehead Study; no dioxin found in fiddleheads.
1991  Penobscot River Users Survey documents fish consumption of tribal members.
     • $104,581 EPA Tribal Multi-media/General Assistance Grant awarded; tribe to
devlop cross-media tribal codes and regulations.
     • $46,875 Clean Water Act Wetlands grant awarded to tribe.
1992  $24,000 Non-point Source Water grant awarded to tribe.
     • $40,000 Clean Water Act § 106 grant awarded to tribe for water quality sampling
and monitoring (grant reprogrammed through tribal multi-media mechanism).
     • Tribe comments on Lincoln Pulp & Paper draft NPDES discharge permit
#ME0002003 request double production which would, in turn, double their
discharge of dioxin laden effluent into Penobscot River. Tribe opposes
discharge of dioxin into river based on treaty rights.
1993  Tribe given limited Treatment as a State under Clean Water Act § 518 for the
purposes of receiving § 106 grant monies to develop a water quality
management plan for tribal water resources in Maine.
1994  Tribe receives $50,675 Tribal General Assistance/Multi-media grant to continue
water quality work, primarily in Penobscot River.

In 1990 the Nation released the results of a 1988 study which analyzed
levels of contaminants—chiefly dioxin—in tissue of fish collected from the
Penobscot River. Although the Maine Department of Environmental Protection
had issued consumption advisories for fish harvested from rivers including the
lower Penobscot (below Lincoln), little actual data had been collected on fish
from the Penobscot River. In 1988 the tribe initiated a Water Quality Monitoring
Program. One major objective of this program was to investigate the levels of
contaminants in Penobscot River fish species and to assess the risk of fish tissue
contamination to human consumers. Two fish species, the smallmouth bass and
the white sucker, were chosen for analysis. The smallmouth bass is a resident
predator species which is abundant in the river and, at the time of the study, was

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8 Penobscot Nation, Department of Natural Resources, Levels of Selected Contaminants
in Tissue from Smallmouth Bass and White Suckers Collected from the Penobscot River, 1988,
(December, 1989).
increasingly being used by tribal anglers for sport and consumption. The white sucker represented a bottom-dwelling species often preyed upon by other species. It had a long life span and the cumulative effects of dioxin exposure could be better assessed. In addition to testing for the presence of dioxin in fish samples, other contaminants including PCBs and mercury were also tested for. Dioxin was found in lower levels in smallmouth bass and in relatively high levels in white suckers (possibly reflecting long-term cumulative effects). PCB levels in smallmouth bass were below detection limits and mercury levels were below the threshold of concern of the Food and Drug Administration.

The Penobscot study reaffirmed Maine's consumption advisory that pregnant women, nursing mothers, and all women of childbearing age not consume fish taken from the Penobscot River. Dioxin tends to concentrate in milk and body fat. It was also recommended that no one consume white suckers, in which levels of dioxin were found that were 10 to 100 times higher than those found in smallmouth bass. Suckers also contained 'relatively high levels of PCBs'.

In 1990 the Nation performed a second study to determine if dioxin had contaminated fiddlehead ferns near the Penobscot River. Fiddleheads are a naturally occurring, edible fern. Fiddleheads are a traditional economic and food source for tribal members. Tribal members pick the ferns on many of the reservation islands in the river and either consume or sell them to local grocery stores. No levels of dioxin were detected in the fiddlehead samples that were analyzed. The Nation concluded that there was no health risk to consumers of fiddleheads.

In 1991 the Nation continued researching the potential effects of dioxin on tribal members who consumed fish from the Penobscot River. This research took the form of the "Penobscot River Users Survey". Initially the survey was developed to determine the river issues of greatest concern to tribal members and to find out whether they would be interested in forming a river council or committee. Results of the survey showed that the majority of respondents had used the river for recreational purposes within the last two years on an average

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11 Penobscot Nation, Department of Natural Resources, Results of 1991 Penobscot River Users Survey Conducted by the Department of Natural Resources, p. 1.
of 10 times per year. Recreational activities included canoeing, fiddleheading, fishing, hunting, and swimming. Of those who did not use the river reasons included lack of time, lack of interest, and concerns about pollution. An overwhelming majority of respondents (72.9%) reported that they did not eat fish from the river and 66.7% of respondents voiced concern about eating fish from the river. These concerns were generally attributed to pollution.

The EPA grants that the tribe has applied for and received from 1991 through 1994 reflect the Nation's unwavering commitment to protecting and enhancing the water quality of the Penobscot River. In 1993 the Nation was also approved by EPA for limited "Treatment-as-a-State" (TAS). This status will enable the tribe to apply for Clean Water Act 106 grant monies in order to develop a water quality management plan for the tribe's water resources in Maine.

Since 1992, the Nation has also been providing comments to the State of Maine, Board of Environmental Protection and to EPA concerning two paper mill discharge permits that have come up for re-approval. The permits would allow continued and increased discharge of dioxin laden effluent into the Penobscot River. The river is already in non-compliance because of dioxin levels high enough to warrant fish advisories. The Nation has consistently and vehemently opposed the discharge of dioxin into the river. They claim that treaty rights and the status of federal recognition guarantee their right to gain sustenance from the river. In this right, it is inherent that fish be safe for consumption. Conversely, EPA's recommended dioxin standard is based on data relevant to consumption of fish by the "average" American. According to EPA data, the average American's yearly fish consumption is 6.5 grams of fish per day. This data is not necessarily relevant to tribal members who consume more than two times the amount of fish that the "average" American consumes. This consumption rate is artificially low by traditional standards because of fears of eating contaminated fish and does not include those Penobscots at the 99th percentile of fish

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12 "Treatment as a State" (TAS) is a policy, often found to be confusing by those familiar with tribal nation status. Why should TAS approval by EPA be necessary, in addition to a tribe's inherent sovereign status, for that tribe to develop and manage and, in most cases, enforce environmental standards? EPA requires that any tribe, like any state, prove that they have the governmental authority and capability to manage their own environmental program. In the absence of this proof, EPA will administer environmental programs for a state or tribe.
consumption, who eat on average 336 grams of fish per day. This is fifty times the fish consumption rate of the average American.13

The Penobscot Nation and Their Relationship to the River

The Penobscot Nation Department of Natural Resources (DNR) was established about 1978 prior to the passage of the Maine Indian Claims Settlement Act. Originally, DNR was established as a forestry and agriculture program for the purpose of managing existing reservation land. With federal recognition, the passage of the land claims act, subsequent purchases of land by the tribe, and the tribe's eligibility for federal funds, the Nation began to apply for and receive funds to initiate their own monitoring programs for the river.

The Penobscot Nation Reservation comprises approximately 200 islands in the Penobscot River, north of and including Indian Island--which is the main island of residence for the tribe. Total area of the islands is approximately 4,480 acres. Historically, and still today, tribal members have used the river for subsistence fishing, hunting, trapping, and fiddleheading.14 Because the reservation includes waters of the Penobscot River, and because the river is central to the history and traditions of the tribe, the preservation and enhancement the Penobscot River and its resources is of utmost concern to the Nation. Unfortunately, the history of the Penobscot River, since the coming of the Europeans, is one of pollution and degradation of water quality. Saw mills, textile mills, leather tanneries, and pulp and paper mills have all contributed industrial wastes degrading the river. In addition, log driving on the river and the construction of hydroelectric dams downstream of Indian Island have contributed to the pollution load of the river water of and surrounding the reservation. Finally, domestic sewage (some untreated) has further destroyed the original quality of the river.15 By 1964 the Penobscot River was no longer safe for recreational use by Indians and non-Indians alike. Fishing, and swimming were no longer safe. Species diversity and abundance were reduced to a fraction of their natural state.16

13 Penobscot Indian Nation, Department of Natural Resources letter to Office of Environmental Equity, U.S. EPA, "Concerns with Water Pollution and the Penobscot Reservation," 8 March 1993, Old Town, Maine, p. 3.
14 "Fiddleheading" is the gathering of the fiddlehead, an edible, wild growing fern.
15 Department of Natural Resources letter addressed to EPA Region I Indian Program, 30 November 1990, Penobscot Nation, Indian Island, Old Town, Maine., p.1.
16 Ibid., p. 2
In 1967, the Maine State Legislature enacted laws which would provide some protection for Maine’s waterways. The laws made illegal any discharge of material into a state waterway which would lower the water quality below an assigned water quality classification. By the mid 1970s water quality significantly improved and aquatic species diversity and abundance increased. These improvements in water quality have continued, though at much slower rates since the 1970s. However, the water quality of the river is still not sufficient to support subsistence fishing by the tribe. This inability to fish for sustenance has been a main point of contention with the state.

In 1989 DNR initiated its first water quality monitoring program. After discovering several unreported spills on the river the Nation secured EPA funding to implement its own monitoring program. Because of their traditional and daily reliance on the river, the Nation wanted to actively help improve the water quality of the Penobscot River. Because of this commitment to protect the environmental integrity of the river and their belief that the Maine Department of Environmental Protection (DEP) did not have the resources to adequately monitor all the rivers in the state the Nation established a water quality monitoring program. DNR established its own laboratory and instituted a program with the necessary equipment and trained staff to collect, process, and analyze water samples. Thus, the State DEP was freed up to concentrate their monitoring efforts in other parts of the state. In addition, DNR has always provided the state with the results of their monitoring and testing. In many cases in Penobscot River studies conducted for the joint benefit of the tribe and the State of Maine, the Nation sought EPA funds for tribes to pay for field and laboratory work and used their staff to conduct the actual studies because Maine DEP did not have adequate staff or time to conduct the studies or collections of samples.17

On June 1, 1992 the Penobscot Nation and the State of Maine signed an agreement. The Nation was to monitor the river at a level which would meet or exceed the State’s Water Quality Management Plan. The state then agreed to incorporate the tribe’s efforts into the State Water Quality Program. DEP also agreed to provide technical assistance and support services to the Nation. The

Nation, as recipient of EPA funds to tribes, would pay to carry out their end of the agreement.

Dioxin and Fish Contamination in the Penobscot River

As documented above, the protection and enhancement of the water quality of the Penobscot River is a significant priority of the Penobscot Nation’s Department of Natural Resources. Dioxin levels in the river and in fish tissue are, in turn, one of the most immediate issues of concern to the tribe. Dioxin, a suspected carcinogen, is produced as a byproduct of the chlorine bleach process used to produce high quality white paper. The effects of exposure to dioxin in laboratory animals include reproductive toxicity, fetotoxicity, developmental toxicity, immunotoxicity, chloracne, and lethality.\textsuperscript{18} Evidence gathered in recent studies also strongly support dioxin as a likely human carcinogen.\textsuperscript{19}

The Nation has repeatedly broached the subject of the discharge of dioxin contaminated effluent into the Penobscot River by pulp and paper mills upstream from Indian Island. As a federally recognized tribe the Penobscot Nation enjoys reserved treaty rights including the inherent right to fish for sustenance.\textsuperscript{20} The Penobscot Nation’s Department of Natural Resources has consistently claimed that this right to fish for sustenance is being disregarded by the paper mills responsible for discharging dioxin laden effluent into the river. In turn, they say, the actions by mills that are keeping the tribe from exercising this right are not regulated sufficiently by the State of Maine and by EPA. Specifically, Lincoln Pulp and Paper, located 35 miles upstream from Indian Island, discharges dioxin laden effluent into the waters of the Penobscot River. The resulting dioxin found in the tissue of fish taken from the river has prompted the State of Maine to issue advisories warning people not to consume more than twelve fish meals per year (8 oz. per meal) of fish caught in the area of the river between Lincoln Pulp and Paper and Penobscot Bay. Many reservation islands, including Indian Island lie south of the mill. Women of childbearing age have been warned not to consume any fish from this 56 mile segment of the river.

\textsuperscript{20} Penobscot Indian Nation, Office of the Governor and Council, Letter to the Board of Environmental Protection, Maine Department of Environmental Protection, "Proposed Rulemaking on Dioxin," 26 August 1992, Old Town, Maine.
Ironically, this segment of the river below Lincoln is in violation of Maine's Water Quality Standards. State standards do not allow the presence of dioxin in the tissue of resident fish. Thus, the presence of an advisory means that the state or EPA water quality standards are not being met.\textsuperscript{21}

However, even with the presence of the advisory, the average Penobscot eats 11 grams of fish per day--nearly twice the amount eaten by the average U.S. citizen. In order to account for the tribe's tradition of unrestrained fishing for sustenance, the recommended level of safe consumption of fish would need to be many times greater than the level allowed by the State of Maine's fishing advisory. This would require much lower levels of dioxin in the river and resident fish tissue than currently exist.

The 1980 Maine Indian Claims Settlement Act specifies that members of the Penobscot Nation may take fish from the Penobscot River within the boundaries of their reservation for their individual sustenance. The Nation maintains that this provision takes precedence over non-Native fishing rights, cannot be arbitrarily limited by the state, includes historically harvested fish species and implies the right to water quality sufficient to maintain tribal fisheries at levels that allow meaningful sustenance harvests by tribal members.\textsuperscript{22} The loss of fishing opportunity and the fear of eating contaminated fish has, according to the Department of Natural Resources, deprived the tribe of the full advantage of their once valuable fishery.

The state, in response to the tribe's complaint, cites a provision of the 1980 Maine Indian Claims Settlement Act that restricts the roles of the tribe and EPA in Maine. This provision prohibits any federal law that "accords or relates a special status or right to an Indian, Indian Nation or Indian lands (including trust lands and reservations) and that also affects or preempts Maine’s civil or regulatory jurisdiction". Thus, the state has consistently denied that the tribe has a legal right to challenge the state's decision not to set a dioxin standard. The mills petitioned the state board responsible for setting the level not to adopt a standard until EPA sets a national standard. EPA expects to set a standard in 1994 after completing a current reassessment of dioxin toxicity and its effects.


\textsuperscript{22} Penobscot Indian Nation, Department of Natural Resources, Letter to Julie Belaga, Region I Administrator, "Concerns About Proposed Interim Standard for Dioxin in Maine," 5 October 1992, Old Town, Maine.
Meanwhile, EPA is currently reviewing the risk to highly exposed sub-populations. Due to challenges presented by the Penobscot Nation, and others who support their endeavors, EPA Region I has agreed to include tribal fish consumption data in determining the dioxin standard for the Agency’s Lincoln Pulp and Paper draft NPDES permit. EPA is under pressure from both the State of Maine and powerful lumber and paper interests to approve a dioxin standard which other EPA regional offices have approved for other states. The Agency is also under pressure from the Penobscot Nation and environmental interest groups to incorporate environmental justice arguments and account for highly exposed sub-populations in their final analysis and recommendation of an acceptable risk level for dioxin.

John Banks, Director of the Penobscot Nation Department of Natural Resources, and other tribal officials have repeatedly, in communications with EPA, voiced their concerns that EPA is not upholding the 1984 Indian Policy nor is it fulfilling it’s trust responsibility to tribes. In a DNR letter addressed to the Office of the Regional Administrator, the tribe cites two points of the policy they feel are being violated:

According to the policy, "in carrying out our responsibilities on Indian reservations, the fundamental objective of the EPA is to protect human health and the environment". Furthermore [principle 5 of policy], . . .also states that "the Agency, in keeping with the Federal Trust Responsibility, will assure that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect reservation environments":23

The “trust” relationship held between the U.S. government and tribes, and the resulting policy of tribal “self-determination” can be difficult concepts for those without previous knowledge of tribal political status. Chapter 3 explains the unique political status of tribes that is the basis for the Indian Policy’s principles of tribal inclusion in Agency decision making and environmental program management affecting tribal lands.

23 Ibid., p. 2.
CHAPTER 3
The Federal/Tribal Relationship and
Tribal Nation Status: How Does This Status
Warrant Tribal Inclusion in EPA Policy Decisions
Affecting Tribal Lands?

It must be a bit disconcerting when the average American on vacation out west suddenly encounters a sign that boldly proclaims that the highway is entering an Indian "nation". We like to think of nations on a much larger scale—preferably an ocean away, with all the hustle and bustle of modern, industrial, institutional life. Nations have different languages, religions, customs, and holidays from our own; they represent a mass of people who have struggled for centuries to create institutions that presently serve them. Indian tribes have some of the attributes we find familiar in other nations; language, religion, and social customs certainly set them apart from other Americans. But we miss the massive crowd of people, the well-developed lands, the military and economic power that we see in larger nations. And so, when the idea of Indian tribes as nations is voiced, many Americans laugh at the pretension, convinced that Indians have some primitive delusion of grandeur that has certainly been erased by history.

Vine Deloria and Clifford Lytle, The Nations Within

Tribal Sovereignty and the Federal/Tribal Relationship

Before the arrival of Europeans, Indian nations were acting as sovereign nations exercising those powers that sovereign nations do, including: making and enforcing laws, defining, and regulating the use of territory, determining membership or citizenship, regulating trade among its members and with members of other nations, regulating domestic relations, regulating property, and forming alliances with foreign nations through treaties, contracts and agreements. In addition to exercising the powers of sovereign nations, the Indian nations of North America recognized the sovereignty of one another by

24 The definition of "sovereignty" drawn upon comes from Indian Sovereignty by Kirke Kickingbird et al., p. 1. "Sovereignty is the supreme power from which all specific powers are derived. Sovereignty is inherent; it comes from within a people or culture. It cannot be given to one group by another.
25 Ibid., p. 5.
making treaties and trade agreements and forming political and military alliances with other tribal nations.

The American colonial governments and later the United States also recognized the sovereignty of Indian nations by entering into over 800 treaties with tribes. Under international law, treaties are a recognized means for sovereign nations to relate with each other.\(^26\) In 1832, in Worcester v. Georgia, the U.S. Supreme Court said:

\[
\ldots \text{the very fact of repeated treaties with [tribes] recognizes [the Indians'}
\]
right to self-government] and the \ldots \text{doctrine of the law of nations is that a weaker power does not surrender its independence--it's right to self-government by associating with a stronger and taking its protection.}\(^27\)

The Legislation of Self-government and Self-determination

Before delving further into an analysis of the effect of federal-tribal policy and the "government-to-government" relationship that the federal government has established with tribes. A brief summary of the history of federal-tribal legislation is necessary.

The era which included passage of The General Allotment Act of 1887, or the Dawes Act, was one of forced assimilation of tribes into the American mainstream. The Allotment Act delegated authority to the Bureau of Indian Affairs (BIA) to allot parcels of land, previously owned communally by the tribes, to individual tribal members. Each head of family received 160 acres; each individual over 18 years received 80 acres. However, previous reservation lands not allotted to individual Indians were opened for homesteading by non-Indians. Although some compensation was made to tribes for the sale of these surplus lands, the primary outcome of the Act was that Indian lands decreased from 138 million acres in 1887 to 48 million acres in 1934. This represented a 65% decrease in Indian held lands.\(^28\)

The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and individual.

President Theodore Roosevelt (1901)\(^29\)

\(^{26}\) Ibid., p. 6.
\(^{27}\) Worcester v. Georgia, 31 U.S. 515, 559 (1832).
\(^{29}\) Ibid., p. 8.
Upon receiving allotments, many Indian individuals became U.S. citizens. But it was not until 1924, under the Indian Citizenship Act, that all Indians were given U.S. citizenship.

In 1934 the Indian Reorganization Act (IRA) was passed. In addition to promoting tribal self-government through encouraging tribes to adopt constitutions, IRA halted the allotment process, recognized tribal governments, restricted the power of the federal government over Indians, and established economic development programs to assist tribes. It is however, important to realize that IRA was a recognition of Indian sovereignty. IRA did not grant to tribes any power previously held by the federal government. For the powers of self-government held by tribes did not originate with IRA. Rather, IRA recognized the inherent powers of self-government held by tribes.30

Tribes were given the option to accept or reject IRA. 181 tribes accepted and 77 rejected it--viewing it as yet another policy to force Indian assimilation into “American” society. Despite the disagreement between tribes, IRA has contributed substantially to the present day definition of political authority held by tribal governments. More recent evaluations of IRA suggest that the limited self-government tribes were allowed under the Act was so narrowly constructed as to be almost meaningless. However, tribes have continued to cling to this concept and the federal mandate for recognition of tribal self-government.

Indeed, legislation after IRA, including the legislation of the late 1960s and early 1970s, cited tribal self-government and self-determination as a basis for expansion of the scope of tribal activities and political powers. From 1961 through the end of the 1970s, under the policy of self-determination, tribes have received millions of dollars to develop reservation facilities and programs. Indian-controlled schools have been established, thousands of homes have been built by the U.S. Department of Housing and Urban Development (HUD), and tribal courts have been expanded. The Indian Self-Determination and Education Assistance Act was passed in 1975. This act provided for tribal control of some programs that were previously administered by the BIA or Indian Health Service.

In the 1960s, as administrative policy shifted towards recognizing tribal self-government and self-determination, succeeding presidents recognized tribal self-determination. President Johnson covered tribal self-determination in

his 1968 congressional message. President Nixon followed in 1970.\textsuperscript{31} In 1983 the Reagan Administration repeatedly expressed support for tribal self-determination and a government-to-government relationship. It is President Reagan's Federal Indian Policy of January 24, 1983 that provided a framework for EPA's Indian Policy published the following year. Within the policy, EPA stated:

"...the purpose of [the] statement is to consolidate and expand on existing EPA Indian policy statements in a manner consistent with the overall Federal position in support of Tribal "self government" and "government-to-government" relations between Federal and Tribal Government."

The policy was designed to guide the Agency in dealing with tribal governments and in assisting tribes in managing environmental protection on Indian lands. In addition, special consideration was given to tribal interests in the making of Agency policy. The "close involvement" of tribal governments in "making decisions and managing environmental programs affecting reservation lands" was also ensured.

The Maine Indian Claims Settlement Act: How Does It Shape EPA's "Government-to-Government" Relationship With the Penobscot Nation?

During the American Revolutionary War the Penobscots fought with the Americans. After the war, the Commonwealth of Massachusetts assumed jurisdiction over the tribe. In 1794 the Commonwealth negotiated a treaty with the Passamaquoddy and Penobscot Tribes in which the tribes relinquished ownership to what now constitutes approximately two-thirds of the State of Maine. In 1820, however, when Maine became a state, jurisdiction over the Penobscots passed to the State of Maine. Subsequently, reservations that had been established by the Commonwealth of Massachusetts were diminished in size by the State of Maine. This was done without the consent of the tribes. The state held jurisdiction over the tribes and thus considered them to be "state Indians"; not federally recognized tribes. The status of "State Tribes" was unique

\textsuperscript{31} In 1961 Congress authorized the Area Redevelopment Administration (ARA) to increase federal funds available to tribes. Tribes were made sponsoring agencies to receive funds under the Act to build community centers and tribal headquarters on reservations.
from the status of the treaty making tribes of the West that later came to be known as federally-recognized tribes.

State status and state jurisdiction over the tribe was first seriously challenged in the 1950s when Penobscot Governor, Albert Nicola, hired an attorney to research Penobscot claims on land ceded by the State of Maine. In the early 1970s the Penobscots and the Passamaquoddy filed a suit against the State of Maine for taking aboriginal lands, mismanaging tribal funds held by the state, interfering with tribal self-government, and denying Indian hunting and fishing rights. The tribe asked the U.S. government to sue on their behalf and honor their federal trust responsibility. Although the U.S. government initially refused, the Federal Court ruled that the Department of Interior and the Department of Justice must represent the tribes although they were not yet federally recognized. This decision was based on the Indian Trade and Intercourse Act. The court ruled that this act had committed the U.S. government to a guardian-ward relationship with the Maine tribes. The court decided that the Maine Indians were "tribes" under the act and were entitled to protection under the federal-trust relationship. Thus, they were represented in their suit by the U.S. Department of Justice against the State of Maine.

The Maine Indian Land Claims suit was finally to be settled out-of-court with the passage of the Maine Indian Claims Settlement Act of 1980. The Act provided the Passamaquoddy and Penobscot Tribes of Maine with $40 million each and provided the Houlton Band of Maliseet Indians in Houlton, Maine with $900,000. In addition to the monetary settlement, the tribes were provided with 100,000 acres of woodland and negotiated with Maine paper companies to purchase 200,000 more at fair market value. Payments and land transfer were made in compensation for lands (12.5 million acres) the tribes claimed had been transferred illegally to Maine in 1820 with the passage of Maine statehood. The transfer of these lands was done, the tribes charged, in violation of the Indian Trade and Intercourse Act of 1790. The Act had been passed as a protective measure against hostile white traders who would intrude into Indian Country. In this way, federal control was brought over non-Indians on Indian land. In designing this piece of legislation, tribes were considered foreign

32 Old Town, Maine. Penobscot Indian Nation, Tribal History, no date, p. 3.
34 Maine Indian Claims Settlement, Chapter 601, §6202. (1980).
nations whose lands were protected by treaty and although these lands might sit within the boundaries of a state, they were considered outside the jurisdiction of the state.\footnote{Kirke Kickingbird et al., \textit{Indian Sovereignty}, (Washington D.C.: Institute for the Development of Indian Law, 1977), p.18.} The Act also prohibited the purchase of Indian lands unless it was done by the U.S. government in a treaty with the tribe.\footnote{Ibid., p. 38.}

Despite the agreement on the details of the settlement that awarded the tribes monetary damages and the return of some lands there was still one issue left unresolved: Who would have jurisdiction in Indian Country in Maine? Would it be the State of Maine or the individual tribes? This final issue was perhaps, most important to Maine officials.

To begin with, one must remember that federally recognized Indian tribes occupy a unique legal position, in that the courts recognize them as continuing to retain their original sovereignty over internal tribal affairs except to the extent that their sovereignty has been limited by federal government. Federally recognized tribes have the power to establish their own courts, and, with the exception of the most serious crimes—such as murder, rape, and arson—to adjudicate disputes and criminal matters that arise between tribal members on their reservations. Similarly, Indians are generally considered to be exempt from state regulatory laws, as well as from many state taxes. Indians who live and earn their income on federal reservations, for example, are not obliged to pay state income taxes. Federally recognized Indians are generally immune from state fishing, hunting, and trapping laws. And another important aspect of Indian tribal sovereignty is that non-Indians living on reservations have no constitutional right to any voice in tribal decision-making.


Due to legal and historical research undertaken during the land claims suit and due to the Federal Court decision that the U.S. government had a trust responsibility to the Maine Indians, the Penobscot Nation was able to fulfill the federal recognition requirements. They established their continual existence as a cohesive tribal community since time immemorial and gained federal
recognition in 1976. However, since its passage into statehood, the State of Maine had felt that "the Passamaquoddie Tribe and the Penobscot Nation had no inherent sovereign powers and that Indians could exercise only those powers which the state saw fit to grant them".38 Thus, the Maine state government vehemently opposed allowing the tribes the federal jurisdiction status they were entitled to under federal recognition. Given that the state had to agree to the provisions of the settlement before Congress would ratify the federal land claims act, this state opposition could very well have endangered the settlement that would cede lands and award monetary damages to the tribes.

In late 1979 the state and the tribes began negotiating the details of tribal jurisdiction. In these negotiations, the tribes relinquished several important rights of sovereignty. The tribes conceded that serious crimes committed by Indians on reservation land would be tried in state court rather than in federal court. The tribes also agreed that individual Indians who lived and worked on the reservation would pay state income taxes and they agreed that Maine's regulatory laws, including its environmental laws, would apply on reservation.

However, because of the Nation's inherent sovereignty, and because of provisions in the Maine Indian Claims Settlement Act, the State of Maine, within its regulatory authority, cannot prohibit the tribe from fishing the reservation waters of the Penobscot River for sustenance. Subsistence fishing is a reserved treaty right, held by the tribe, that should be upheld by the federal government and its agency, the EPA, as part of the federal trust responsibility to tribes. However, the question that arises: Is the state unlawfully interfering in this treaty right if it allows discharge of toxics into the river that render the fish there unsafe for consumption by tribal members in any amount they choose? It is around this issue and the right of the tribe to use the Penobscot River to gain sustenance, that the tribe has organized to push EPA for inclusion in its NPDES permitting process for Lincoln Pulp and Paper. The permitting process will be discussed in detail in Chapter Four.

**Tribal Inclusion Based on the Federal/Tribal Relationship**

In November 1984, EPA Administrator William D. Ruckelshaus, signed the **EPA Policy For the Administration of Environmental Programs on Indian Reservations**. Like President Reagan's Federal Indian Policy, published nearly

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38 Ibid., p. 117.
two years earlier, EPA's Indian Policy was based on the principles of tribal "self-government" and the "government-to-government" relationship established between the federal government and tribal governments. The EPA policy laid down nine principles to "guide the Agency in dealing with tribal governments and in responding to the problems of environmental management on American Indian reservations". The principles also guided individual managers and staff to pursue program activities and decision-making processes in ways that would meet EPA's long range objective to consistently include tribal governments as partners in those activities and processes, much as the Agency includes state governments. Throughout the policy the Agency claims that within its fundamental objective to protect human health and the environment, its priority is to involve tribes in Agency decisions and program management affecting Reservation lands. This inclusion is to be performed to the degree that states have been included in policy decisions affecting state lands.

Within the Indian Policy there are nine principles to guide Agency staff in dealing with tribal governments; five specifically deal with the inclusion of tribes in EPA decision making. The policy also includes two principles that stress cooperation between tribal, state, local, and federal governments and cooperation between federal agencies to aid tribes in assuming environmental responsibilities for reservations. There is a principle that refers to compliance on reservations with federal environmental statutes. The fourth additional principle calls for the institutionalization of the Indian Policy principles by incorporating them into planning, management, and budgeting processes and into legislative initiatives. The heart of the policy stresses the concept of tribal inclusion.

These principles are rooted in the federal policy of recognizing tribal governments as "sovereign entities with primary authority and responsibility for the reservation populace". Following are the five principles that call for tribal inclusion:

- EPA will work directly with tribal governments on a one-to-one basis (based on the "government-to-government" relationship) rather than as subdivisions of other governments.

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40 Ibid., p. 2.
• EPA recognizes tribal governments as the primary parties for setting standards, making environmental policy decisions and managing reservation programs that are consistent with Agency standards and regulations.
• EPA will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands (i.e. responsibilities which the Agency has traditionally delegated to state governments for non-reservation lands).
• EPA will take steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs and problems.
• EPA, in upholding federal trust responsibility to tribes, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

The emphasis placed on tribal inclusion in EPA's Indian Policy is particularly important for tribes as reverence for the land and its natural resources has always been central to the cultures of the tribes of North America. Thus, protecting the environment is fundamental to the survival of Indians and their cultures. Many Indians still depend on their rights to hunt and fish for sustenance and to harvest plants for consumption and medicines.

The reservation land base and natural resources located within reservation boundaries are also integral to preserving tribal sovereignty. By controlling their lands and natural resources Indian nations can increase tribal economic self-sufficiency that is essential for fulfilling tribal self-determination.41 Key to controlling tribal lands and fulfilling the federal government's policy of self-determination for tribes is the inclusion of tribes in federal policy processes and decision-making that has implications for tribal lands and interests.

CHAPTER 4
EPA's Institutional Commitment to Inclusion:
Comparing State and Tribal Inclusion
In EPA Decision Making in Region I

The cornerstones of the [EPA Indian] Policy and Guidance are the principles of Indian "self-government" and "government-to-government" relations between the Federal Governments and Tribal Governments. Through implementation of the Policy, the Agency hopes to realize the long-range objective of including Tribal Governments as partners in decision making and program management on reservation lands, much as we do with State Governments off-reservation.

U.S. EPA Indian Policy

The EPA Indian Policy of 1984 states that the goal for inclusion of tribes is similar to the partnerships that states enjoy in EPA decision making. At the heart of the justification for tribal inclusion in EPA decision making, is the "government-to-government" relationship held between tribes and the federal government. In the first principle of the Indian Policy, EPA recognizes tribal governments "as sovereign entities with primary authority and responsibility for the reservation populace". Therefore, EPA asserts that it will work directly with tribal governments, not as political subdivisions of a state or other governmental unit, but as an "independent authority for reservation affairs".

Thus, in this chapter, national and regional mechanisms for inclusion of Region I tribes in Agency environmental decisions, will be compared to mechanisms for inclusion of Region I states in Agency decision making. In particular, the roles that the state and tribe have played in the ongoing Lincoln Pulp and Paper NPDES permit process, will be compared. National EPA outreach efforts or policy efforts that have influenced the inclusion of Region I states and/or tribes in Agency decision making will also be examined.

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42 U.S. EPA, Office of External Affairs, EPA Indian Policy For the Administration of Environmental Programs on Indian Reservations, 1984, p. 2.
The Inclusion of States in Agency Decision Making: The Task Force to Enhance State Capacity

The Task Force on State Capacity... has presented... a report that recommends a major new emphasis on the working relationship between EPA and the states. The report recognizes the interdependence between state and federal environmental programs. ...I view strengthened state/EPA relations as one of my top priorities. ...Much good work is underway across the Agency to build stronger working relationships with the states. ...I want to pursue... increased state participation in Agency policy and priority-setting processes... and make it clear that enhancing state capacity is part of EPA's job...."

Carol M. Browner, EPA Administrator
May 17, 1993

Back in 1984, then Administrator, William D. Ruckelshaus, emphasized that the intent of federal environmental programs was to draw on the "strengths of federal, state, and local governments in partnership(s) to protect public health and the nation's air, water, and lands" and to administer those federal programs at state and local levels. The EPA Administrator, William Reilly, of the Bush Administration, initiated a movement that has since been continued by current Administrator, Carol Browner, to strengthen the capacity of states to manage environmental programs. Out of this movement, came the Task Force to Enhance State Capacity. The task force was established to improve partnerships between EPA and the states and to recognize states as the "primary environmental managers in the country". The task force was comprised of EPA and state officials who worked together for over a year to generate recommendations, in four key areas, for EPA to improve it's partnerships with states: building state/EPA relations; alternative financing mechanisms; building state capacity to manage environmental programs; and streamlining the grants process. So, although the task force was convened at a national level, representatives from the regions and states were involved in the formulation of the report and recommendations. The task force's recommendations focus on EPA's role nationally, and regionally, in building the capacity of states to

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manage their own environmental programs. In the 1980s the states were increasingly transferred authority, from EPA, to manage their own environmental programs and author and enforce environmental regulations (delegated programs). However, the increase in programs delegated for state implementation, under state authority was not accompanied by grant funds to finance the newly acquired programs that previously had been managed and financed by EPA. Thus, a major goal of the task force was to assist states in identifying alternative financing mechanisms and to enable them to make easier transitions into managing major environmental programs. EPA's mechanisms to increase state capacity include:

- Increasing joint planning between EPA headquarters and regions and states.
- More efficient grants administration.
- Increased training and technical assistance opportunities.
- Improved data management (i.e. increased electronic communications with the states).
- Alternative and creative environmental finance.
- Legislative action to make state-capacity building a primary mission of the Agency.

Regional Initiatives to Include States

The Region I Leadership Team, a body comprised of the Region's top officials, is strongly committed to state inclusion and has an ambitious regional agenda of state outreach activities, to ensure participation by the New England states in regional decisions. Among the Leadership Team's efforts to consult with states are joint planning sessions between EPA and state officials to identify mutual priorities for potential allocation of EPA grant funds. Grants flexibility, which would provide for more efficient grants administration, in the form of multi-media pilot projects, has recently been undertaken as part of this joint planning effort. In devising multi-media pilot projects the states and EPA have exchanged their lists of priority areas to be addressed in innovative program

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45 The Regional Leadership Team is comprised of the Regional Administrator, the Deputy Regional Administrator, the Division Directors and Deputy Directors for each of the media programs, the Directors of Regional Council, Civil Rights, Environmental Services, and External Programs.
development. Overlapping priorities are assessed by the state and a pilot project is proposed to EPA. In this way, the Region promotes pilot multi-media projects in the New England states that may provide greater, more integrated environmental protection benefits.

In addition to facilitating development of innovative environmental protection programs by states, the Region holds training programs for state environmental staff and provides technical assistance to state staff in areas where federal resources and expertise may be greater than states, such as in the field of emergency response.

Within EPA regionally, there is extensive communication with the New England states. The Governor's Environmental Committee, comprised of the six New England state environmental commissioners and the two environmental secretaries, meets quarterly with the Region I Leadership team to discuss common concerns. The Leadership Team travels annually to visit with each of the states as well. The late Paul Keough, Deputy Regional Administrator, established these annual visits to the states. In addition, the Region I Assistant Administrator, the third ranking official of the region, meets annually with the state environmental Deputy Commissioners. Finally, the Leadership Team holds conference calls with the states individually, when there are pressing issues that require more immediate discussion. Doug Gutro, Region I State Liaison, described the Region's state communication agenda as very ambitious, relative to other regions.

The State of Maine's Role in the Lincoln Pulp and Paper NPDES Permit Process

In 1992 Lincoln Pulp and Paper applied to EPA Region I, for renewal of their National Pollutant Discharge Elimination System (NPDES) permit. This five-year renewable permit would allow the mill to discharge dioxin laden effluent into the Penobscot River at a specific concentration. Normally, the permissible level of dioxin allowed in the water would be determined by a standard set by the state as part of its water quality standards. However, the state declined, in 1993, to set a dioxin standard because of scientific controversy over the carcinogenic effects of dioxin in humans and political pressure from the paper industry in Maine. Rather, the state decided to wait for the completion of

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46 Doug Gutro Interview.
EPA's dioxin reassessment, undertaken in 1991, before setting a state standard for dioxin. There is hope by the tribe, national environmental groups, and Maine environmental organizations, that the reassessment will bring a stronger position by EPA, based on more conclusive evidence, that dioxin is carcinogenic in humans and causes other harmful health effects. The paper industry however, because of expert disagreements over interpretation of evidence, has had reason to hope that EPA's reassessment of dioxin might show less probability of carcinogenic effects in humans.48 This reassessment is tentatively due for completion in June, 1994. Because Maine did not set a standard for dioxin, in issuing the draft NPDES permit to Lincoln Pulp and Paper, EPA elected to use their own national recommended dioxin standard of 0.013 ppq (parts per quadrillion). This standard reflects a one in one million risk of additional cancers from exposure to the allowable level of dioxin. However, the standard was determined using fish consumption data for the "average" American. The consumption data factored into this standard presents a problem. As we saw in Chapter Two, highly exposed populations, such as the Penobscot Nation, will not be protected at the EPA risk level. On October 9, 1992, EPA issued the first draft permit, ME0002003, for Lincoln Pulp and Paper. The public comment period for the draft permit was in effect from October 9, 1992 until November 7, 1992.49

The State of Maine's economy centers on the paper industry that has been located in the state for well over 100 years. Well known as a major source of environmental degradation, the paper industry is responsible for air and water pollution and the deforestation of large areas of forest land. Lincoln Pulp and Paper is one of seven paper mills in Maine that produce high quality white paper by the dioxin producing, chlorine bleaching process.50 As Maine has not been delegated permitting authority under the Clean Water Act, EPA is responsible for issuing the NPDES permit using EPA's national recommended dioxin standard.

However, although EPA is issuing the discharge permit to Lincoln Pulp and Paper, the State of Maine--as a primary affected party--received special

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48 See the "Correspondence" column of New England Journal of Medicine, June 20, 1991, for a debate by experts about how carcinogenic dioxin is in humans.
50 Lori Thayer, "Environmental Justice For Native Americans: The Case of the Penobscot Nation" (Master of Arts Thesis, Tufts University, Department of Urban and Environmental Policy, 1994), p. 82.
consideration as a primary commenter on the permit and was notified of Lincoln Pulp and Paper's application for renewal of the discharge permit. Consequently, state DEP officials would expect to see a draft permit in the near future and would have had an opportunity to familiarize themselves with the particular specifications in the permit. This could have been accomplished through informal conversations with counterpart EPA water quality staff and permit writers responsible for gathering data, incorporated into permits, that determine discharge limits.51

The informal conversations and information flow that occur between EPA and state environmental staff are a crucial part of the development of the relationship between state and federal government agencies. It is important to remember that such communication has resulted in a relationship based on familiarity between the two governments and their agencies. These relationships have been steadily built over the twenty-plus years that EPA has given grants to states, thus enabling state administration of environmental programs. This history of mutual communication, and of the role EPA has played in building state environmental infrastructures, is important to remember when, in the next section, we look at tribal involvement not only in the NPDES process but in Agency decision making that occurs regularly throughout EPA and which may affect tribes.

In addition to regular communication between EPA and the states, such as that surrounding such decisions as the Lincoln Pulp and Paper NPDES permit, EPA Region I and the three states for whom they issue permits (Maine, New Hampshire, and Massachusetts)52 meet occasionally to discuss upcoming permit cycles. These meetings may include familiarizing each other with the various permits due for renewal. Hence, workloads can be plotted so that multiple permits don't come up for renewal simultaneously, leaving a gap when very few come up for renewal. Such meetings further enable states to become more intimately involved in the permitting process and facilitate greater influence, by states, in EPA decisions. This participation in EPA decision making, in addition to allowing the state to influence Agency decisions that affect state lands, better

52 Connecticut, Rhode Island, and Vermont have the NPDES permit program delegated to them. So, while they can issue their own discharge permits the other three New England states rely on EPA to carry out this responsibility.
equips staff with knowledge to better assess and monitor pollutants being discharged into state waters.

This section has, by no means, covered the breadth of how Region I states are included in Agency decision and program management. However, it has conveyed the overall intent and commitment of the Agency to include and recognize states, through formal and informal mechanisms, as partners in environmental program management.

The Inclusion of Tribes in Regional Decision Making: The Region I Indian Program and Workgroup

The Region I Indian Program and Regional Indian Workgroup were established to administer grant funds, provide technical assistance to tribes, and to involve tribes in assuming regulatory responsibility and program management. It is nearly ten years since the publication of the EPA Indian Policy, and Region I still officially allocates just 10% of a full-time position to staff the Indian Program. It is impossible that a program that deals with eight tribes on a regular basis, could be maintained in only four hours of worktime per week. Thus, it is obvious that the Program Manager must, in reality, spend much more time than this, managing the program or the program would suffer. (Remember, this is in addition to the nearly full-time duties required by the Indian Program Manager's other position as Federal Facilities Manager). Also, thanks to the efforts of the Indian Program Manager, funds have been secured from an EPA Headquarters discretionary fund, every year since 1990, to hire an American Indian environmental studies student as a part-time, year round intern. The students who have filled this position have been instrumental in helping to maintain the regular administration of the program and daily contact with eight New England tribes. However, despite these personal efforts by the Indian Program Manager, let us not forget that the Agency itself, still only allocates four hours per week of staff time for the operation of the region's only concerted effort to reach out to the eight New England tribes and administer tribal programs.

53 It may sometimes be the case, because of the prohibitive cost or lack of staff resources, that a tribe will decline to assume full regulatory or management responsibility for an environmental program. In this case EPA, as an arm of the federal government, should act as the primary program manager and regulator keeping in mind that the Agency is charged with upholding the federal-tribal trust responsibility and thus should adequately consider and protect tribal environmental interests.
In fact, when Anne Fenn took over in 1989, Region I Indian program and media program contact with the tribes had been almost non-existent. During this same year the Water Management Division established an internal work group to oversee the Division's Water Program contact with Tribes. The work group focused primarily on the use of Clean Water Act grant programs by tribes to develop and promote effective water quality planning and management on reservation. The Air and Waste Divisions also have media-specific grants available to tribes, but until very recently have not emphasized providing grants to tribes to the degree that the water division has. This is due to the lack of extensive provisions in the environmental acts or tribal grants.

Providing and coordinating funding and technical assistance for tribes is an ongoing activity of the Region I Indian Program. Grant programs available to tribes have begun to be utilized by Region I in the last few years. In addition to media-specific grant programs (Clean Lakes, Water Quality Management, and Solid Waste landfill upgrading) the Tribal General Assistance Grants became available to tribes in 1991. The General Assistance grant funding allocated to Region I has increased every year since. By FY1993 seven of the eight New England tribes had received a General Assistance grant. The eighth tribe, federally recognized in 1991, has not yet applied for an EPA grant.

From Fiscal Year (FY) 1990 through FY 1994 approximately $1,220,000 in grant monies have been awarded to the Region I Tribes [See attachment A]. These include funding for water quality management, wetlands management, clean lakes programs, radon abatement, hazardous materials training, solid waste landfill upgrading, a pollution prevention program, and fourteen Tribal General Assistance Grants. General Assistance grants, previously called "Tribal Multi-media Grants" are intended to help Tribes increase their environmental protection capacity on-reservation. Unlike media specific grants, General Assistance Grants can be used to develop monitoring and regulatory programs across media (land, air, and water). Only one grant was received by a New England tribe previous to 1989. In 1986 the Penobscot Nation was awarded a $40,000 technical assistance interagency grant by EPA and the Department of Energy to perform a water quality analysis of the Penobscot River.

As of 1990, the Region I Indian Program initiated activities to fulfill such goals as more extensive outreach to tribes, gathering of baseline environmental data on the tribes, and coordinating funding and technical assistance activities with media program staff. According to the Region I Indian Program Manager,
the goal of outreach to tribes has been addressed by "regular telephone contact with tribal governmental and environmental leaders, through regular visits to the reservations, by EPA attendance at tribal conferences and meetings, . . . through EPA mailings and updates on upcoming EPA regulations, EPA conferences for Tribes and [consistent] telephone contact". Baseline environmental data for tribes was gathered through the Region I Tribal Environmental Assessment and the data was updated in the summers of 1992 and 1993 during the annual visits of the Regional Indian Program staff to the reservations in Region I. Information gathered was incorporated into written profiles for each of the tribes. These profiles provided tribal histories and outlined the governmental organization of each tribe as well as alerting the reader to the environmental issues with which the tribes were immediately concerned. The profiles were then distributed to media programs within the region to be used for reference when dealing with tribes on environmental protection issues.

However, as discussed in Chapter Four, the Indian Policy seems to have been largely unused and unread by Agency staff.

The Regional Indian Workgroup, although a source of competent technical assistance for tribes, is not the body of influence, within the region, that it could be. The workgroup would be a much more valuable resource for tribes if it were comprised of the region's top management. The current workgroup is comprised of staff level employees such as environmental scientists and engineers, grants administrators, and attorneys. Although these staff are well able to provide technical assistance to tribes, they are not in positions to set priorities for staff education and increased involvement of tribes in program decisions affecting tribal lands. When the author left the Agency in October, 1993 there was not one top administrator, Division Director, or Deputy Division Director as a member of the Regional Indian Workgroup. The members were primarily staff level engineers (not responsible for determining policy and making management decisions--but functioned to support these decisions with strong science and technical data, along with one attorney, two section chiefs, and the Indian Program Manager.

There are several likely reasons why the Indian Workgroup and the Indian Program have not been as successful as they could be in influencing the regional agency's commitment to tribes. First, upper-level managers have not

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54 For a breakdown of the average amount received per tribe, see Chapter 3.
been meaningfully and actively involved the activities of the workgroup and the Indian Program. This under-involvement is partially due to the lack of direction and emphasis on working with tribes, that regional media programs should receive from their headquarters counterparts. According to Linda Murphy, Region I Air Management Division Director, it has been only in the last year that tribes and tribal grants have become a priority on the agendas of national meetings she attends. In addition to this lack of direction from Headquarters, there is widespread lack of knowledge among Agency staff and managers, about the sovereignty status of tribes and of the importance of the Indian Policy in guiding EPA staff in their work with tribes. Murphy admitted to being confused herself about how to deal with tribes and that there must certainly be confusion on the staff level about how involved the Air Division should be, and in what capacity, with tribes. This confusion is not unique to the Air Division. Following is Murphy's assessment of how tribes are treated or viewed in Region I:

In the Western states, particularly Region 8 [Denver]. . . they treat tribes as nations. And we don't, in my view, treat tribes as nations in the east. I don't think people legally think of a tribe as [having] status as a nation. . . in New England."

Doug Luckerman, Region I Attorney, served as Region I Indian Program Manager for four months during the winter of 1993-94 when current Program Manager, Anne Fenn, was on maternity leave. He had the following to say about the understanding by EPA staff of the EPA Indian Policy and it's guidelines for how to work with tribes:

. . . I can say categorically that they [managers and staff] don't know about [the Indian Policy]. They may have been sent the policy, but its one thing to say "I'm aware and I think about this policy every time I see a permit that is going to affect an Indian tribe". It's something else to say "Oh yeah, I remember something came across my desk a couple years ago and talked about an Indian policy, but I don't remember what it says". That's what I found when I talked to people. They knew something was out

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55 Interview with Linda Murphy, Air Management Division Director, U.S. EPA, Region I, Boston, MA, 29 April 1994.
there but they weren't quite sure how it fit and that was the problem...people at the management level who should be giving direction and support [to their staff] were not aware of how important it was.\textsuperscript{56}

Tribal Multi-media or General Assistance Grants

Piloted in 1991, with a $104,000 grant to the Penobscot Nation, the Tribal Multi-media grants (now called the General Assistance Program for Tribes), were developed to build the capacity of tribes to manage environmental programs on reservation. The grants are primarily used to develop tribal environmental program infrastructure by hiring staff to develop and carry out environmental protection programs on reservation. From 1991 to 1994 Region I tribes have received $916,000 in EPA Multi-media grant funding to carry out projects that include the development of a tribal environmental regulatory program and the development of a water quality management plan and monitoring program. \textbf{[see Attachment A]} Despite the fact that the Tribal Multi-media grants have not sufficiently supported the building of tribal environmental infrastructures, the tribes have emphasized the tremendous importance of these grants.\textsuperscript{57} While media-specific grants are awarded to tribes in smaller amounts \textbf{[see Attachment A]}, the Multi-media or General Assistance Grants are awarded in larger amounts. Fourteen Multi-media grants, totaling $860,000, were awarded to the Region I tribes from 1990 to 1994. This is an average of $61,850 per grant. This is substantially more than the average single-media grant awarded to New England tribes during the same period. Multi-media funds enable tribes to pay the staff necessary to develop and run the environmental programs on reservation. These staff are necessary for the tribes to take part in environmental management partnerships with EPA and other agencies. Only through this participation, will tribes be able to ensure adequate protection of their reservation environments.

Single Media Grants

Within Region I, single-media grants comprise a small portion of the EPA funding that has been awarded to the New England tribes. From 1990 to 1994

\textsuperscript{56} Interview with Doug Luckerman, Region I Attorney, U.S. EPA, Office of Regional Council, Boston, MA, 22 April 1994.

\textsuperscript{57} Ibid.
five of the eight New England tribes have received approximately $314,000 in 13 single-media grants for such projects as pollution prevention, upgrade of a solid waste landfill, and wetlands protection. This is an average of $24,150 per single media grant. There is obviously a need to increase funding for single-media grants to tribes, however, this is a more appropriate longer-term goal. For, even if single-media grants were increased dramatically, the environmental program infrastructure that is financed by multi-media grants is not in place in all of the New England tribes. Existing staff within the most New England tribal environmental protection programs, might possibly be overwhelmed with the time-consuming multiple reporting requirements and data gathering needed to fulfill several media specific workplans.

The Annual Tribal Meeting with the Regional Administrator

In the last several years Region I tribes have met in Boston with the Regional Administrator, the Deputy Regional Administrator, the Indian Program Manager, and other interested media program staff. However, these meetings have, to date, been two or three hour meetings with all eight tribes. It cannot be expected that the Regional Administrator will have the time in this one annual meeting to become very knowledgeable about each tribe’s specific environmental issues. Although Indian Program staff annually visit each of the reservations for a one day meeting, it is necessary that the upper most echelons of EPA management take greater opportunities to meet with the tribes, individually.

The Penobscot Nation’s Role in the Lincoln Pulp and Paper NPDES Permit Process

On November 4, 1992 the Penobscot Nation submitted comments on the Lincoln Pulp and Paper draft NPDES permit. For purposes of commenting on the draft permit the tribe was given the same opportunity to comment as any citizen. However, while the State of Maine received special consideration as a primary affected party and commenter on the permit, the tribe initially did not receive special consideration. This was largely due to a simple lack of awareness by Agency staff of the location of the reservation and the subsistence fishing patterns of tribal members. Given the reservation location and tribal fishing practices, the tribal members are more directly affected by the

\[^{58}\text{Interview with Dave Turin and Eric Hall, U.S. EPA, Region I, Water Quality Management Section, Boston, MA, 5 May 1994.}\]
dioxin present in the wastewater discharged from the mill. Their reservation comprises approximately 200 islands in the Penobscot River. Indian Island, the main island of residence is 35 miles downstream from the mill. The tribe is traditionally a riverine tribe with an entire culture built around the river. Inherent in tribal sovereignty is the right to fish for sustenance. As discussed in Chapter Two, this right has been acknowledged by treaties and reaffirmed by the Maine Indian Claims Settlement Act of 1980. Given that the mill is discharging dioxin in their effluent and tribal members are eating an above "average" amount of fish from the river, should the tribe not also be given special consideration? Given tribal fish consumption data, the Penobscot Nation members are a highly exposed sub-population and should be given special consideration in the writing of, and data-gathering for this permit.

In November, 1992 the tribe submitted detailed comments on the Lincoln Pulp and Paper permit to EPA that addressed specifically, the tribe's right to fish for sustenance in the Penobscot River. In October, 1993 the tribe again provided significant comments to the Water Quality Compliance Branch on the Lincoln Pulp and Paper draft NPDES permit. However, by this time, the tribe had supplemented their detailed comments with the tribal fish consumption data gathered in the Penobscot River Users Survey. In addition, the tribe did much more to emphasize the importance of this issue to the tribe. John Banks, Director of Natural Resources for the Penobscot Nation, described the tribe's efforts as a "massive education and...advocacy effort to get the region to finally realize how important the issue [was]." National environmental groups such as the Environmental Defense Fund (EDF) submitted comments reaffirming and supporting the tribe's criticisms of dioxin levels in the Penobscot River and reaffirming the argument that tribal members, as a highly exposed sub-population, were at greater risk. Banks has expressed doubt that the tribe's submission of extensive comments to EPA Region I would have been incentive enough for the region to seriously reexamine the permit. He felt that such actions by the Environmental Defense Fund were crucial in getting the Agency to reassess the limits in the permit. In addition to the efforts of EDF, United South and Eastern Tribes (USET), an organization representative of the tribes of the southern and eastern states, wrote to Administrator Browner supporting the

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59 Interview with John Banks, Director of Natural Resources, Penobscot Nation, Old Town, ME, 3 May 1994.
Penobscot Nation's request that the Agency reexamine the allowable dioxin limits in wastewater discharged from the mill.

In May, 1993, at the EPA Administrator's first meeting with tribal leaders, the Penobscot Nation Governor, Jerry Pardilla, presented Administrator Browner with water quality samples taken from the Penobscot River. One sample, was taken upstream from Lincoln Pulp and Paper. The other was taken down river from the discharge point. In this symbolic act, Governor Pardilla allowed the Administrator to view for herself the water quality degradation of the Penobscot River and challenged EPA to uphold their trust responsibility to the tribe. He asked EPA to protect the Penobscot River from such environmental degradation because the State of Maine was not adequately protecting the river and the tribe. 60

Another important supporter of the Penobscot position was Ada Deer, Assistant Secretary of Indian Affairs. Assistant Secretary Deer wrote a letter to EPA Administrator Browner urging the Administrator to "give the concerns of the Nation special attention as [the] Agency processes this permit, and to respond to those concerns in keeping with the federal trust responsibility to this tribe". 61

The second draft permit was issued by EPA in October, 1993 with a revised dioxin standard of 0.0078 ppq for dioxin (down from 0.013 ppq) in Lincoln Pulp and Paper wastewater effluent. This standard represented the same risk of one in one million cancers, but became more strict because it was based instead on the Penobscot Nation fish consumption data rather than the data for the "average" American. Although this dioxin standard is more stringent than the standard used in the first draft permit, the Nation is still not completely satisfied. They, along with environmental advocacy groups, are advocating that EPA eventually set a discharge limit of zero for dioxin. 62

The Lincoln Pulp and Paper NPDES permit issuance is delayed until June 30, 1994, pending ongoing negotiations between Penobscot Nation officials and

representatives from Lincoln Pulp and Paper.\textsuperscript{63} The goal of the negotiations is to achieve a long-term understanding between the tribe and the mill. It is the goal of the tribe that the mill will continually work to reduce dioxin levels in their wastewater effluent and the mill has agreed. Lincoln Pulp and Paper is willing to undertake more frequent monitoring (than the state currently does) of water quality at its discharge point and downstream from this point. The tribe's eventual goal is that Lincoln Pulp and Paper will retrofit the mill with chlorine free production technology.\textsuperscript{64} Although the mill has responded that they would have to go out of business if required to go chlorine free, the two parties are still negotiating. If the negotiations produce solutions which are allowable under EPA's statutory and regulatory requirements, EPA water quality staff have expressed interest in incorporating into the permit, any solutions arrived at through negotiations.\textsuperscript{65}

The Tribal Operations Committee: A Recent National Initiative to Include Tribes as Partners in Environmental Management

The most recent and significant national effort by the Agency to ensure inclusion of tribes is the establishment of the Tribal Operations Committee (TOC). The TOC represents a significant effort by the Agency to formally gather together tribal leaders to advise EPA on tribal environmental concerns and to help guide the Agency in its fulfillment of the Indian Policy. First convened in February, 1994 in Washington, D.C., the committee meets regularly with EPA leaders, to achieve improved communication between tribes and EPA and to identify problems which can be resolved cooperatively. The committee consists of 17 tribal representatives from the nine EPA regions that have federally recognized tribes. Nominated by the eight New England tribes, John Banks, Director of Penobscot Department of Natural Resources, is the Region I representative to the committee. Among initial efforts of the TOC to intensify tribal input into EPA decision making, are the following:

- The development of a position paper supporting the creation of an Office of Indian Affairs within EPA to report directly to Carol Browner. The

\textsuperscript{63} Interview with John Banks, Director of Natural Resources, Penobscot Nation, Old Town, ME, 3 May 1994.
\textsuperscript{64} Interview with Doug Luckerman, Region I Attorney, U.S. EPA, Office of Regional Council, Boston, MA, 22 April 1994.
\textsuperscript{65} Interview with Dave Turin and Eric Hall, U.S. EPA, Region I, Water Quality Management Section, Boston, MA, 5 May 1994.
office would oversee budget allocations to tribal programs and make recommendations for the annual budget and planning process. The paper calls for an office that would administer Indian programs and that would be provided with sufficient resources and staff to meaningfully fulfill the principles of the Indian Policy and revised Implementation Guidance. The TOC will also make recommendations for the organizational structure of the office and implementation of the office programs.

- To advise EPA's newly established task force, led by Martha Prothro of Administrator Browner's staff and Bill Yellowtail, Region 8 Administrator, in their review of EPA's 1984 Indian Policy and subsequent development of an updated and more effective implementation plan for the policy. This implementation plan will include objectives and actions by which the Agency can integrate tribal environmental needs into national and regional planning and budgeting processes.

- Attending EPAs Annual Budget and Strategic Planning meeting for Fiscal Year 1996 on April 25, 1994. This was the first time both tribal and state representatives were invited to participate. Tribal capacity building was a top priority in discussions centering around EPA's five year strategic plan. In order to fulfill the goal of tribal capacity building, EPA Administrator, Carol Browner, has pledged to advocate strongly, in her 1996 Congressional testimony for an increase in EPA's budget to fund additional tribal environmental programs and to fund additional EPA staff to work directly with tribes.

The new Tribal Operations Committee is one outcome from Administrator Browner's emphasis on partnerships with tribes. Although it is a national initiative, the committee is comprised of tribal members from each of the regions and could have a profound effect on the development of EPA tribal programs regionally. In a letter written to tribal leaders nationally, Browner has affirmed her intent, and that of the Clinton Administration, to help build tribal capacity for environmental management in Indian Country.

66 Interview with John Banks, Director, Penobscot Indian Nation, Old Town, Maine, 3 May 1994.
strongest and most effective environmental protection depends on strong and competent state/local and tribal environmental management. .67

In the last several months there has been a rejuvenated effort to reaffirm EPA's commitment and fulfill the Agency's responsibility to tribes. With the creation of the Tribal Operations Committee, the Prothro-Yellowtail taskforce undertaking of the review and revision of the Indian Policy Implementation Guidance, and Administrator Browner's reaffirmation of the 1984 Indian Policy, it is apparent that EPA is gearing up to more meaningfully include tribes as partners in Agency planning and decision-making. This national effort by EPA's top officials may improve, in the near future, the face of the Regional Indian Programs and EPA-Tribal relationships nationally and regionally. As regional efforts (or lack of effort) to include tribes are discussed here, it should be remembered that some of the recommendations for prioritizing tribal environmental program needs may already be in the early stages of policy formation. Thankfully, the Agency is in a period of transition as it seeks to include tribes meaningfully in Agency policy processes and decision-making. This recent prioritizing of EPA/Tribal partnerships may signal the beginning of a fuller implementation of EPA's Indian Policy.

Until these recent efforts, with the exception of Indian Program outreach, the relationships that EPA Region I has had with the tribes have been inconsistent: media program contacts with tribes have taken place on an as-needed basis—usually in response to a situation needing immediate attention or at the request of the tribe. In Region I, the Indian Program, only partially staffed, and the Regional Indian Work group have been the Region's sole concentrated efforts to work with tribes.

Tribal Versus State Inclusion in Region I: The Summary

In examining the treatment, or inclusion, of tribes versus states in Region I decision making, two national initiatives for inclusion emerge that gauge the Agency's increasing awareness of the need to form environmental management partnerships. For states, there is the Task Force to Enhance State Capacity. For Tribes, the newer Tribal Operations Committee (TOC), which

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convened its first meeting in February of this year. Both initiatives are significant attempts by the Agency, nationally, to facilitate greater partnership with states and tribes in managing environmental programs. However, there is a significant difference between the State Capacity Task Force and the Tribal Operations Committee. The State Capacity Task Force and its report with recommendations, can draw on the more plentiful resources of Agency staff and resources allocated for work with states. The TOC, on the other hand, is in its earliest stages of growth and has yet to access the resources and commitment of Agency staff--other than those working specifically with tribes. The TOC, however, has joined in one meeting so far with top national and regional management. This is the FY 1996 Agency Budgeting and Planning meeting.

In addition to these two major initiatives, the region performs outreach to both states and tribes. However, the outreach to tribes is, with the exception of the Indian Program, minimal and resources (staff and funding) allocated to carry out tribal activities are, extremely inadequate. On the state front, the regional power structure is active in reaching out to states to exchange ideas for and facilitate innovative environmental management programs. Meetings are also held between the Leadership Team and states to discuss each state’s specific environmental program needs and issues. Informally, Region I staff also confer with state staff in the development or implementation of Agency policy. This type of communication, and the benefits it provides, were discussed in the Lincoln Pulp and Paper NPDES Permit case.

Conversely, the Region has not made substantial progress in its efforts to include tribes in decision making and to facilitate greater environmental program management by tribes. The Region I Indian Program is still understaffed. This lack of commitment to even staffing the Indian Program with a full time Program Manager, points to a larger, regional and national disregard for tribal environmental program needs. Although tribes have received, since 1991, essential funds for environmental program infrastructure-building, in the form of Tribal Multi-media grants, there has not been a significant attempt to promote tribal eligibility for single-media grants.

Finally, the Agency--nationally and regionally--has not made a concerted effort to educate regional staff about Agency responsibilities to tribes and about the environmental needs of the New England tribes. Tribal awareness among Agency staff--and even managers--is appallingly low. This lack of awareness, along with the shortage of resources allocated for tribal
activities, has meant that tribes, and the Region I Indian Program have had to squeeze whatever they could from the Agency to simply maintain a viable presence by EPA in the environmental program development of the New England tribes. The struggles are evident in the efforts of the Region I Indian Program Manager to staff the program, and in the efforts of the Penobscot Nation to force inclusion in Agency decision processes.

However, there seems to be a light, still dim, on the horizon. EPA Headquarters, has very recently renewed their commitment to tribes by reaffirming the Indian Policy and by establishing the Tribal Operations Committee. EPA Administrator, Carol Browner, has also indicated that staff and Multi-media grant resources will be increased, substantially over current levels, in the Agency’s fiscal year 1996.
CHAPTER 5
EPA and Tribes as Partners in Environmental Protection: Conclusion and Policy Recommendations

The Lack of Meaningful Tribal Inclusion in EPA Policy Decisions: A Recipe for Inequitable Environmental Protection on Reservations

Given the historic reverence for nature that is central to the cultures of indigenous peoples of North America, the struggle for environmental protection is often more central to the lives of Indians than it is for non-Indians. Tribal reverence for the earth is rooted in ancient spiritual and ecological wisdom that is integral to many tribal cultures.

The Penobscot Nation has always used the river for transportation, recreation, and consumes the food harvested from the river and its shores. The river has always been identified by the Tribe as a living, breathing, life-giving wonderful creation of the Great Spirit who gave this gift to the Penobscot people. The Penobscot Nation has always protected the river to the best of its ability and continues to do so...

James G. Sappier, Former Governor
Penobscot Nation

It is significant that much of the pollution contaminating reservation lands, waters, and air has a source off the reservation. In other words, non-tribal communities, individuals, and industries off-reservation are polluting tribal lands. For this reason, it is essential that tribes be given access to participate as partners in EPA decision-making and policy-making processes. Partnerships between the Agency and tribes will lead to formation of policy, affecting reservation lands, that is culturally informed rather than eurocentric. If EPA and Indian tribes work together to make mutual decisions, the ability of off-reservation polluters to degrade tribal land will be diminished. Indian people and non-Indians alike will benefit as tribes prompt EPA and states to consider more equitable environmental protection policies.

68 James G. Sappier, Executive Director, United South and Eastern Tribes letter to EPA Administrator Browner, "The Effect of Dioxin in Penobscot River," 1 February 1994, Nashville, TN.
Throughout the thesis research, two phenomenon have emerged repeatedly that explain why tribes have not been a priority regionally. This non-prioritization has precluded tribes from being meaningfully involved in Agency decision-making. First, as discussed in Chapter Four, there is widespread ignorance, within Region I of the political status of tribes and of EPA’s responsibility to work with tribes as it works with states. In addition, as evidenced in Chapter Four and in the author’s conversations with Region I staff, while employed with the Agency, most of the Region I staff are confused about what their program responsibilities are to tribes and how they should fulfill them.

Second, and most importantly, as discussed Chapter Four, the region, until very recently, has received no indication from EPA Headquarters that the Indian Policy and tribes are an Agency priority. Regional staff and managers have received insufficient program direction and institutional guidance from EPA Headquarters that would allow them to work consistently and effectively with tribes. Regional program and grant priorities are largely determined by the media programs and EPA administration in Washington. Linda Murphy of the Air Management Division admitted that attending EPA conferences to familiarize herself with tribal opportunities in air programs was not "as high a priority as some of the other things [she's] dealing with". She also indicated that the whole grants process is presently in turmoil and she is waiting to hear from Headquarters about what the division’s responsibilities are to tribes.69

A more obvious indicator of the Agency’s lack of commitment to tribal programs, than the level of tribal awareness by Agency staff, is the lack of resources dedicated to fund tribal environmental activities. If tribes are to be treated similarly to states, why is it that in FY93 tribes received only 0.2% of the Agency’s $6 billion dollar budget?70 Indian people make up 0.8% (2,000,000) of the U.S. population,71 with about half this number living on reservation lands. This does not include non-Indians who live within reservation boundaries and would be affected by pollution on the reservation.72 Reservation lands cover

69 Interview with Linda Murphy, Air Management Division Director, U.S. EPA, Region I, Boston, MA, 29 April 1994.
70 Lori Thayer, "Environmental Justice For Native Americans: The Case of the Penobscot Nation" (Master of Arts Thesis, Tufts University, Department of Urban and Environmental Policy, 1994), p. 53.
72 U.S. Environmental Protection Agency, Office of Federal Activities, Administration of Environmental Programs on Indian Lands, July, 1983, p.3.
approximately 3% (54 million acres) of the land within the United States. This is an area equal to the combined acreage of New England, New Jersey, and Maryland. In addition, tribes hold treaty rights to hunt, fish, graze livestock and gather food for subsistence on an additional 100 million acres. Tribes are directly affected by pollution on nearly 9% of the land in the U.S., yet they receive only 2/10ths of 1% of the Agency budget for environmental protection activities. Conversely, EPA Fellow, Lauren Wenzel, in her report of environmental risks in Indian Country, noted that the $26 million provided to all federally recognized tribes between 1985 and 1990, was three to four times less than the amount granted to just three states of comparable geographic area and population to that of all tribal lands in the U.S.

As discussed in Chapter 1, the environmental statutes establish a regulatory scheme based on federally established national environmental standards, with state governments delegated responsibilities to achieve and maintain those standards. This regulatory scheme assumes that state governments will have the authority, and the know-how, to regulate pollution sources everywhere inside state boundaries, including reservation lands. However, EPA, in its Indian Policy, seeks for tribes to be included as partners in managing environmental programs on Indian lands. This recognition of tribes as primary program managers acknowledges that states cannot and should not manage environmental programs for reservations. Yet, despite recognizing tribes as the primary caretakers of Indian lands, the Agency has not supported tribes with the funding necessary to develop environmental program infrastructures to carry out their responsibilities.

Most of the tribes in Region I have utilized EPA tribal multi-media grant funds to hire environmental protection staff who have instituted monitoring and, in some cases, regulatory programs on-reservation. Although the seven New England tribes who have applied for these grant funds have received at least one multi-media grant since 1991, the year that the program was piloted, no tribe has received the grant every year. Consequently, during my time with the Agency I remember two tribes, in particular, having considerable trouble finding alternate funds to maintain the salaries of environmental staff in years when the

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EPA grant was not available. Thus, although multi-media grant funds are available for infrastructure building, they are not available in the dollar amounts necessary to provide consistent funding that is needed by tribes during the formative years of their environmental protection programs.

The Road to Inclusion of Tribes in EPA's Environmental Protection Scheme: Policy Recommendations

As state governments generally do not possess the authority or know-how to set and enforce culturally informed environmental regulations for reservation lands, it is imperative that EPA fulfill the principles of the Indian Policy that proclaim the Agency’s willingness to work directly with tribes on a government-to-government basis and that recognize tribes as the primary parties for making environmental policy decisions on tribal lands. State environmental protection agencies often do not have an interest in protecting tribal lands, nor do they have the cultural understanding to do so. Consequently, EPA’s top officials need to strongly advocate for changes in environmental statutes and regulations. Thus necessary institutional mechanisms and funding for tribes will be provided to enable tribes to access similar federal resources and statutory pathways that states have accessed to build and maintain state environmental programs. Even in the case of the Maine tribes, where, as discussed in Chapter Three, their environmental regulatory authority has been limited by the Maine Indian Claims Settlement Act, it is still imperative that the tribes be able to access grant funds that will enable them to set up monitoring and abatement programs. Administering such environmental protection programs will enable the tribes to assist the state and EPA in the work of environmental protection while ensuring that the tribe will be able to inform regulatory decisions. Thus, regulatory decisions such as those made by the State of Maine and EPA concerning dioxin and Lincoln Pulp and Paper’s permit to discharge would be avoided. Tribes then, as highly exposed sub-populations, would be protected to the same degree as other Maine residents.

In addition to advocating for statutory and regulatory language that will facilitate greater control and participation by tribes in environmental program management, Agency and tribal officials should review and revise the Indian Policy. The state/tribal comparison, which is central to the inclusionary principles of the policy, is somewhat troublesome. As discussed in Chapter Three, the political status of tribes is different from states. EPA asserts that it will work with
tribal governments, not as political subdivisions of a state or other governmental unit, but as "independent authorit[ies] for reservation affairs". However, states are, in all cases political subdivisions of another governmental unit; the federal government. It is possible that EPA needs to redefine, for internal use, the political definition of tribal governments, on which the Indian policy principles are based. The best comparison for tribal political status is not state sovereignty, but lies somewhere in that gray area of political definition between a state government and the federal government. Tribes are smaller nations that lie within a larger nation and tribes have a “trust” relationship with the federal government. These definitions of tribal nation status should replace completely, the state comparison. By limiting tribal inclusion in environmental protection to a comparison with states, EPA is not truly recognizing the sovereignty and self-determination of tribal governments and may be encouraging Agency staff, who do not understand an alternate definition of “nationhood”, to disregard the nation status of tribes as a delusion of grandeur on the part of tribal people.

Headquarters, in addition to advocating for changes in the language and meaning of the Indian Policy, could support the Policy with more specific, guidance outlining the Agency’s responsibility to work, in partnership with tribes. For instance, within a guidance document that is specific to a particular media program, the political status of tribes should be discussed, along with the Agency’s trust responsibility. Also discussed, should be the specific requirements for administering tribal grants and including tribes in decision making processes that are unique to that particular media program. In addition, tribal sovereignty and trust can be difficult concepts to understand. Regional media program managers, in concert with the Regional Indian Program Manager, might want to outline, in an addendum to the guidance, the environmental and jurisdictional issues specific to the tribes in the region.

In addition to program guidance that educates EPA staff more fully about their responsibilities within their programs to tribes, mandatory tribal training should be held for all Region I staff who work, either directly or indirectly, with tribes. Tribal training should also be mandatory for all EPA managers and should be part of the orientation for new employees who will be working in a capacity that will affect tribes. Periodic tribal training of EPA staff could be carried out by the Regional Indian Program staff and thus, would be a cost effective way to educate Region I staff.
As EPA provides increased direction and training to staff, the Agency must legitimize their commitment to tribal inclusion by increasing grants to tribes and by increasing the numbers of staff who are officially allocated all or part of their time to work with tribes. Currently, employees officially designated to work with tribes number approximately 160 FTEs (full-time equivalents) across the country. The Tribal Operations Committee has suggested that number be raised to 250 FTEs nationally. Remember that in Region I, the Indian Program Manager is officially allocated .01 FTE for her work with the tribes. Additional FTEs should be placed within the Indian Program so that every Region has at least one full-time Program Manager. Media program managers should also assess tribal-related workloads within their programs and determine the minimum number of FTEs needed within their media program for work with tribes.

Grants to tribes must also be increased in order for tribes to access “start-up” funds similar to those states received in the first years of environmental program management. Multi-media grant dollars, in particular, should be increased substantially in the next fiscal year. Tribal multi-media grants were developed to build the capacity of tribes to manage environmental programs on reservation land. For twenty-one years, EPA has given grants to states. Twenty-one years ago EPA was financing 100% of state environmental programs. With the federal support for infrastructure and capacity building that states received as fledgling environmental managers, they are now much less dependent on the federal government to finance their environmental protection programs. EPA finances only 25% of state environmental program costs today.75 It should also be noted, that while states have additional sources of revenue, most tribes do not exercise the authority to tax. Tribes are limited in alternative sources of funding. In addition, many reservations boast unemployment rates of 70% or higher. American Indians have the highest unemployment rate of any ethnic group nationally. Tribes, in general, are poor.

However, although not all tribes are likely to obtain the level of financial independence that states have, in administering environmental management programs, most tribes will eventually achieve more financial independence. Under the federal policy of tribal self-determination, tribes are accessing economic development grants that are boosting tribal economies. In addition, tribes are pursuing, independently, many successful economic development

75 Ibid.
enterprises. So, although tribes may not have the same financial resources available to them as states, they are continually cultivating alternate resources. However, in the meantime, most tribes require capacity building or "start-up" funds in the form of Multi-media grants, just as states needed start-up funds twenty years ago. These grants have fewer reporting requirements than a host of single-media grants would require. Diminished reporting requirements make the multi-media grant ideal for fledgling tribal environmental programs without the staff capacity to manage several different grants, all with separate workplans and separate paperwork and progress reports that must be submitted to EPA periodically.

An appropriate longer-term goal may be to advocate, with Congress, for increased single-media funding. Increased emphasis on tribes within the media programs will require a concentrated effort to educate media program staff and it will require the possible establishment of new grant programs or set-asides for existing programs to serve the needs of tribes adequately. As media program staff in Headquarters and in the Region, tailor program guidance to assist media staff in working with tribes, they should also look for ways to make existing single-media grants more accessible to tribes. While environmental regulations determine tribal eligibility for grants, regional media program managers and top level regional administrators should advocate for greater eligibility of tribes and for clearer definitions of current tribal eligibility. Many of the grant programs do not prohibit application by tribes. They simply do not mention that tribes would be, according to the definition of grant eligibility, allowed to apply for the grant. EPA media staff, without sufficient knowledge, would therefore not assume that tribes would be eligible along with the states, municipalities, and research institutions specifically defined as eligible for the grants. Only an EPA staffer with knowledge of the Indian policy and understanding of EPAs trust responsibility to tribes, would stop to consider that tribes might be eligible to apply for the grant, then notifying tribes along with other eligible applicants. As tribes continue to build and diversify their environmental protection programs, they will find that they have greater needs for media specific grants. Tribes such as the Penobscot Nation, that have built a reasonably diverse environmental protection program with well-qualified staff, have made the transition from strictly building environmental program infrastructure to prioritizing particular media activities and environmental protection goals within their natural resources department. As they have grown,
they have developed a greater use for single-media grants with more specific program goals.

There are also some non resource intensive remedies that will promote greater inclusion of tribes in EPA environmental program management. Greater visibility of tribes and the Regional Indian Program is needed within the Region. Heightened visibility of the Indian Program would not only increase it's accessibility to top decision makers within the Region, but would facilitate education and awareness of Agency staff as to the Agency's commitment to working with tribes on a government-to-government basis. The Agency should consider moving the Region I Indian Program from it's current location in the Planning and Management Division where finance, budgeting, and grants administration is located, to a location more immediately accountable to the Regional Administrator.

The Regional Indian Workgroup should also occupy a more important place in the Agency. Workgroup members, in addition to seeing that tribal environmental staff are provided with technical assistance, and coordinating tribal media program activities with the Indian Program staff, should also serve as tribal information resources for media program staff. But most importantly, these workgroup members should be in positions of authority that will enable them to direct media program staff in working with tribes appropriately. It would take a group of Division Directors or Deputy Division Directors, similar in stature to the Region I Leadership Team, to emphasize the importance of working with tribes and provide direction to employees within the media programs on how to work with tribes. These same top level people are needed to prioritize the education and training of staff. Staff need to better understand the responsibility of the Agency under the federal/tribal trust responsibility and under the EPA Indian Policy in order to work effectively with tribes. It is critical that the people running the programs be involved in the workgroup so that there is a commitment, at the highest levels of the Agency, to work with tribes.

In addition to membership on the Indian Workgroup, the Leadership Team should consider an outreach agenda for tribes similar to their outreach activities to states. While tribes are smaller than states in terms of land mass and population and in the size of their environmental protection programs, a scaled-down version of the state outreach agenda might be sufficient to involve tribes in a more meaningful way in Agency decision-making.
In addition to such outreach activities, the Regional Administrator and Deputy Regional Administrator, rather than meeting with all eight tribes once a year in Boston, should meet with tribes individually or in small groups. These meetings should take place in tribal territory rather than in Boston. While EPA staff may have visited all of the New England states and are generally aware of the environmental issues of concern to the states--most staff have not visited the New England reservations. Most staff are also not familiar with the environmental needs of the tribes. Meeting with all eight tribes at one meeting in Boston hardly facilitates the thorough education of EPA officials nor does it increase their in-depth understanding of tribal environmental needs. These needs are often unique from the needs of the state within which their reservation lies. Staff should not assume that by having knowledge of state environmental issues, they understand tribal environmental needs.

Finally, tribes should be asked to participate in state/EPA meetings where issues which might affect tribal lands or natural resources. For example, when EPA and the states meet to discuss permit cycles, tribes should be included if any of those permits coming up for renewal are for discharge or emission of pollutants into natural resources utilized by a tribe.

A Final Call for Tribal Inclusion

Tribes should be meaningfully involved in the formation of EPA's environmental protection policies and in decisions made by Agency staff and managers that will affect the environmental integrity of reservation lands. If tribes are not appropriately involved there is a danger that policies will be written and decisions occur that adversely affect tribes. Tribal lands and natural resources are often contaminated by off-reservation sources over which they have no control as opposed to suffering contamination from pollution sources within reservation boundaries. The New England tribes historically, have been fisherman, subsisting from waters running through their reservations. Protection from pollution of these natural resources is imperative to protect the health, culture, and sometimes the livelihood of tribal members. If tribes are not meaningfully involved in environmental policy decisions affecting their lands and resources, they will have to rely on the sense of

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76 This may be true with the exception of many of those individuals who have visited the Pequot Foxwoods Casino in Ledyard, CT. This experience, however, is hardly transferable to the experience one would have when visiting the Maine tribes.
responsibility and justice of non-tribal people, state governments, and the federal government to ensure that their people and natural resources are adequately protected from pollution. However, tribes are not in a position to entrust others with the protection of the environment that is central to their culture and way of life. In this country, we have a 220 year history of unkept treaties with tribes, theft and blatant contamination of tribal lands and resources, and disregard of tribe's rights by states, their citizens, and the U.S. government. This history illustrates why tribes cannot rely on the simple goodwill of non-Indians and non-tribal governments and on the 'justice' handed down by their courts to ensure that the health of tribal people and their lands and waters, that are considered sacred, will be protected.
BIBLIOGRAPHY
BIBLIOGRAPHY

BOOKS

GOVERNMENT DOCUMENTS AND REPORTS
Penobscot Nation, Department of Natural Resources, Results of the 1991 Penobscot River Users Survey Conducted by the Department of Natural Resources.


INTERVIEWS

Banks, John. Director, Department of Natural Resources, Penobscot Nation, Indian Island, Old Town, ME. Interview, 30 March 1994.

Banks, John. Director, Department of Natural Resources, Penobscot Nation, Indian Island, Old Town, ME. Interview, 3 May 1994.

Fenn, Anne H. Region I Indian Program Manager, U.S. Environmental Protection Agency, Boston, MA. Interview, 30 March 1994.


Meaney, Patricia. Deputy Regional Administrator, U.S. Environmental Protection Agency, Region I, Boston, MA. Interview, 5 May 1994.

Murphy, Linda. Region I Air Management Division Director, U.S. Environmental Protection Agency, Boston, MA. Interview, 29 April 1994.


NEWSPAPERS


PERIODICALS


Fenn, Anne and Featherman-Sam, Emma. "Region I Indian Program." We're Number One: An Employee Newsletter of the Environmental Protection Agency, 18 March 1992, pp. 1 and 4.


UNPUBLISHED MATERIALS


64

Boston, MA. U.S. Environmental Protection Agency. Region I Indian Program. "Report from Indian Program Coordinator on Regional Administrator's Indian Program Conference Call," 11 October 1986.


Old Town, ME. Penobscot Nation. Department of Natural Resources letter addressed to Dean Marriot, Commissioner, Maine Department of Environmental Protection. "Lack of Communication...by Agency Toward the Penobscot Indian Nation", 15 August 1991.


Old Town, ME. Penobscot Nation. Tribal history. No date.


## EPA FUNDING TO REGION I TRIBES SINCE INCEPTION OF INDIAN PROGRAM

### FY1996

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<tr>
<th>Tribe</th>
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<tr>
<td>PENOBSKOT NATION (DOE/EPA technical assistance interagency grant through CERT)</td>
<td>To perform water quality analysis of Penobscot River.</td>
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<td>NARRAGANSETT INDIAN TRIBE (CWA 314 Clean Lakes)</td>
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<td>PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP (Title III; Hazardous Materials Training)</td>
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<tr>
<td>PENOBSKOT NATION (104 Wetlands)</td>
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<tr>
<td>PENOBSKOT NATION (Tribal Multi-media/General Assistance)</td>
<td>Partial funding by Regional Air, Pesticides &amp; Toxics Management Division ($5K), Waste Management Division ($10K), Office of Water Management Division ($35K).</td>
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<td>WAMPANOAG TRIBE OF GAY HEAD (Administered by NEIWPC)</td>
<td>To complete Water Quality Management Plan.</td>
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<td>PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP (RCRA)</td>
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Attachment A
| FY1993 | MASHANTUCKET PEQUOT TRIBE (Tribal Multi-media/General Assistance) | $65,000 |
|        | NARRAGANSETT TRIBE OF INDIANS (Tribal Multi-media/General Assistance) | $70,000 |
|        | PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP (Pollution Prevention Incentives for States [PPIS] ) for Tribal pollution prevention community education program. | $14,000 |
|        | PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP (Tribal Multi-media/General Assistance) Added on to 1992 grant. | $35,000 |
|        | WAMPANOAG TRIBE OF GAY HEAD (Tribal Multi-media/General Assistance) | $80,000 |
|        | **Subtotal** | **$264,000** |

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**Attachment A**