RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE'S JANUARY 14, 2013, SUBMISSION TO EPA FOR APPROVAL OF CERTAIN OF THE STATE'S NEW AND REVISED WATER QUALITY STANDARDS (WQS) THAT WOULD APPLY IN WATERS THROUGHOUT MAINE, INCLUDING WITHIN INDIAN TERRITORIES OR LANDS

January 30, 2015

INTRODUCTION

This document contains responses to the significant comments EPA received concerning Maine's January 14, 2013, submittal to EPA Region 1, in which Maine proposed certain revisions to its surface water quality standards (WQS or standards) pursuant to section 303(c) of the federal Clean Water Act (CWA). EPA Region 1 solicited comments from the public specifically relating to the aspect of Maine's request that EPA approve the State's WQS revisions to apply in waters within Indian territories or lands (hereinafter referred to as "Indian lands") located in Maine. It is important to note that, in the Agency's judgment, the public comments EPA received in relation to Maine's January 14, 2013, submission raised both significant legal and technical questions, which extend equally to the EPA's decisions addressed in its letter approving and disapproving certain of Maine's standards in waters within Indian lands. EPA's responses to the comments below will be presented in the context of Maine's January 14, 2013, submittal, but EPA applied the principles articulated in this document to our decision on all the WQS the State has asked the Agency to approve for waters in Indian lands.

Maine's 2013 submittal specifically included a request that EPA approve the WQS revisions as applying to all waters throughout the State of Maine, including to waters within Indian lands located within the State. Neither the CWA (and its implementing regulations), nor the federal Administrative Procedure Act (APA), specify any notice and comment requirements that EPA must satisfy before approving or disapproving a state's new or revised WQS submittal. EPA's longstanding position has been that it is sufficient for EPA to review the adequacy of a submitting state's public process for revisions to its WQS and to rely on that process if it adequately notified and involved the public. See 40 C.F.R. §§ 131.5(a)(3), 131.6(e), and 131.20(b) and 40 CFR part 25 for public participation requirements relevant to state adoption of WQS. The State of Maine's Department of Environmental Protection (ME DEP) provided public notice and an opportunity to comment (including a public hearing), at the state level, on the WQS revisions included in the State's January 14, 2013, submittal to EPA.

However, while ME DEP provided public notice of the substance of the WQS revisions as they would apply generally in the State, the State's notice may not have sufficiently informed the public that ME DEP intended to seek EPA's approval of these revisions to apply in waters within Indian lands. To ensure adequate public participation and development of a complete administrative record for EPA's subsequent decisions, EPA decided to seek further comment due to the possibility that the State's notice may not have been sufficiently clear to some members of the public about the State's intent to apply its WQS revisions to waters in

Indian lands. Accordingly, in August of 2013, EPA solicited additional comment on the approvability of these WQS for waters in Indian lands. In particular, EPA sought comments regarding the State's legal authority to establish WQS in waters in Indian lands under the Maine Implementing Act (MIA, 30 M.R.S.A § 6401, et seq.) as ratified by the Maine Indian Claims Settlement Act (MICSA, 25 U.S.C. § 1721, et seq.) and on whether these WQS revisions would adequately protect water quality in Indian lands.

This responses to comments (RTC) document contains EPA's responses to the significant comments EPA received. We reiterate that EPA lawfully used its discretion to seek additional public input to better inform its approval/disapproval decision and to ensure that any potential flaws in the State's public process are remedied. There is no legal prohibition in the CWA, the Administrative Procedure Act, or any other applicable legal requirement that precludes EPA from seeking such comment to better inform its decision when the administrative record before it is potentially incomplete. Adequate public participation in the context of a federal agency's decision-making process, where regulatory decisions are being made that potentially impact the public or where there is significant public interest, is a fundamental aspect of administrative law in our system of government. Furthermore, we emphasize that EPA's having sought public comment in this one instance, in addition to the State's public participation process, does not in any way set a legal or policy precedent that could in any way be used by any person in the future to require EPA to solicit public comment on any State's WQS submission for EPA review and approval or disapproval. As explained throughout EPA's RTC document and Decision Support Document related to EPA's decision on Maine's WQS submissions, the Agency has been presented with a unique set of circumstances due to the highly atypical legal framework that MIA and MICSA establish for Indian lands in Maine; circumstances which do not exist in other areas of the United States.

The WQS revisions in Maine's 2013 submittal include five new or revised WQS criteria, including three human health criteria (HHC) for the allowable levels or concentrations in surface waters for three toxic pollutants: arsenic, acrolein, and phenol. For arsenic, ME DEP changed the cancer risk level, fish consumption rate, and percentage of inorganic arsenic (relative to organic arsenic) used in calculating the criteria for *inorganic* arsenic, which is the form of arsenic that is harmful to human health. For acrolein and phenol, ME DEP updated its ambient water quality criteria consistent with updates EPA has made to its recommended criteria for those two pollutants based on newly published reference doses.

This RTC document is a source of information about EPA's decision on Maine's submissions, and should be read in conjunction with EPA's letter communicating its decision on these and other WQS to Maine DEP and with the accompanying Decision Support Document; the latter focusing specifically on, among other things, the question whether Maine has adequate legal authority to establish WQS in waters located in Indian lands and on whether Maine's standards meet the requirements of the CWA. This RTC document incorporates the terminology and reasoning presented in those other two documents, while expanding on it in certain respects to address the more specific individual comments EPA received. This responsiveness summary digests and organizes the significant comments received. Opposing comments concerning each issue were grouped together where EPA received comments on both sides of an issue. We received

comments from the State of Maine's Office of the Attorney General, the Commissioner of the ME DEP, and from three of the four federally recognized Indian Tribes in Maine – the Penobscot Nation, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs; no other parties provided comments to EPA.

The particular language used in the summary of each issue presented below may derive primarily from one set of comments. But this does not mean that EPA has not considered each of the comments received on the issue in question. EPA did not limit its analysis of the comments submitted to the digest presented below, and we have reviewed each comment in its entirety. This outline and its digest of the comments are simply designed to structure our responses and make them more accessible to the interested public, while addressing the substantive content of all of the significant comments received.

Comments and Responses to Comments on EPA's 2003 NPDES Program Approval

Some of the key issues relevant to Maine's WQS submission were also the subject of public comments EPA received in the context of EPA's 2003 action on Maine's National Pollution Discharge Elimination System (NPDES) program application. In fact, the Penobscot Nation and the Houlton Band of Maliseet Indians specifically incorporated by reference into their comments on Maine's WQS submission those Tribes' earlier comments on Maine's NPDES program application. Consequently, EPA's responses today to some of those same issues, or at least to certain aspects of those same issues, parallel EPA's earlier responses to comments received on Maine's NPDES program application. For completeness and efficiency, rather than repeat in this RTC document all of EPA's responses to the Tribes' comments on Maine's NPDES program, EPA hereby incorporates by reference its responses to public comments received on Maine's NPDES program application, but only to the extent those earlier responses are consistent with, and are not superseded by, the First Circuit's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), and the responses expressly articulated in this document and in EPA's accompanying Decision Support Document.

Federal Indian Common law cited by Maine Indian Tribes and Protecting the Tribes' Sustenance Fishing

As discussed in detail below in EPA's specific responses to specific public comments, many of the Maine Tribes' (primarily the Penobscot Nation's) legal arguments opposing Maine's jurisdiction to establish WQS in waters within Indian lands included citations to federal case law. EPA addresses that case law in more detail later in this RTC document. Many of the Tribes' comments rely heavily on the case law. It is therefore worth noting here in summary, for purposes of orienting the reader to what follows, that EPA found many of those cited cases compelling from the standpoint of supporting the proposition that the CWA requires protection of the quality of the water that supports the Maine Tribes' sustenance fishing practices, culture and lifestyle. The cases cited also represent a strong collection of federal Indian common law on subjects such as the federal government's trust responsibility to Indian tribes, the sovereign status of Indian tribes in

the United States, and the canons of statutory construction used by the federal courts to interpret treaties and statutes addressing the rights of Indian tribes.

With one very important and dispositive exception that arises due to the unique nature and jurisdictional provisions of the settlement acts[1], EPA does not disagree that the cases cited by the Maine Tribes articulate valid and accurate general principles of federal Indian common law. In EPA's view, however, none of these cases answers or is dispositive of the question whether Maine has legal jurisdiction to establish WQS in waters within Indian lands in Maine, but that is precisely the argument that the Maine Tribes frequently assert is supported by those cases. As EPA explains in this RTC document and in its Decision Support Document, the settlement acts clearly undermine the Maine Tribes' use of those cases to oppose Maine's assertion of jurisdiction. Moreover, EPA reads the vast majority of the Maine Tribes' comments as taking the position that protection of their sustenance fishing practices and a legal conclusion that Maine has jurisdiction to establish WQS in waters within Indian lands in Maine are mutually exclusive. The inaccuracy of that position is demonstrated by EPA's Decision Support Document. That is, EPA has determined that Maine has jurisdiction to establish WQS in waters within Indian lands in Maine and that EPA has no discretion to find otherwise given the settlement acts. At the same time, however, EPA has also disapproved certain of Maine's WQS as not being adequately protective of the applicable CWA designated uses, which encompass the Maine Tribes' sustenance fishing practices. Consequently, the jurisdictional scheme embodied in the settlement acts renders those cases inapposite to EPA's decision. In addition, to the extent that the Maine Tribes cite

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[1] Settlement Acts in Maine

MIA and MICSA

In 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA), which resolved litigation in which the Southern Tribes asserted land claims to a large portion of the State of Maine. 25 U.S.C. §§ 1721, et seq. MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA), which was designed to embody the agreement reached between the State and the Southern Tribes. 30 M.R.S. §§ 6201, et seq. In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA. 30 M.R.S. § 6205-A, 25 U.S.C. § 1724(d)(1). Since it is Congress that has plenary authority as to federally recognized Indian Tribes, MIA's provisions concerning jurisdiction and the status of the Tribes are effective as a result of, and consistent with, the Congressional ratification in MICSA.

MSA and ABMSA

In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs. 30 M.R.S. §§ 7201, et seq. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. 25 U.S.C. § 1721, Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143. One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Maliseets in MICSA. See ABMSA § 2(a)(4) and (5). In 2007, the Federal Court of Appeals for the First Circuit confirmed that the Micmacs and Maliseets are subject to the same jurisdictional provisions in MICSA. Aroostook Band of Micmacs v. Ryan, 484 F.3d 41 (1st Cir. 2007).

Where appropriate, this document will refer to the combination of MICSA, MIA, ABMSA, and MSA as the "settlement acts."

to the First Circuit's opinions interpreting MIA and MICSA, EPA's RTC document explains why those cases also do not support the Tribes' assertion that Maine does not have jurisdiction.

Two examples illustrate this general point. While EPA agrees that *U.S. v. Adair*, 723 F. 2d 1394 (9th Cir. 1984); *Winters v. United States*, 207 U.S. 564 (1908); and *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658 (1979), may be cited in support of arguments that address tribal sustenance fishing practices and the associated quantity and/or quality of the waters that support those fishing practices, nothing in those cases does or can supersede or affect the jurisdictional arrangement embodied in the settlement acts. Similarly, while *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *State of Washington, Dep't of Ecology v. U.S.E.P.A.* 725 F. 2d 1465 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Oklahoma Tax Comm'n v Sac & Fox Nation*, 508 U.S. 114 (1993); and *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g*, 476 U.S. 877 (1986), may each stand for or support in some manner the proposition that states generally lack jurisdiction in Indian reservations absent express authorization by Congress, those cases cannot properly be cited to support an argument that Maine has no jurisdiction to apply state law in Indian lands in Maine, because Congress expressly granted Maine such authority in the settlement acts.

EPA's Specific Responses

I. Maine's legal authority or jurisdiction to establish WQS in Indian waters.

A central issue raised by Maine's WQS submission is whether Maine has the necessary legal authority, or jurisdiction, to establish WQS applicable to surface waters (both reservation and trust land waters) situated in Indian lands located within the exterior boundaries of the State of Maine. EPA received many comments about this legal issue from three of the Maine Indian Tribes and from the State of Maine.

EPA's Decision Support Document contains, among other things, a legal analysis of the specific statutory provisions of the settlement acts and their respective legislative histories. That analysis supports EPA's legal determination that Maine has the necessary legal authority to establish WQS in surface waters located in Indian lands in Maine. While the legal analysis constitutes EPA's reading of the language and legislative history of the statutes themselves, it does not always address directly the way in which the Maine Tribes' articulated their jurisdictional arguments opposing Maine's legal authority to establish WQS in waters in Indian lands in Maine.

The reason for that is that the Tribes' public comments on the jurisdictional question rely, to a great extent, on two concepts derived from principles of

federal Indian common law, i.e., the federal government's trust relationship to Indian tribes generally and the concept of inherent tribal sovereignty. It is for that reason that EPA's responses below to the Maine Tribes' public comments on the jurisdictional question principally are organized around the way in which the Tribes specifically crafted their jurisdictional arguments, i.e., primarily in terms of the federal trust responsibility and the concept of inherent tribal sovereignty. After addressing those comments from the Tribes, EPA's responses also address the State of Maine's comments on the federal trust responsibility and tribal sovereignty.

A. Does the federal trust responsibility affect or determine whether Maine has jurisdiction to establish WQS in waters within Indian lands?

Many of the Tribes' comments relating to whether Maine has jurisdiction focused on the federal trust responsibility to the Maine Indian Tribes. The Tribes asserted that the EPA's trust responsibility obligates EPA to conclude that Maine does not have jurisdiction. Examples of those comments are identified below first, followed by examples of the State of Maine's comments about the trust. EPA's responses to the comments are provided after the listed representative examples received from the parties who commented.

<u>Representative examples of comments from Maine's Indian Tribes</u>

1. EPA's federal trust responsibility and duties under the CWA preclude EPA from finding that Maine has jurisdiction to promulgate WQS applicable to waters in Indian lands.

2. EPA's Constitutionally-based trust responsibility and federal Indian common law require EPA to reject Maine's WQS application as to waters within Indian lands.

3. EPA's trust responsibility requires it to protect the Tribes' natural resources and sovereign authority against state encroachment.

4. Approval of Maine's WQS in waters within Indian lands would be an unlawful abdication of EPA's trust responsibility because it would empower Maine to control tribal resources when Maine does not even recognize the existence of the Penobscot Nation's sustenance fishery.

5. The authority to establish WQS under the CWA applicable to the Southern Tribes' sustenance fishery established under MIA and MICSA must reside with EPA in the first instance, as the Tribes' trustee, or, eventually with the Penobscot Nation.

6. Congress acquired the Houlton Band of Maliseet Indians' trust lands for the purpose of preserving the Tribe's riverine culture, including traditional fishing, hunting and gathering activities. EPA therefore has a trust responsibility to protect the quality of the waters in the Tribes' lands.

Representative examples of comments from the State of Maine

1. The concept of a federal "trust responsibility" to Indian tribes does not apply under the CWA because there are no substantive or procedural requirements written into the CWA that anyone may review to assess whether a particular action that EPA takes complies with a "trust responsibility." EPA cannot establish procedural or substantive requirements, pursuant to a trust responsibility, that are not already embodied in the CWA. The federal trust responsibility toward Indian tribes in Maine is fully and exclusively expressed through the substance of the statutes and regulations that an agency is charged with administering.

2. Even if the concept of a federal "trust responsibility" otherwise would apply toward the Maine Indian Tribes under the CWA, Title 25 U.S.C. section 1725(h) of MICSA makes clear that federal Indian law that would otherwise affect or preempt the jurisdiction of Maine relating to "environmental matters" has no effect in Maine.

3. Reservation lands in Maine are not held in trust by the federal government.

EPA's responses to comments concerning the general nature of the federal trust responsibility to the Maine Tribes in this case and the extent to which that trust responsibility is relevant or dispositive to the question whether Maine has adequate legal authority or jurisdiction to establish WQS for surface waters within Indian lands located in Maine

As EPA previously noted in its responses to public comments received on Maine's NPDES program application in 2003, the commenters' arguments (on both sides) regarding the federal government's trust responsibility to the Maine Indian Tribes do not accurately articulate the scope of the trust responsibility as relevant to EPA's decisions in this matter; and, more specifically, do not accurately articulate the scope of the trust responsibility to the Maine Indian Tribes as EPA exercises its authorities under the CWA.

First, it is important to note that the existence, operation and extent of the federal trust responsibility to the Maine Indian Tribes under the United States Constitution and

applicable federal statutory and common law cannot be determined in isolation from the allocation of legal jurisdiction among the tribal, State, and federal governments under the the settlement acts. For example, the jurisdictional framework set forth in the MIA was ratified by Congress in MICSA, and it is well-established law that Congress has plenary authority to legislate in the area of Indian affairs. EPA does not have the legal authority to alter the jurisdictional arrangement ratified by Congress in the settlement acts, either pursuant to the trust responsibility to the Maine Indian Tribes in relation to the CWA or pursuant to any other law.

At the same time, however, EPA still must consider the trust responsibility toward the Maine Indian Tribes when implementing the CWA, but must do so within the bounds of the jurisdictional scheme that Congress ratified in the settlement acts and the requirements of the CWA. It is for this reason that the federal trust cases cited by the Penobscot Nation in its comments are inapposite, i.e., none of these cases discusses the federal trust obligation against the backdrop of statutes such as the settlement acts, and they cannot properly be cited for the proposition that the trust obligation should or does override Congress' jurisdictional arrangement in those settlement acts such that Maine cannot establish WQS in waters in Indian lands in Maine. The cases cited by the Tribe include, e.g., *HRI, Inc. v. E.P.A.*, 198 F.3d 1224 (10th Cir. 2000); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942).

As EPA earlier explained in its responses to public comments on EPA's proposed approval of Maine's NPDES program, the trust responsibility towards the Maine Indian Tribes continues to operate in Maine in relation to the CWA, even under the settlement acts, but that the trust's reach and effect are more limited than might typically be the case in other states. In other words, the settlement acts significantly revise in Maine the jurisdictional arrangement that more typically exists elsewhere in the United States among Indian tribes, a state, and the federal government. EPA notes that the Penobscot Nation's comments cite to a number of federal court opinions that address the trust. See for example, *Worcester v. Georgia*, 31 U.S. 515 (1832); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985); and *State of Washington, Dep't of Ecology v. U.S. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985); *HRI, Inc. v. E.P.A.* 198 F.3d 1224 (10th Cir. 2000); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942). These cases and others of their kind, which may have addressed the federal trust, are not relevant to the analysis of whether Maine has jurisdiction to establish WQS in waters within Indian lands in Maine because the courts in those cases were not confronted with statutes like the settlement acts which, as EPA said above, alters the typical framework within which the trust operates.

<u>The trust and federal Indian common law</u>

As a threshold matter, when delving into the meaning of the settlement acts, EPA is employing, and always has employed, where appropriate, the interpretive canons of federal Indian common law that derive from the general trust responsibility. For

example, we agree that any ambiguity in the meaning of statutory provisions that attempt to limit tribal sovereignty must be narrowly construed and that such ambiguities must be resolved in favor of the tribes. EPA also agrees that the federal government's general trust responsibility charges the Agency with a responsibility to protect the tribes' inherent sovereignty from unwarranted state encroachment. Adhering to these basic common law elements of the trust doctrine does not run afoul of the settlement acts. They do not result in any alteration of the jurisdictional arrangement ratified in the settlement acts and simply require the Agency to consider the Maine Indian Tribes' interests and welfare consistent with Maine's authority, when EPA implements the CWA. In so doing, we are not thereby affecting or preempting Maine's jurisdiction, but merely applying the law which provides that jurisdiction to the State, and analyzing how that grant of authority from Congress affects EPA's CWA decisions in relation to the Maine Indian Tribes. We note that the First Circuit, without much comment, has invoked the general trust in support of the idea that ambiguities in MICSA should be interpreted in favor of the Tribes where possible. *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999).

Consistent with the discussion above, the settlement acts do not create a complete barrier to the application of the federal common law concerning the federal government's trust responsibility in Maine. For one example, MICSA itself provides for certain lands and natural resources to be held in trust for the Penobscot Nation and the Passamaquoddy Tribe (hereinafter referred to for convenience as the "Southern Tribes") and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1724. (Also for convenience, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs will hereinafter be referred to as the "Northern Tribes," where appropriate). So the mechanism of having the federal government serve as a trustee for tribal resources operates expressly under MICSA. The trust relationship is also evident elsewhere in the statute, albeit in a more inchoate form. MICSA clearly establishes that the Houlton Band of Maliseet Indians and the two Southern Tribes are federally recognized and it specifically charges them to document how their governments are structured. 25 U.S.C. §§ 1721(a) (3), (4), and (5), 1722(a), (h) and (k), and 1726. The Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 2(a)(1) and Sec. 3(1) and Sec. 7.[2] These various provisions are perfectly consistent with EPA's work with the Tribes on a government-to-government basis consistent with a trust relationship with the federal government. In addition, MICSA and MIA combine to explicitly reserve to the Southern Tribes the right to take fish for their individual sustenance within their reservations and to manage their lands and natural resources more generally. 30 M.R.S.A. § 6207(4); 25 U.S.C. § 1724(h); see also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. The Southern Tribes' statutorily reserved sustenance fishing right establishes an interest that the Southern Tribes have in the protection of specific natural resources, the fish that may

[2] In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to status of the Aroostook Band of Micmacs. 30 M.R.S. §§ 7201 et seq. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. 25 U.S.C. § 1721, Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143.

sustain them and the water quality on which the quality of that fishing right depends. In addition, as articulated in EPA's Decision Support Document, EPA has determined that Congress's intent in the settlement acts was to establish a land base for the four federally recognized Maine Tribes permitting them to sustain their unique culture and lifestyle practices. The legislative record regarding the trust land provisions in MIA, MICSA, MSA and ABMSA demonstrate Congress's intent to provide the Tribes with the opportunity to exercise their sustenance life ways, including sustenance fishing in waters of tribal trust lands. For additional discussion relevant to the Maine Tribes' sustenance fishing practices, see EPA's Decision Support Document and the Department of the Interior's (DOI) January 30, 2015 letter to EPA. In sum, it is relatively easy to conclude that all the elements of a trust relationship exist under the settlement acts for the four federally recognized Maine Tribes, consistent with the trust doctrine as it has been developed in the federal common law. The Tribes are federally recognized; the Tribes have an interest in specific natural resources which the CWA charges EPA to protect; and the federal government, including EPA, has a responsibility to consider the Tribes' interests, consistent with applicable law.

As stated earlier, however, the existence of this trust relationship does not and cannot legally alter the jurisdictional arrangement Congress ratified in the settlement acts. The trust by itself does not and cannot compel, or constitute an independent basis for, EPA to disapprove Maine's surface WQS as applied in waters within Indian lands in Maine on the grounds that the State does not have jurisdiction to do so where, in fact, the settlement acts and their jurisdictional provisions actually *do* provide Maine with the requisite legal authority. Accordingly, EPA disagrees with the Penobscot Nation's comments that cite to and characterize several of the First Circuit's legal opinions as providing a basis for applying the full suite of federal Indian common law principles and the trust *prior to* analyzing MIA and MICSA. . See Page 11 of the Penobscot Nation's comments, citing *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999) and *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st. Cir. 1994).

<u>Tribal comments that the trust obligates EPA to find that Maine does not have jurisdiction because the trust requires EPA to protect the Tribes from state encroachment</u>

Outside Maine, EPA has typically excluded Indian country from EPA-approved state environmental programs based on the absence of state jurisdiction in Indian country. See, e.g., *HRI, Inc. v. EPA*, 198 F.3d 1224, 1247 (2000). By contrast, in Maine, the jurisdictional provisions of the settlement acts provide the State jurisdiction to administer WQS in waters in Indian lands. Moreover, MICSA's savings clauses (see more detailed discussion in EPA's Decision Support Document), in effect, prevent any federal law applicable to Indians from rewriting those jurisdictional provisions (*i.e.*, from preempting or affecting the application of Maine law) without explicit Congressional action made specifically applicable in Maine. Therefore, as discussed above in this RTC document, EPA has carefully considered how the trust operates consistent with MIA, MICSA and the CWA in the context of Maine's surface WQS submission. EPA is not relying on the trust to determine whether Maine has jurisdiction to establish water quality standards for waters in Indian lands. As discussed elsewhere in this RTC document, the jurisdictional

scheme established in the settlement acts bears on how the Agency implements our decision consistent with the trust responsibility.

However, notwithstanding that Maine does have jurisdiction to establish surface WQS that apply in waters within Indian lands in Maine, EPA's implementation role under the CWA and the trust responsibility to the Tribes nonetheless require EPA to consider the effects that Maine's WQS would have on the Maine Indian Tribes' interests and welfare as we exercise our existing CWA authority. This is not different in kind from the way in which the CWA generally obligates EPA to consider and comply with the requirements of the CWA in assessing impacts of state and EPA decisions on the interests and welfare (in this instance human health, specifically) of persons in light of the goals of the CWA. In other words, EPA must evaluate the adequacy of Maine's WQS as they apply to waters within Indian lands using a standard or methodology that is consistent with the requirements of the CWA. The trust responsibility to the Maine Indian Tribes together with the Agency's authorized means of implementing the CWA require EPA to consider impacts on the Tribes in relation to protections of tribal resources that are addressed by the settlement acts and the CWA. See e.g., the discussion in EPA's Decision Support Document regarding the "designated use" of sustenance fishing and its protection under the CWA.

In addition, as we will discuss further below, the CWA assigns EPA a very important role in overseeing state surface WQS programs. Therefore, EPA's decision finding that Maine has the authority to establish WQS for waters within Indian lands will not prevent EPA from continuing to work with the Tribes and will not prevent EPA from communicating with all interested parties to improve coordination in protecting water quality in the surface waters in question. In fact, EPA's decision letter to ME DEP is a concrete example and manifestation of how CWA requirements provide for EPA's protection of the Maine Indian Tribes' interests and welfare in a way that is consistent with the jurisdictional framework established by Congress in Maine through the settlement acts and with the trust responsibility to the Tribes.

Maine's comments about the trust

As EPA earlier articulated in its responses to comments on Maine's NPDES program application in 2003, EPA disagrees with Maine's assertion that the federal government has no trust relationship or responsibility with respect to the Southern Tribes' reservations. While it is true that Congress curtails the applicability of the Non-Intercourse Act to the Penobscot Nation and the Passamaquoddy Tribe in MICSA Section 1724(g)(1), Congress also created similar responsibilities in Sections 1724(g)(2) and (3) that apply post-MICSA. Section 1724(g)(3) requires the approval of the Secretary of the Interior for six specific types of land transfers within the Southern Tribes' "territories,"

which have been defined, in MIA,[1] to include the reservations.[2] See 25 U.S.C. §1724(g)(3). Section 1724(g)(2) states that "any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory ... shall be void ab initio and without any validity in law or equity." 25 U.S.C. §1724(g)(2). This language is very similar to that of the Non-Intercourse Act which states that no transfer of land or title to land from any Indian nation or Tribe "shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. §177. More importantly, Congress intended for these MICSA sections to replace the Non-Intercourse Act as a source of federal trust responsibility. Both houses of Congress, in responding to concerns about federal protection of the Southern Tribes, acknowledged that "[o]ne of the most important federal protections is the restriction against alienation of Indian lands without federal consent. [The sections that eventually became Sections 1724(g)(2) and (3)] specifically provide] for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. §177." H.R. DOC. NO. 96-1653, at 15 (1980); S.R. DOC. NO. 96-957 at 15(1980). As Congress confirms, Sections 1724(g)(2) and (3) essentially replace the Non-Intercourse Act as a source of federal trust responsibility. Reading MICSA as Congress intended would mean that the reservations are subject to a federal trust responsibility by nature of their inclusion as delineated parts of Penobscot Indian Territory and Passamaquoddy Indian Territory. See 25 U.S.C. §§1724(g)(2) and (3); 30 M.R.S.A. §6205.

Additionally, there are other sources of the federal trust relationship with respect to the reservations, as well as to the Southern and Northern Tribes' trust lands. It is obvious that the reservation lands are central to federally protected rights reserved for the Penobscot Nation and the Passamaquoddy Tribe. MICSA federally recognizes the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. 25 U.S.C. §1721. The Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains a similar provision at Sec. 2 (a)(1). In addition, MIA reserves, for the Southern Tribes, hunting and fishing rights within their reservations. 30 M.R.S.A. §6207(4). Both the House and Senate Committee reports relating to MICSA confirm that Congress intended for the Southern Tribes to have "the permanent right to control hunting and fishing ... within their reservations" according to the terms set out in MIA. H.R. DOC. NO. 96-1653, at 17 (1980); S.R. DOC. NO. 96-957 at 16 (1980). MICSA also reserves, for the Penobscot Nation and the Passamaquoddy Tribe, the right to manage their natural resources. 25 U.S.C. §1724(h). See also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. Therefore, it is reasonable to conclude that Congress reserved the trust lands in order to preserve the Maine Tribes' cultural activities, in

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[1]The Maine statute that is ratified by MICSA. See 30 M.R.S.A. §6205.

[2]The First Circuit has recognized that the necessity of the signature of the Secretary of the Interior implicates a federal trust responsibility. See Key Bank 112 F.3d. 538 at 553.

particular sustenance fishing, and intended that there be some federal responsibility to protect these activities consistent with the trust responsibility and the requirements of the CWA. For additional discussion relevant to the Maine Tribes' sustenance fishing practices, see EPA's Decision Support Document and DOI's January 30, 2015 letter to EPA.

Ultimately, the CWA provides the relevant authority for EPA to approve or disapprove Maine's surface WQS. 33 U.S.C. §1251 et. seq. As mentioned before, MIA, in 30 M.R.S.A. Section 6207(4), reserves for the Penobscot Nation and the Passamaquoddy Tribe, a sustenance fishing right within their reservations. MICSA, in 25 U.S.C. Section 1724(h), reserves for these Tribes, the right to manage their natural resources. See also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. Federal common law principles, and Congressional intent, support the position that the Tribes have the ability to practice sustenance fishing in their reservation and trust land waters. Section 303(c) of the CWA specifically gives EPA the authority to ensure that states adopt WQS that are protective of human health and the environment. 33 U.S.C. § 1313(c). EPA is the federal body charged with protecting the very resource that is reserved for Maine's federally recognized tribes, and the CWA gives EPA the authority to oversee state WQS. EPA should account for tribal resources, such as their fishing rights, in exercising that oversight authority, as required by the CWA and consistent with CWA authority and the trust relationship.

Moreover, it is clear that the State of Maine itself contemplated that sustenance fishing practices for the Maine Tribes would be part of the settlement embodied in MIA and subsequently ratified by Congress through MICSA. MIA section 6207(1) provides that "[i]n addition to the authority provided in this subsection, the Passamaquoddy Tribe and the Penobscot Nation, subject to the limitations of subsection 6, may exercise within their respective Indian territories all the rights incident to ownership of land under the laws of the State." The legislative history to MIA clearly indicates that both reservation lands and lands acquired pursuant to MIA after its enactment (trust lands) would enjoy riparian or littoral rights under state law and/or principles of common law.

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law. Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are covered by the selling party or included by general principles of law. State of Maine, Maine Legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "AN ACT to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory." Paragraph 14. 1980.

In support of the State's assertion that no trust relationship exists with respect to the reservations, Maine cites in its comments to a letter from DOI in which that Agency, according to Maine, stated that "fee title to the islands in the Penobscot River was held by Maine in trust for the benefit of the Penobscot Nation" and also cited to *Bangor Hydro-Electric Co.,* 83 FERC ¶ 61,037, 1998 WL292768 (F.E.R.C.). Bangor is a Federal Energy Regulatory Commission (FERC) case regarding the licensing of a hydro-electric project under the Federal Power Act (FPA). 16 U.S.C. §§797, 808. The Penobscot Nation and DOI intervened regarding parts of the Penobscot Nation's lands that were inundated when the project was originally built. Both Bangor and the case upon which it relies, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99,115 (1960), recognized that the narrow definition of "reservations," which relies on a strictly property oriented understanding of the term, is confined to the FPA. Bangor at 10. Tuscarora plainly says that "the national 'paternal interest' in the welfare and protection of the Indians is not the 'interests in lands owned by the United States' required, as an element of 'reservations' by § 3(2) of the Federal Power Act." Tuscarora, at 115. FERC's assertion in Bangor that "no trust relationship exists" with respect to aboriginal lands, should therefore be understood in this limited capacity, that "no trust relationship exists" for the purposes of the FPA, which requires an interest in lands owned by the United States. Bangor is therefore irrelevant in determining whether there is a federal trust responsibility with respect to the reservations outside the context of the FPA, and therefore does not establish or constitute precedent for the trust responsibility in the context of EPA's implementation of under the CWA.

Tuscarora, however, highlights the difference between 1) a narrow trust responsibility relating to lands "held in trust" and 2) a more general interest in the welfare and protection of the Indians, which points to a general federal trust responsibility, a distinction which is important to this discussion. In federal Indian law, the federal government's general trust responsibility derives from the United States Constitution as further developed by the Supreme Court and other federal courts of the United States, and has become a key aspect of federal Indian common law. The general trust responsibility includes the notion that the federal government has a responsibility, as a general matter, to consider and protect Indian tribes' interests when implementing federal statutes or evaluating decisions that may affect tribes. The federal government's attention to the Indian law canons of statutory construction that have evolved in the common law is an element of this general trust responsibility. The general trust responsibility does not, however, create or establish substantive obligations on the part of the federal government.

The specific trust on the other hand derives from substantive rights established in statutes or regulations that are implemented by the federal government on behalf of Indian tribes. The specific trust is sometimes referred to as an obligation that entails fiduciary duties on the part of the federal government to protect specified tribal rights. As noted in Cohen's Handbook of Federal Indian Law, "[t]he concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and the opinions of the Supreme Court." Cohen explains that the Supreme Court played a major role in defining the relationship between the federal government and Indian tribes. The Court's cases established principles, among others,

such as tribes' right to own land and to set land use policies for those subject to tribal authority, as a federal duty to protect tribal rights including tribal property rights, and as a rationale for canons of construction of various legal documents in light of the federal government's obligation to protect tribal sovereignty and property. See generally section 5.04[3][a] of Cohen's Handbook. In this case, EPA has attended to the general trust responsibility to the Maine Tribes by consulting with them about and understanding their interests in the decisions we are making regarding Maine's WQS in tribal waters, and by implementing the requirements of the CWA that apply to the WQS program. The substance of EPA's review of those WQS is governed by the generally applicable requirements of the CWA that guide EPA's implementation, not by any authority that creates a specific fiduciary obligation to any particular tribe in Maine.

We note that Maine also argues that CWA Section 518, a provision that allows Indian tribes to apply for treatment in the same manner as a state ("treatment as a state" or "TAS") status for purposes of certain CWA programs, is not available to the Tribes in Maine. Accordingly, says Maine, that fact is another reason why EPA has no trust responsibility to the Maine Tribes. EPA responds that its decision on Maine's WQS submissions relates to *Maine's* submission regarding WQS for waters in Indian lands, which is governed by EPA's CWA authorities and responsibilities, and which is unaffected by the separate issue of potential tribal roles under Section 518.[3] Even assuming, only for purposes of responding to Maine's specific comment, that none of the Maine Tribes could qualify for TAS status under CWA Section 518, EPA strongly disagrees that such fact, even if true, would mean that no trust responsibility exists to the Maine Tribes. This RTC document and EPA's Decision Support Document each address and demonstrate EPA's exercise of its CWA authority consistent with the trust responsibility to the Maine Tribes notwithstanding EPA's determination that Maine has adequate legal authority to establish WQS for waters within Indian lands. Maine's comment about CWA section 518 is not relevant to the question of whether a federal trust responsibility exists in Maine under the settlement acts and the CWA.

From the perspective of EPA's earlier description of the general and specific trust responsibilities, and for all of the other reasons discussed above, a federal trust relationship clearly does exist with respect to the Penobscot Nation and Passamaquoddy Tribes' reservations as well as with respect to the Southern and Northern Tribes' trust lands. In summary, although MICSA Section 1724(g)(1) negates the application of the Non-Intercourse Act (a statute often identified as a source of the federal government's specific, as opposed to general, trust responsibility) to these Indians, Congress intentionally included modern non-intercourse provisions in MICSA Section 1724(g)(2) and (3), thereby continuing a federal trust responsibility to the Tribes, and more specifically to their reservations. In addition to these non-intercourse provisions and the common law sources of the federal government's general trust responsibility, the CWA

[3] EPA notes that on October 8, 2014, the Penobscot Nation submitted to EPA an application "to administer water quality standards program and for federal approval of the standards" covering the Maine Stem of the Penobscot River from Indian Island north to the confluence of the east and west branches of the river. Included in the Nation's submission was a TAS application. EPA has not commenced a formal review of the Nation's application, wanting first to address Maine's submissions.

gives EPA the authority to review the State's WQS for consistency with the statute and thereby to utilize its existing authority to protect the reservations and trust lands and the practices and rights associated with them. The relevant settlement acts established trust lands for the Northern and the Southern Maine Tribes, and specifically defined those holdings to include "land or natural resources," which in turn specifically includes "fishing and fishing rights." The settlement acts contain provisions about the potential disposition and management of those resources. The relevant statutory provisions have been cited earlier in this RTC document. So in utilizing our existing CWA authority to protect the Maine Tribes' interests and welfare in relation to the reservations and trust lands, EPA is acting consistently with the settlement acts in Maine and the trust responsibility.

The State also cites in its comments to the First Circuit's opinion in *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007) in support of its contention that EPA has no trust responsibility to the Maine Indians Tribes in making decisions under the CWA. Maine claims that the CWA contains no set of written standards that anyone may review to assess whether a particular implementation decision EPA may render complies with its trust obligation under the CWA. Thus, Maine asserts, an EPA decision that breathes substantive or procedural requirements into the CWA pursuant to its trust relationship, but independent of the CWA, would be arbitrary and capricious, citing to *Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C. Circuit 2001).

EPA agrees with Maine's assertion that any specific requirements that flow from a specific trust relationship must derive their content from and are the product of applicable law, whether treaties, statutes, or regulations. See *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1482 (D.C. Cir. 1995); *State of California v. Watt*, 668 F.3d 1290, 1324 (D.C. Cir. 1981). However, EPA disagrees with Maine to the extent the State argues that EPA may not, in exercising our existing authority and discretion under the CWA, be informed by our consideration of tribal interests consistent with the general trust relationship. The CWA includes requirements for how EPA must review the adequacy of WQS, and EPA must apply those requirements to Maine's WQS in Indian waters. In considering the impacts of Maine's WQS on the water quality-related interests and welfare of the Indian Tribes in Maine, and most notably on the tribal sustenance fishing practices associated with Indian land waters, EPA is exercising its CWA authority consistent with the trust relationship, the requirements of the CWA, and the settlement acts. EPA's decision that Maine's human health criteria are not sufficiently protective of the CWA "designated uses" that apply to waters in Indian lands is directly tied to a fundamental requirement of the CWA, *i.e.* that WQS must protect designated uses. See EPA's Decision Support Document for a more detailed discussion. In this regard, EPA's decision to disapprove certain of Maine's WQS is entirely consistent with the holding in *Nulankeyutmonen Nkihttaqmikon v. Impson* in the sense that EPA's decision is derived from CWA requirements, provisions in the settlement acts, and Congress's intent to preserve the Tribes' sustenance fishing practices, culture, and lifestyle.

B. Many comments from the Maine Tribes relating to the question of Maine's jurisdiction focused on the concept of the Tribes' inherent sovereignty, and/or the concept of "internal tribal matters" as an explicit expression in MIA/MICSA of the Southern Tribes' retained inherent sovereign status. Maine submitted comments along the lines that MIA/MICSA provide the State with jurisdiction, at least implying that these concepts raised by the Tribes do not function to alter that outcome.

Examples of the Tribes' comments

1. Establishing an appropriate fish consumption rate (FCR) and cancer risk level (CRL) for use in establishing WQS under the CWA are each an "expressly retained sovereign activity."

2. Setting CRLs and FCRs amounts to regulation of the Tribes' sustenance fishing right, which the State is not authorized to do under MIA and MICSA.

3. Establishing WQS under the CWA is an inherent sovereign right and is an internal tribal matter.

4. If the Indian Tribes, as opposed to the State, were establishing WQS in Indian waters, the Tribes would not be regulating any non-tribal members.

5. An Indian Tribe's inherent authority or tribal sovereignty cannot be divested unless Congress expressly acts to do so.

6. Water quality in Indian waters is something that may directly threaten the "health or welfare of the tribe." Water rights and governmental jurisdiction are "critical elements necessary for tribal sovereignty."

7. Congress did not "unequivocally abrogate the Tribe's inherent authority to protect the sustenance fishery."

8. The legislative history to MICSA indicates that MICSA's sustenance fishing right is an example of an "expressly retained sovereign activity."

9. Inherent sovereignty applies in this context and allows Indian tribes to protect subsistence practices embodying cultural, spiritual, and physical elements.

10. Inherent sovereignty precludes Maine from regulating in this way. Sustenance fishing is an aboriginal right.

11. The notion that establishing WQS in Indian waters is an internal tribal matter is supported by federal and State governments' adoption of principles in the United Nations declaration on the Rights of Indigenous Peoples.

12. Determining a CRL that tribal members will be subjected to is an internal tribal matter. Maine is asking EPA to approve Maine's policy judgment about the level of risk the Tribes should face, which is inappropriate and inconsistent with the Tribes' inherent sovereignty.

13. Protection of tribal health and welfare is an internal tribal matter over which the State may not exercise jurisdiction, and includes environmental regulation.

Examples of the State's comments

1. The CWA and MIA/MICSA provide Maine with the authority to establish WQS in waters within Indian lands in Maine.

2. MICSA's savings clauses would preclude the Maine Indian Tribes from implementing a WQS program in Maine.

EPA's responses to comments concerning principles of inherent tribal sovereignty (and MIA's and MICSA's internal tribal matters provision) and its effect on Maine's legal authority to establish WQS for waters within Indian lands

Basic tenets or principles of federal Indian common law as they relate to tribal sovereignty

EPA agrees with the comments that set forth the basic tenets of federal Indian common law supporting the idea that Indian tribes have retained their inherent powers as sovereign entities (unless expressly abrogated by Congressional action), that such sovereign status has existed since long before contact with European nations, and that Indian tribes' sovereignty it is not something that was delegated or granted to the tribes by Congress. EPA has consistently sought to uphold the inherent sovereignty of Indian tribes wherever applicable. See, e.g., EPA's 1984 Indian Policy.

Many of the federal court opinions cited by the Penobscot Nation in its comments reflect or discuss certain aspects of these common law principles of federal Indian law. See, e.g., *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *State of Washington, Dep't of Ecology v. U.S.E.P.A.* 725 F. 2d 1465 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Oklahoma Tax Comm'n v Sac & Fox Nation*, 508 U.S. 114 (1993); *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g*, 476 U.S. 877 (1986); *Kiowa Tribe of Oklahoma v. Mfg techs, Inc.* 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217 (1959); *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005); *Montana v. United States*, 450 U.S. 544 (1981); *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996).

These general principles of Indian common law cited by the Penobscot Nation, however, are not dispositive of and do not directly answer the fundamental jurisdictional question before EPA in this matter: what effect do the settlement acts have on the jurisdictional relationship among the Southern and Northern Tribes, the State of Maine, and the federal government when implementing the CWA WQS program applicable to Indian waters within Indian lands in Maine? The cases cited by the Penobscot Nation were not decided against the backdrop of statutes like MIA and MICSA which, as EPA has explained throughout this RTC document, alter in certain important respects the Maine Indian Tribes' inherent sovereign status as compared to the more typical situation that exists in parts of the United States that do not have statutes like MIA and MICSA.[4]

EPA recognizes the fundamental principles of federal Indian law relating to inherent tribal sovereignty, and is aware that Congress has plenary power over Indian affairs as established in the Indian commerce clause of the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As a result, only Congress may change the jurisdictional relationships in Indian country by expanding or contracting state, tribal and federal jurisdiction. If Congress takes any action to limit a tribe's sovereignty, it must do so expressly and any ambiguities must be resolved in the tribe's favor. Congress may provide for state law to apply in Indian country, but it must do so expressly. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

In this matter, EPA is applying the Congressional grant of legal authority to Maine in the Southern and Northern Tribes' Indian lands which is adequate to support the State's assertion of legal authority to implement a CWA WQS program applicable to waters in Indian lands located in Maine. See EPA's Decision Support Document for a more detailed discussion and analysis. Both MIA and MICSA, as further elucidated in MIA's and MICSA's legislative histories, embody a jurisdictional framework that serves as a compromise in settlement of the land claims that gave rise to these statutes. The Senate Report accompanying MICSA specifically addressed concerns about the impact of these

[4] The Penobscot Nation also cites to *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005) as a First Circuit opinion that addresses tribal sovereignty "absent their divestment by the federal government." See Page 14 of the Penobscot Nation's comments. This case, however, like the others cited by the Tribe, does not stand for the proposition that MICSA did not give Maine the legal authority to establish WQS in waters within Indian lands.

two statutes on the Penobscot and Passamaquoddy Tribes' sovereign rights and jurisdiction. "While the settlement represents a compromise in which State authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with [certain legal precedent] the settlement provides that henceforth the Tribes will be free from State interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the Tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes." Page 14, Special Issues. The Senate Report goes on to describe other ways in which the Tribes' sovereignty is protected, including, but not limited to, the hunting and sustenance fishing right provisions in the statutes and the provisions granting to the Southern Tribes state constitutional status of municipalities. However, the nature of this compromise in retaining certain aspects or elements of the Tribes' sovereignty does not override or conflict with the fact that Congress in MICSA ratified a jurisdictional relationship among the Tribes and the State that gave Maine the authority to apply state law to those matters not falling within either:1) the internal tribal matters provision in the statute; 2) the Southern Tribes' reservation hunting and fishing rights or 3) certain other matters specifically reserved by the statutes to the Tribes.[5] EPA's conclusion that Maine has the legal authority to establish WQS in waters within Indian lands is consistent with MIA and MICSA because, as discussed below in more detail, doing so is not an internal tribal matter and does not alter or regulate the Southern Tribes' right to take fish within their reservations for their individual sustenance. In fact, EPA's Decision Support Document explains that the Southern and Northern Tribes' fishing rights are being protected under the CWA notwithstanding Maine's authority to establish WQS in waters within Indian lands.

Consistent with the analysis above of the Maine Tribes' sovereign status, as expressed in MICSA, which ratifies MIA, the federal Indian common law cases cited by the Penobscot Nation are generally inapposite here. The vast majority of the cases did not address the scope of the sovereign status of an Indian tribe under statutes similar to MIA and MICSA. See e.g., *Kiowa Tribe of Oklahoma v. Mfg techs, Inc.* 523 U.S. 751 (1998); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217 (1959); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Montana v. United States*, 450 U.S. 544 (1981); *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996). In addition, although the Penobscot Nation also cites to several First Circuit cases discussing some aspects of inherent tribal sovereignty generally, none of those cases held that Maine law did not generally apply to the Maine Indian Tribes under MIA section 6204 and MICSA sections 1725(a) and 1725(b)(1) on the basis of the Tribes' inherent sovereign status. See, e.g., *Akins v. Penobscot Nation*, 130 F. 3d 482 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F. 3d 706 (1st Cir. 1999); *Bottomly v. Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 19179); and *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005).

[5] The other matters referenced here are not pertinent to EPAs decision.

The effect of the settlement acts on federal Indian common law as they relate to tribal sovereignty

The settlement acts clearly represent a substantial revision to the relationship between state and Indian jurisdiction that would apply in Maine absent the settlement acts. Virtually every court that has reviewed the statutes has emphasized that it is impossible in Maine to simply apply federal Indian common law without first starting with the settlement acts. See, e.g. *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999), cert. denied 527 U.S. 1022 (1999); *Penobscot Nation v. Georgia-Pacific*, 254 F.3d 317, 320 (1st Cir. 2001), cert. denied 534 U.S. 1127 (2002); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983), app. dismissed 464 U.S. 923 (1983); *Great Northern Paper Inc. v. Penobscot Nation*, 770 A.2d 574, 580 (Me. 2001), cert. denied -- U.S. –, 122 S.Ct. 543 (2001); *Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007). For example, the settlement acts create a status for the Northern and Southern Tribes (although there are statutory differences for each of the two groups) that is unique in the nation, and extends state authority over the Tribes to an unusual extent. Therefore, to say simply that federal Indian common law applies to the Maine Tribes (without any qualification) understates the critical role the settlement acts play in revising the customary formula for gauging Indian sovereignty.

On the other hand, it overstates the effect of the settlement acts to say that federal Indian law is irrelevant to interpreting how the settlement acts apply in Maine. As a threshold matter, for example, MICSA is a federal statute that modifies tribal jurisdiction, and therefore is subject to the interpretive doctrines in federal common law giving the tribes the benefit of the doubt where the statute is ambiguous. *Fellencer*, 164 F.3d at 709. Additionally, MICSA ratified the jurisdictional formulation in MIA for the Southern Tribes, and MIA specifically preserves "internal tribal matters" from state regulation. When analyzing the scope of "internal tribal matters," the First Circuit has twice referred to general principles of federal Indian law, both common law (*Akins*, 130 F.3d at 489-90) and statutory provisions (*Fellencer*, 164 F.3d at 711), to help understand the extent of that term. MICSA and its legislative history make it clear that "internal tribal matters" is not a reservation of the Southern Tribes' full inherent sovereignty that predated passage of MICSA. But the term nevertheless protects key elements of the Southern Tribes' inherent sovereignty from state regulation. Therefore, when confronted with MICSA, courts have looked to the body of federal Indian law to better understand how a tribe's inherent sovereignty works in the customary case. In EPA's decision on Maine's WQS submission, EPA has similarly filtered the body of general federal Indian common law through the lens of MICSA, recognizing its unique requirements, while understanding at the same time that the statute operates against the backdrop of federal Indian common law.

EPA would disagree with any assertion that the Southern or Northern Tribes are no longer sovereigns, notwithstanding that the Southern and Northern Tribes are treated differently by the settlement acts in certain respects. Congress specifically recognized the tribal governments of the Southern and Northern Tribes. 25 U.S.C. §§ 1721(a) (3),

(4), and (5), 1722(a), (h) and (k); Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, at Sec. 2 (a)(1) and Sec. 3(1). Congress charged the Tribes with developing written instruments to govern their affairs when acting in a governmental capacity. 25 U.S.C. § 1726 and Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, at Sec. 7. It is explicitly clear in MIA and MICSA that the Southern Tribes exercise sovereignty in the sense of having governmental authority over their internal affairs and may take fish for their individual sustenance within their reservations. Using the term sovereignty when referring to the activities of these tribal governments is completely consistent with, indeed is compelled by, the terms of MICSA and The Aroostook Band of Micmacs Settlement Act. But the focus of this matter is the extent of the State's authority in relation to that which may be reserved to the Southern and Northern Tribes, and simply embracing or banishing the term "sovereignty" (without any qualifications or more nuanced explanations) contributes little to answering that question.

Penobscot Nation's sovereignty argument in relation to MIA section 6204

The Penobscot Nation asserts that the Tribe's full aboriginal inherent sovereignty was intended by Congress to be retained in MICSA. The Penobscot Nation argues this is true notwithstanding the language in MIA section 6204 generally subjecting all Indian Tribes in Maine to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein. The Penobscot Nation argues that section 6204 "merely confirms that the Nation will adopt Maine law as its own, but it does not expressly impose any form of State regulatory authority upon the Tribe or its natural resources." The Tribe cited to *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P. 2d 1085 (C.A. 1974), a case included in one section of MICSA's legislative history.

Although the Tribe's comment doesn't refer to MIA section 6202, "Legislative findings and declaration of policy," EPA notes that this language may also be relevant to the Tribe's argument:

> The foregoing agreement between the Indian claimants and the State also represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State.

As part of this overall argument in support of the Tribe's assertion of full aboriginal inherent sovereignty, the Tribe also references certain passages from MICSA's legislative history and federal case law. For a number of reasons, EPA disagrees that this particular argument, either on its own, or in conjunction with the Tribe's other arguments about

inherent tribal sovereignty, results in a legal conclusion that Maine is precluded by MIA and MICSA from establishing WQS in waters within Indian lands in Maine.

First, as set forth in EPA's Decision Support Document, and as explained in various other portions of this RTC document, the statutory provisions of MIA and MICSA and those statutes' legislative histories, very clearly establish that state law applies to the Penobscot Nation and the Passamaquoddy Tribe (and the other Maine Tribes) in the context of environmental regulation. Moreover, as the First Circuit said in *Maine v. Johnson*:

> In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected in the particular case, *unless* the internal affairs exemption applies; and the scope of that exemption is determined by the character of the subject matter. Discharging pollutants into navigable waters is not of the same character as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property. [*Maine v. Johnson*, 498 F. 3d 37, 46.]
>
> In addition to Maine's explicit authority over tribal lands and natural resources, the Settlement Acts expressly divested the Maine Tribes of sovereign immunity, *25 U.S.C. § 1725(d)*, and with limited exceptions, made the Maine Tribes subject to the general criminal and civil law of Maine even with respect to activities carried out on tribal lands. *25 U.S.C. § 1725(a), (c)*; *30 M.R.S.A. § 6204*. [*Maine v. Johnson*, 498 F. 3d 37, 42-43.]
>
> [T]he question here is whether *Maine* has adequate authority to implement permitting as to the tribes' lands, and *section 6204* on its face is about as explicit in conferring such authority as is possible. [*Maine v. Johnson*, 498 F. 3d 37, 43.]

Each of these passages from *Maine v. Johnson* directly conflicts with the Tribe's argument that MIA and MICSA did not intend to provide Maine with the legal authority to regulate the Penobscot Nation under state law because the Settlement Acts intended to preserve the Maine Tribes' full aboriginal inherent sovereignty. Indeed, every time the U.S. Court of Appeals for the First Circuit has adjudicated the extent of Maine's jurisdiction in Indian territories, it is clear the court held that MICSA applies the laws of the State to the Southern Tribes.

Five different First Circuit cases adjudicating the application of state law in the Southern Tribes' territories have never hinted at the idea that state law applies to the Tribes as anything other than state law. *Passamaquoddy Tribe v. Maine*, 75 F.3d at 789, n. 1 (1st Cir. 1996) ("Among other things, the Gaming Act, if it applied, would preempt various provisions of Maine's criminal law, including 17–A Me. Rev. Stat. Ann. §§ 953–954."); *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997) ("This case turns on whether the issuance of stumpage permits is an 'internal tribal matter.' If this is an internal tribal matter, then under both Settlement Act and the Implementing Act, Maine law does not apply and no claims arise under the Maine Constitution or under the Maine

Administrative Procedure Act. Thus no claim arises under state law warranting the exercise of diversity jurisdiction." 130 F.3d at 485); *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), cert. denied, 527 U.S. 1022, 119 S. Ct. 2367, 144 L. Ed. 2d 771 (1999) (Maine state law did not apply only because the decision whether to employ a tribal member or a non-tribal member as a community nurse fell within the "internal tribal matter" exception to the applicability of state law under MIA and MICSA); *Penobscot Nation v. Georgia Pacific Corporation*, 254 F. 3d 317 (1st Cir. 2001) (Company demanded documents from Maine Tribes based on Maine's Freedom of Access Act. "Under Maine law, the Tribes are regulated in certain respects as municipalities, and municipalities are covered by the Access Act." 254 F.3d at 318.); *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007) ("The Southern tribes say that state authority over land and water resources can coexist with tribal authority, pointing to certain provisions of the Settlement Acts that explicitly make state authority 'exclusive.' So, the tribes say, the existence of Maine's authority does not automatically negate concurrent tribal authority over the same subject matter. But the question here is whether Maine has adequate authority to implement permitting as to the tribes' lands, and section 6204 on its face is about as explicit in conferring such authority as is possible. What the tribes might do if Maine did not legislate is beside the point. The Southern tribes' concurrency argument would have bite only if their own 'concurrent' regulatory authority, if it existed, took priority over enacted Maine law. But this would turn on its head the explicit language of the Settlement Acts giving Maine authority over land and water resources in the tribes' territories. If there is 'concurrent' jurisdiction at all, it is subordinate to Maine's overriding authority to act within the scope of section 6204, which clearly includes Maine's power to regulate discharge permitting consistent with the Clean Water Act.") And none of these cases held that the reference to W*auneka v. Campbell*, 22 Ariz. App. 287, 526 P. 2d 1085 (C.A. 1974), in MICSA's legislative history, supports the proposition that Maine state law does not apply as state law to the Southern Tribes under MIA section 6204.

MIA's internal tribal matters provision

In this subsection of EPA's RTC document, EPA provides a legal analysis of the "internal tribal matters" provision in MIA, as ratified by MICSA, as well as a discussion of how the First Circuit has construed the provision in its decisions to date. As explained below, EPA concludes that establishing WQS in waters within Indian lands is not an internal tribal matter. That conclusion is well-supported by First Circuit precedent, which strongly suggested that the balancing factors from *Akins* and *Fellencer*, that should be used in circumstances that constitute close questions of the applicability of the internal tribal matters provision, would be *inappropriate* if applied to the question of Maine's authority to establish WQS in waters within Indian lands. *Maine v. Johnson,* at 46. Nevertheless, because of the prominence of the concept of internal tribal matters in the Penobscot Nation's comments, EPA analyzes the concept below in detail. EPA even analyzes the balancing factors from *Akins* and *Fellencer* as applied to the WQS question to demonstrate that, even if it were appropriate to apply the factors, the analysis shows that Maine has authority to establish WQS in waters in Indian lands and that such

authority is not inconsistent with and does not run afoul of the internal tribal matters provision in MIA.

EPA recognizes the importance of the "internal tribal matters" provisions in MIA section 6206(1), as ratified by MICSA section 1725(b)(1), which by its terms only applies to the two Southern Tribes. We agree that, to the extent a subject is an internal tribal matter, the State is precluded from regulating that subject and that it falls beyond the reach of the grant of state authority in MIA section 6204, as ratified by Congress. Therefore, the scope of the internal tribal matters concept essentially defines the boundary of the State's jurisdiction and the State's ability to regulate activities in the Southern Tribes' territories.[6]

The internal tribal matters provision in MIA and MICSA is a reservation of authority to the Southern Tribes based on their inherent sovereignty that predates MICSA. Congress did not intend, however, to reserve through MICSA the *full scope* of the Southern Tribes' inherent sovereignty which the federal courts had recently recognized prior to MICSA. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-66 (1st Cir. 1979); *Joint Trib. Coun. of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). That interpretation would cause the exception of internal tribal matters to swallow the rule Congress created, which is that state law generally applies to the Maine Tribes and their lands. But as we discuss further below, the common law generally interpreting Indian Tribes' inherent sovereignty is relevant to assessing the scope of internal tribal matters, at least as a threshold test. If a subject matter would be beyond the reach of any Indian Tribe's inherent sovereignty, it could not qualify as an internal tribal matter under MICSA. If a subject matter is generally within the inherent authority of a Tribe to govern (and one decides it is appropriate to undertake an internal tribal matters analysis), EPA concludes that the next step in the analysis consists of using the factors that the First Circuit has derived in analyzing the provisions of MIA and MICSA. In short, EPA has concluded that "internal tribal matters" under MICSA is a subset of the inherent authority Indian Tribes generally retain as reflected in the general principles of federal Indian common law.

In addition, we note that it would be difficult to reconcile the unique wording of MICSA section 1725(f) with the interpretation that internal tribal matters reserves the Southern Tribes' unimpaired inherent sovereignty. This section provides:

> The Passamaquoddy Tribe and the Penobscot Nation <u>are hereby authorized to exercise jurisdiction</u>, separate and distinct from the civil and criminal jurisdiction of the State of Maine, <u>*to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto*</u>.

25 U.S.C. § 1725(f) (emphasis added). These provisions of MICSA show that the jurisdictional arrangement Congress ratified in MICSA results in an atypical scope for the Southern Tribes' inherent authority. That is because an Indian Tribe's inherent

[6] MIA and MICSA also identify areas of jurisdiction specifically reserved to the Southern Tribes, but those provisions are not relevant to this WQS analysis under the CWA. See e.g. sections 6209-A and 6209-B.

sovereignty typically is not dependent on or subject to definition by state law in the United States, and it requires no affirmative grant of authority from Congress for a Tribe to assert its inherent sovereignty in relation to state law. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n. 14 (1982) ("[N]either the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes."], see also id. at 168 ("Tribal sovereignty is neither derived from nor protected by the Constitution. Indian tribes have, however, retained many of the powers of self-government that they possessed at the time of their incorporation into the United States." (Stevens, J. dissenting; footnote omitted)). But Congress has plenary authority to alter the scope of an Indian tribe's inherent sovereign authority.

Congress understood that MIA had essentially flipped the presumption against state law applying in Indian country, and the wording of section 1725(f) therefore makes sense. Faced with ratifying a state statute that included an aggressive extension of state authority over the Southern Tribes and their territories, using sweeping language creating a presumption that state law applies, Congress was being careful to point out that the Southern Tribes still exercised independent jurisdictional authority for certain purposes under the terms of the MIA. The wording of section 1725(f) is fully consistent when we conclude that internal tribal matters reserved some subset of the Southern Tribes' inherent sovereignty, and that Congress was expressly confirming that residual authority. MICSA, however, also ratifies a substantial grant of authority to the State, which includes adequate authority to establish WQS in waters in Indian lands. Normally, outside Maine, establishing WQS in Indian lands would fall outside state jurisdiction. Here, MIA and MICSA provide that authority to the State.

Consistent with the discussion above regarding the scope and limitations of the internal tribal matters provision, the portion of MICSA's legislative history which specifically speaks to the States' authority to regulate the *environment* in the Southern Tribes' territories is direct and compelling. Most notably, when discussing the specific section of MICSA that ratifies MIA's jurisdictional arrangement for the Southern Tribes, the Senate Report concludes:

> . . . State law, including but not limited to laws regulating land use or management, conservation and <u>environmental protection</u>, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27(emphasis added).

The only other place in the Congressional Committee Reports that speaks directly to regulation by the State of environmental matters in Indian lands is the discussion of the first savings clause in MICSA, section 1725(h). This provision makes federal Indian law up to 1980 generally applicable in Maine, but only if that law does not affect or preempt state jurisdiction:

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

25 U.S.C. § 1725(h)(emphasis added). This provision does not control what jurisdiction Maine received under MICSA; it simply protects the jurisdiction granted to the State elsewhere in MICSA from inadvertent intrusion by general federal Indian law. As a structural matter, however, it is notable that Congress specifically identified "environmental matters" as an area of state law to be protected, strongly supporting our conclusion that environmental regulation was included in the grant of authority to the State. The Senate Report confirms this conclusion:

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian Tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. at 31; see also H.R. Rep. at 29. This passage makes it very clear that Congress understood it was making state environmental law applicable to Indian lands.

As noted earlier, the First Circuit's precedent interpreting MIA and MICSA is consistent with Congress' intent to make Maine environmental law apply to Indian lands. And establishing WQS is, in character, much more akin to discharging pollutants into navigable waters than it is to such matters as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property.

First Circuit precedent interpreting MIA's and MICSA's internal tribal matters provision, including an analysis of the *Akins* and *Fellencer* factors

In its decision in *Maine* v. *Johnson*, the First Circuit squarely addressed the "internal tribal matters" provision in MIA, ratified by MICSA. In *Maine* v. *Johnson,* the Court noted that its decisions in *Akins* and *Fellencer* were the only two in which the Court had

directly construed the phrase "internal tribal matters" as applied to the Maine Tribes. The Court clearly distinguished both of those prior cases from the CWA NPDES program case before it, noting, among other things, that in each of *Akins* and *Fellencer*, the State disclaimed any interest in regulation or superintendence over the activities in question. The Court noted further that the Settlement Act's jurisdictional provisions clearly affirmed Maine's asserted power in the context of regulating discharges of pollutants into navigable waters, even for facilities located on tribal lands discharging into tribal waters. The Court stated that "[i]f the internal affairs exemption negated so specific a ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction." *Maine* v. *Johnson,* at 45. The Court subsequently noted that "[i]n our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected in the particular case, *unless* the internal affairs exemption applies," finding that discharging pollutants into navigable waters is not of the same character as the enumerated examples of internal tribal matters contained in the MIA. *Id.* At 46. The Court clearly rejected EPA's use of the "balancing test" that the Agency stated was consistent with the Court's analysis in *Akins* and *Fellencer*, noting that "discharging pollutants into navigable waters is not a borderline case in which balancing . . . or ambiguity canons . . . can alter the result." *Id.* At 46.

As noted above, in *Maine* v. *Johnson* the First Circuit suggested that EPA's application of the balancing factors and method of analysis derived from *Akins* and *Fellencer* was misplaced in an area of regulatory authority so clearly reserved to the State under MIA and MICSA. It therefore behooves EPA first to ask the question whether the facts and surrounding circumstances pertinent to Maine's WQS submissions are more akin to the circumstances present in *Maine v Johnson* or to those present in *Akins* and *Fellencer*. That is, is Maine's request to apply its WQS to waters within Indian lands clearly within its regulatory authority under MIA and MICSA in the way that the Court in *Maine v. Johnson* viewed regulating discharges of pollutants into navigable waters (where Maine expressed a strong interest in doing so)? Or does the WQS context before EPA now involve circumstances and relative tribal and state interests more akin to a dispute over whether non-tribal members have timber rights in Indian territory (where the State had disclaimed an interest in regulating the issue), or to a situation in which a tribe wanted the ability and right to determine who, as between a tribal member and non-tribal member, could work as a community nurse (and where the State disclaimed any interest in applying its anti-discrimination laws to that decision)?

Upon examination, the factual circumstances and relative tribal and state interests presented by Maine's establishment of WQS in tribal waters are clearly are more analogous and pertinent to those at issue in *Maine v. Johnson* than they are to those in *Akins* and *Fellencer*. Maine's WQS program falls within a broad area of environmental regulation; Maine has expressed a strong desire to exercise regulatory authority in this area; and there potentially would be non-trivial impacts on non-tribal members outside of tribal lands were EPA to find that MIA and MICSA preclude Maine from applying its WQS in waters in Indian land. Following the First Circuit's reasoning then, it would not even be appropriate for EPA to apply the balancing factors from *Akins* and *Fellencer* to determine whether Maine has jurisdiction to establish WQS for waters in Indian lands.

The Court found that the circumstances present in *Akins* and *Fellencer* were much closer legal questions as to whether the internal tribal matters provisions of MIA and MICSA applied, as compared to whether those provisions applied to the question whether Maine had authority to implement an NPDES program in Indian lands. Two critical factors that informed the Court's holding were the potential effects of a tribal NPDES program on non-members outside of Indian territories and the State's strongly expressed desire to implement such program itself throughout the State, including in waters within Indian lands. The Court's holding is consistent with the idea that the jurisdictional provisions of MICSA establish a presumption that Maine was provided with regulatory authority over a particular activity absent a finding that the internal tribal matter exception applied (and absent a showing that other explicitly reserved areas of tribal jurisdiction, clearly not relevant to the WQS context, applied).

Thus, the Penobscot Nation's use in its public comments of the *Akins* and *Fellencer* balancing factors as a basis of its jurisdictional analysis would be rejected by the First Circuit. Of central importance to the First Circuit's analysis of the internal tribal matters provision in MICSA is that its scope is *not* defined by the idea that the concept is intended to cover any and all matters that a sovereign government would typically have authority to regulate, but, rather, under MIA and MICSA the *character* of the activity at issue must be so internal to *tribal* government that it does not impact the State's authority in a way that affects non-tribal members or that is contrary to the State's interest in exercising its authority consistent with the atypical allocation of state jurisdiction under MIA and MICSA. At bottom, it is hard to discern how, given the potential effects of a tribal CWA WQS program on non-member upstream dischargers and on the application of State law, in an area of regulation where the State has expressed a strong desire that its standards apply throughout the State, that the First Circuit would decide that Maine did not have adequate jurisdiction to set WQS for waters in Indian lands. See EPA's Decision Support Document for additional discussion.

A direct comparison of the various factors, dynamics, and impacts described above in relation to a WQS program, with the factors considered by the First Circuit in its decision that Maine has jurisdiction under MIA and MICSA to issue NPDES permits to tribally-owned facilities located on tribal land and which discharge only to tribal waters, compels a legal conclusion that Maine has jurisdiction to establish WQS in waters within Indian lands. As discussed elsewhere in this document and in EPA's Decision Support Document, however, the State's authority and discretion to set such standards is not unbounded and must still comply with CWA requirements, including those that would protect the designated use of sustenance fishing in waters in Indian lands.

Nonetheless, EPA would like to respond fully and comprehensively to the Penobscot Nation's comments. Consequently, EPA provides below specific responses to the Penobscot Nation's internal tribal matters argument, even though the logic of the First Circuit's analysis in *Maine v. Johnson* suggests that these factors are not appropriately applied to the facts presented by Maine's WQS submission.

Before delving into the specifics of the Penobscot Nation's comments on this issue, we note that federal Indian common law plays a limited role in our interpretation of the internal tribal matters exception. The First Circuit has stated that:

> We stress that we do not read the reference by Congress to Santa Clara Pueblo in the legislative history of the Settlement Act as invoking all of prior Indian law . . . . But we also do not agree that reference to such law is never helpful in defining what is an internal tribal matter. Congress was explicitly aware of such law, and explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act. In other areas, courts have long presumed that Congress acts against the background of prior law.

Akins, at 489. Insofar as federal Indian common law provides insight into the sorts of activities that Congress and the courts considered to be matters of inherent tribal sovereignty, and thus what rights Congress may have reserved under the settlement acts, it is a useful aid for determining whether water quality regulation is an internal tribal matter. The First Circuit directs us to examine that common law. The court does say that federal Indian common law defines the scope of internal tribal matters. The internal tribal matter exception under MICSA is essentially a reservation of some elements of inherent tribal sovereignty. *Akins*, at 489. Therefore, in order to qualify as an internal tribal matter, an activity must, as a threshold matter, qualify as a matter of inherent tribal sovereignty. However, concluding that a matter would be treated as part of a tribe's inherent tribal sovereignty under federal Indian common law does not end the inquiry. The First Circuit then provides us a series of factors to determine whether the issue or activity is an internal tribal matter under MICSA.

EPA's responses to the Penobscot Nation's *Akins* and *Fellencer* factors analysis

Factors:

a. Does the activity regulate only tribal members?

Tribal comment: There would only be an indirect effect on non-tribal members. Non-tribal members are not being regulated directly.

EPA's response:

To the extent that the *Akins* and *Fellencer* balancing factors are analyzed, the degree to which an activity may affect non-tribal members has been a primary consideration for the First Circuit. A finding that Maine does not have authority to establish WQS for waters in Indian lands, and the corresponding finding that the Maine Indian Tribes do have that authority for those waters, could have a non-trivial effect on non-member facilities in Maine subject to effluent limitations in NPDES permits that must ensure compliance with WQS. *See*, e.g., *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996), *cert. denied,* 522 U.S. 965 (1997). In *City of Albuquerque v. Browner*, the City of Albuquerque challenged EPA's approval of the Isleta Pueblo's water quality standards on

a number of grounds, including that certain of the Tribe's standards were allegedly unattainable because they were too stringent, and would have an adverse effect on an upstream discharger located outside of Indian Country. The Tenth Circuit upheld the district court's opinion affirming EPA's approval of the Tribe's WQS. Under the First Circuit's analysis in *Akins* and *Fellencer*, the *potential* for impacts on non-members of a tribal CWA WQS program weighs heavily against finding that Maine does not have authority under MIA and MICSA to establish WQS in waters in Indian lands under the concept of internal tribal matters.

b. Does the activity relate to lands that define the Tribes' territories, particularly to the commercial use of tribal lands?

Tribal comment: The matter at hand concerns the harvesting or deriving of value from tribal resources.

The second factor in the *Akins* and *Fellencer* analysis concerns a tribe's ability to decide how to use its own resources to protect the interests of its members. The First Circuit found that the Tribe's decisions regarding commercial use of "the very land that defines the territory of the Nation" fell within the realm of internal tribal matters. Id. at 487, 488. This factor is not necessarily limited to commercial use of land, however. Rather, it has to do with resources within the tribe's territory that have a direct effect on tribal well-being. In *Fellencer*, the court analogized control of natural resources on tribal land to control of human resources on tribal land. *Fellencer*, 164 F.3d at 710. The particular "human resource" at issue was a community nurse who was not a tribal member, but who practiced on the Penobscot reservation serving tribal members, and whose practice had a direct effect on the health of tribal members. In this case, the court recognized that "Indian tribes may 'retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the ... health or welfare of the tribe.' " Id., quoting *Montana v. United States*, 450 U.S. at 566.

Fellencer confirms that in order to protect tribal health and welfare, tribes may control activities of non-members *within* Indian territory. However, tribes do not generally have authority to control such activities outside of Indian territory. *Montana v. United States*, 450 U.S. at 565-66. Here, many of the waters in question, *e.g.*, the Penobscot River, and the fish in those waters, are resources used by Maine, its citizens, and the Maine Tribes. The First Circuit's holdings in *Akins* and *Fellencer* do not provide EPA with any grounds to deny the state jurisdiction over setting WQS in any waters within Indian lands, and even more certainly not for waters and resources that are used by tribal and non-tribal members. Again, however, it is important to note that notwithstanding Maine's jurisdictional authority, EPA has the authority under the CWA to protect the Maine Tribes' sustenance fishing practices provided for under the settlement acts by ensuring that WQS applicable to waters in Indian lands protect the quality of water necessary to support those sustenance fishing practices.

c. Does the activity affect the Tribes' ability to regulate their natural resources?

Tribal comment: The matter concerns the regulation or conservation of tribal resources.

EPA's response

The First Circuit has held that an activity predominantly affecting a tribe's ability to control the use of its own resources is likely to be an internal tribal matter. *Akins* in particular examined an example of natural resource regulation, stumpage permits, which it determined was an internal tribal matter. However, the *Akins* holding is a narrow one. Under *Akins*, the test is not whether the assertion of state law interferes with the tribe's regulation of its natural resources, but whether the assertion of *tribal authority* over such resources interferes with *state* regulation. The court emphasized that "[b]y its own terms, the Implementing Act, § 6204, makes State laws regulating land use or management, conservation and environmental protection applicable to tribal lands. The absence of an assertion that any such [State] laws are involved here is telling." *Akins*, 130 F.3d at 488. The deciding element in the court's analysis of this factor seems to be that the stumpage permit system, "involving tribal lands, appears to have no significant impact on Maine's environmental or other interests." Id.

Also important in the First Circuit's consideration was the geographic component of inherent tribal sovereignty. Id. at 489. The court determined that timber permitting qualified as an internal tribal matter in part because "the policy concerns the harvesting of a natural resource from [land that defines Indian territory]." Id. at 487. The timber subject to the disputed permitting system was located entirely on the Penobscot Nation's territory. Because the resource was confined to Indian territory, the associated permitting system did not impair the State's ability to regulate its own natural resources.

The issue we face today is vastly more complicated than in *Akins* because many of the rivers and streams that are tribal waters flow through and touch both tribal and non-tribal lands. In addition, the WQS regulations at issue involve potential impacts to discharging facilities that operate inside and outside Indian territories. Following the First Circuit's analysis of MICSA, EPA begins with the assumption that the State's laws are generally applicable in all waters. See 25 U.S.C. § 1725(b)(1). Certain activities may be excluded from state regulation as internal tribal matters, but the general presumption is that state laws apply to all water bodies in Maine.

Based on this factor, the State has clear jurisdiction to establish WQS that may have the potential to affect the effluent limitations contained in NPDES permits issued to facilities that are largely located and operate outside of tribal territories and, under the reasoning in

Maine v. Johnson, even to sources that are on tribal lands and owned by tribal members and which have no measurable impact on non-members.[7]

d. Does the activity implicate or impair an interest of the State of Maine?

Tribal comment: The State's only interest in establishing WQS is in subverting sustenance fishing.

EPA response

Another important factor in the First Circuit's prior consideration of internal tribal matters was whether the State had asserted any interest in regulating the matter at issue. The *Akins* court noted at the outset that "[t]his is not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws" and that the tribe's regulation of its own timber resources was "not of central concern to ... Maine." *Akins*, at 487, 488. In *Fellencer*, the court clarified that a general state interest in regulating a matter such as employment discrimination was not sufficient to remove the matter from the scope of internal tribal matters. But because the State expressly disavowed an interest in regulating *tribal* governmental employment decisions, the court found that tribal regulation of its own employees did not impair any *state* interest. *Fellencer*, at 710-11.

In its WQS submission, Maine has vigorously asserted its interest in regulating water quality throughout the State, including within waters located in Indian lands. That is a very different dynamic between the State and the Indian Tribes than the one that existed in the *Fellencer* and *Akins* disputes. Id., *Akins*, 130 F.3d at 488 ("This is ... a question of allocation of jurisdiction among different fora and allocation of substantive law to a dispute between tribal members where neither the Congress nor the Maine Legislature has expressed a particular interest."). In *Maine v. Johnson*, 498 F.3d 37, 45, the First Circuit stated:

> In both those cases, unlike this case, Maine disclaimed any interest in regulation or superintendence. *Akins*, 130 F.3d at 488; *Fellencer*, 164 F.3d at 710-11. By contrast, in the present case, Maine affirmatively asserts authority as to both tribal and non-tribal land to regulate discharges into navigable waters. The Settlement Act provisions just quoted affirm that power. If the internal affairs exemption negated so specific a ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction.

[7] As discussed below, EPA is requiring the State to consider impacts on tribal resources and amend its WQS accordingly. However, the State is not required to cede regulatory authority simply because its activities have an impact on tribal resources.

e. Is defining the activity as an "internal tribal matter" consistent with prior legal understandings?

Tribal comment: Under federal Indian common law principles, the matter at hand involves the inherent authority of an Indian tribe, which must be free from undermining by a state.

EPA's response:

As explained earlier, Maine's jurisdiction to establish WQS in Indian lands is consistent with the First Circuit's analysis of MIA and MICSA and its holdings in *Maine v. Johnson, Akins* and *Fellencer* and, to the extent applicable given MIA and MICSA's unique jurisdictional arrangement, other federal Indian common law.

In order to understand the internal tribal matters exception, we must recognize that MICSA, while legislated against the backdrop of federal Indian common law, altered the operation of that common law in Maine. Under federal Indian common law, Indian tribes may have a paramount interest in regulating their own water quality that supersedes that of the state in which the tribes' territory is located. However, as discussed earlier and below, federal Indian common law may aid us in interpreting MICSA but cannot change the statute's general provision for state jurisdiction over natural resources. We must look carefully at what Congress and the courts have said regarding the extent of the internal tribal matters exception to state jurisdiction.

Following the First Circuit's example, we look first to the legislative history of MICSA, and then to federal Indian common law for prior legal understandings of internal tribal matters. As mentioned earlier, we rely largely on the Senate Report, which the House Report "accepts as its own" in part. H.R. Rep. at 20; *Garcia v. United States*, 469 U.S. 70, 76 (1984) (committee reports are an authoritative source for determining legislative consent), cited by *Akins*, at 489. The few references that the Senate Report makes to natural resource regulation are telling. In its discussion of the application of state environmental law under section 1725(b)(1), the provision of MICSA ratifying the MIA and its jurisdictional provisions, the Senate Report states:

> State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27.

In addition, when explaining the operation of the savings clauses discussed earlier, the Senate Report provides a specific example of a federal environmental law that would be

excluded from operating in Maine Indian Country to avoid interfering with state environmental law. Although the example in this passage focuses on the provision in the Clean Air Act that allows Indian tribes to redesignate their lands to a new air quality classification under the prevention of significant deterioration (PSD) air permitting program, the passage ends by emphasizing that this exclusion would also operate more generally as to "police power laws on such matters as . . . environmental regulation."

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian Tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. at 31; see also H.R. Rep. at 29. In addition, this passage makes clear that Congress was not limiting the application of federal Indian law in Maine solely to avoid any interference with state environmental regulation as it applies to lands outside Indian territories. The report specifically discusses Congress's intent to protect the application of state air quality laws which will be applicable to land held "for the benefit of the Maine Tribes." Again, this discussion would be pointless if Congress did not specifically intend to make state environmental regulation applicable in the Southern Tribes' territory.

This passage in MICSA's legislative history is telling in the context of analyzing the State's authority to set WQS under the CWA. The Clean Air Act provision cited by the Senate report refers to the authority tribes have outside Maine to redesignate the air quality classification for their territory so that PSD permits for upwind facilities must include emission limits that protect the air quality consistent with the tribe's chosen classification of its territory. This example is strikingly similar to the function of the WQS program in the context of the CWA. Both programs involve the authority of non-federal sovereigns to determine the level of environmental quality that must be maintained within their territories, and that determination has the effect of controlling the content of permits issued to facilities that might impact those territories. Indeed, the "Area Redesignation" provisions in section 164 of the Clean Air Act are about as direct a cognate to the WQS program in the CWA as one could find in federal environmental law. It is reasonable then, for EPA to conclude, that Congress intended its grant of jurisdiction to the State to include a program like the CWA WQS.

Our inquiry does not end here. *Akins* opens the possibility that even in the area of natural resource regulation, activities may fit within the internal tribal matters exception and be free of state regulation. Here we turn to the federal Indian common law to help us define the contours of inherent tribal sovereignty, which in turn form the basis for internal tribal matters. The analysis of federal Indian common law in *Akins* draws a clear distinction

between inherent tribal authority over the activities of members and non-members. Tribes generally have authority over their own members. In some circumstances, federal Indian common law has found that tribal authority extends to non-member conduct on tribal territory, but not to non-member conduct outside of tribal territory. See *Akins*, at 490. MICSA constricted the common law understanding of inherent tribal sovereignty by establishing the general presumption that state law applies even within tribal territories. 33 U.S.C. § 1725(b)(1). Therefore, the fact that an activity takes place on or off reservation no longer answers the question. Instead, the relative involvement of tribal members and non-members becomes decisive.

Of course, *Akins* and *Fellencer* themselves form part of our prior legal understanding of internal tribal matters. However, these cases provide little more than an analytical framework for considering the issue. Neither case offers a definitive interpretation of the scope of internal tribal matters. To the contrary, the First Circuit emphasized that "[w]e tread cautiously and write narrowly, for the problems and conflicting interests presented by this case will not be the same as the problems and interests presented in the next case." *Akins*, 130 F.3d at 487. *Akins*, while recognizing one example of natural resource regulation as an internal tribal matter, was narrowly drawn to address only stumpage permits where state legal requirements were not at issue. Overall, *Fellencer* went somewhat further in addressing impacts on non-members, holding that a tribe could regulate the activities of a non-member who was acting on tribal territory, serving tribal members, and whose activities had a direct impact on tribal health and welfare. It is tempting to read these cases together to say that natural resource management decisions having a direct impact on tribal health and welfare are an internal tribal matter. But these holdings, as discussed earlier, are not so broad. *Akins* emphasized that tribal authority extended to activities of tribal members, and in some case non-members, *within* tribal territory. *Akins*, 130 F.3d at 489. *Fellencer* relied heavily on its understanding of employment discrimination law as a major source of support for its decision that tribal employment decisions are internal tribal matters. The law surrounding the employment issue indicated quite clearly that tribal governmental employment decisions were retained as an element of inherent tribal sovereignty under MICSA.

Although the situation outside Maine may be quite different, under MICSA EPA has concluded that establishing WQS in Indian water in Indian lands in Maine is not an internal tribal matter. Tribal comments have suggested that under *Fellencer*, tribes may regulate non-member activities that have a direct effect on tribal health and welfare. This reading, however, stretches the First Circuit's decision far past its boundaries. In finding that the Tribe could exercise authority over a non-member to protect tribal health and welfare, the *Fellencer* court emphasized the minimal effects on non-members versus the significant effect on tribal members, as well as the clear statutory basis for the Tribe's control over its governmental employment decision. Here, tribal WQS under the CWA potentially could impact non-tribal members. EPA cannot extend the results of these cases to such vastly different circumstances, particularly when the reasoning of the cases counsels us to do the opposite.

Tribal government as an element of internal tribal matters, including establishing cancer risk levels and fish consumption rates as a matter of tribal policy judgments.

The Tribes argue that establishing cancer risk levels and fish consumption rates are matters of tribal government policy that are part of a distinctly governmental function, that of establishing WQS under the CWA. The Tribes assert that this should lead EPA to conclude that as a legal matter Maine does not have jurisdictional authority to set such standards.

EPA's response

EPA agrees that Maine's fishing designated uses and the Northern and Southern Tribes' trust land and reservation land sustenance fishing practices require adequate protection under the CWA. However, that fact, as important as it is to the Tribes' physical, spiritual and cultural existence, does not alter the jurisdictional framework embodied in the settlement acts. Those vital interests and cultural practices of the Tribes, as critical elements of their survival and well-being may still be protected to the extent authorized under the CWA, and EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands demonstrates that very important point. As the First Circuit has stated, not every matter that might fall within the notion of a governmental function necessarily constitutes an internal tribal matter under MIA and MICSA. "That a tribe attempts to govern a matter does not render it an internal tribal matter." *Akins* at 486.

We agree with the comments from the Tribes' advocates that water quality regulation is of central importance to these Tribes and is a critical issue in maintaining their culture and way of life. We also understand the Tribes' desire to exercise as direct a control over that water quality as possible. Outside the context of the settlement acts, we agree with the Tribes that water quality management is a core governmental function, and therefore that it should generally be reserved to tribal governments. EPA cannot agree, however, that MIA's reference to "tribal government" as one of the examples of internal tribal matters sweeps into that concept all the attributes generally associated with Indian self-governance outside Maine.

C. Tribes commented that EPA will be unable to protect tribal resources if EPA determines Maine has authority to establish WQS in waters within Indian lands.

EPA's response

Certain comments from the Tribes generally raised concerns about the protection of tribal resources if EPA determines Maine has authority to establish WQS in waters within Indian lands. EPA recognizes that if Maine is the standard-setting authority, the State will have the first opportunity to make the judgment calls involved in implementing the WQS program. However, the State's WQS must still meet CWA requirements, which include establishing water quality criteria that assure uses are protected. As demonstrated

by EPA's decision to disapprove certain of Maine's WQS on the basis that they do not adequately protect tribal sustenance fishing practices, EPA's oversight of the State's program through authority established in the CWA plays an important role in protecting water quality in Indian lands notwithstanding the jurisdictional arrangement established by the settlement acts.

Notwithstanding the Tribes' concerns, the practical realities of how a state's WQS program operates do not suffice as a basis for ignoring the jurisdictional arrangement in the settlement acts. As discussed extensively above, Congress has revised that customary jurisdictional formula in Maine. So, pursuant to the settlement acts and the CWA, EPA must acknowledge that the State has the authority to establish WQS applicable to Indian lands, just as the First Circuit has already determined that Maine has the authority to issue federal NPDES permits in Indian lands.

EPA does not agree that finding Maine has authority to implement the WQS program in Indian lands constitutes some sort of delegation to the State of the trust responsibility. As already explained in this RTC document, EPA has discussed the proper interpretation of the trust responsibility to the Maine Tribes generally, and in this matter specifically. EPA has also explained its continuing role in CWA program oversight, in which the trust plays a role. The Agency's continuing role in program oversight does provide adequate tools under the CWA for protecting the Maine Tribes' interests. But before discussing those oversight mechanisms, it is important to understand the context within which EPA's oversight authority operates and how that relates to MICSA's provisions. There are various provisions in the CWA that assign EPA the task of reviewing a state's decisions in implementing the CWA. The Act expresses this authority in various ways, but essentially EPA is either charged with intervening or provided the opportunity to intervene when state decisions do not comply with the requirements of the CWA.[8]

Maine's comments suggest that MICSA's provisions, especially the savings clauses, prevent EPA from exercising its CWA oversight authorities on behalf of the Tribes consistent with the trust responsibility. In EPA's view, Maine inaccurately characterizes EPA's oversight in this matter as "apply[ing] heightened scrutiny to Maine's WQS before approving them as to Indian Territory." See page 10 of Maine's September 13, 2013 WQS comments. EPA is not applying heightened scrutiny to Maine's WQS, but rather is exercising its responsibility as required under the CWA, and consistent with the settlement acts, to protect the Maine Tribes' sustenance fishing practices. See EPA's Decision Support Document. In so doing, EPA is at the same time acting consistently with the trust responsibility to the Tribes. The implication embedded within Maine's comment is that such a decision by EPA would accord the Tribes a special status and that intervening in a state regulatory decision under the CWA would affect or preempt the

[8] See e.g., 33 U.S.C. § 1342(d)(2)(when objecting to a proposed State NPDES permit, EPA shall provide a State with "a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator") and 40 CFR 123.44(c), or 33 U.S.C. § 1313(c)(4)(B)(EPA shall promulgate a water quality standard "if a revised or new water quality standard submitted by such State . . . is determined by the Administrator not to be consistent with the applicable requirements of this chapter").

State's jurisdiction to make that decision, which would run afoul of MIA and MICSA. Ultimately, the CWA establishes EPA's relevant authority, which EPA is exercising consistent with the federal trust responsibility. 33 U.S.C. §1251 et. seq. As mentioned before, MIA, in 30 M.R.S.A. Section 6207(4), reserves for the Penobscot Nation and the Passamaquoddy Tribe a right to take fish for their individual sustenance within their reservations. MICSA, in 25 U.S.C. Section 1724(h), reserves for these Indians the right to manage their natural resources. The CWA specifically gives EPA the authority to administer the statute to protect surface waters. 33 U.S.C. § 1251 et. seq. More specifically, the CWA gives EPA certain authority to oversee state water quality standards to ensure that they adequately protect human health and the environment. 33 U.S.C. § 1313. And EPA is exercising that authority to protect the resource uses that are here of interest to the Tribes -- the sustenance fishing uses of those waters -- consistent with the trust relationship and the requirements of the CWA.

EPA does not agree with Maine's interpretation of the effect of MICSA's savings clauses on the trust, because the Agency's disapproval of Maine's HHC as they would apply to waters within Indian lands is grounded in the requirements of both the CWA and the settlement acts. No state in the nation has "jurisdiction" to establish WQS contrary to the requirements of the CWA, at least in the sense that states cannot do so without running the risk that EPA will disapprove them. Therefore, the savings clauses in MICSA do not shield Maine from EPA's oversight under the CWA when EPA bases its objections on CWA requirements, for such objections do not affect any authority or jurisdiction that Maine has.

D. EPA must protect a broad range of cultural, spiritual, and physical aspects of the Tribes' lifestyles and associated resources. Sustenance fishing touches on all of these aspects of the Tribes' existence and culture.

EPA's response

EPA fully recognizes, respects and appreciates the broad range of cultural, spiritual, and physical aspects of the Tribes' lifestyles and associated resources, and the ways in which a sustenance fishing lifestyle touches on all of these aspects of the Tribes' existence and culture. EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands reflects the extent to which, under the CWA, EPA has the authority to ensure that Maine's WQS adequately protect the Tribes' sustenance fishing practices in relation to the Tribes' fish consumption and therefore their health. EPA notes, however, that notwithstanding EPA's recognition of and respect for the multi-faceted nature of the Tribes' sustenance fishing lifestyle and the various ways in which the Tribes' existence and culture depends on that practice, the focus of EPA's decision to disapprove certain of Maine's WQS in Indian lands necessarily is specific to the physical health-related fish consumption practices of the Tribes. That focus is necessary pursuant to the authority

provided by Congress to EPA under the CWA and the WQS program when human health criteria are established.[9]

However, EPA recognizes that in so protecting the Maine Tribes' sustenance fishing practices, through a focus on human health impacts, other cultural and spiritual aspects of grave importance to the Tribes may also be protected. This does not mean that EPA is overreaching or extending its authority under the CWA; it simply means that there are collateral benefits that arise due to the fact that protecting the Tribes' health through protection of their sustenance fishing practices has implications for other important aspects of their lifestyle and culture.

E. Tribal comment: Maine's regulatory actions and expressed legal positions demonstrate that the Maine Tribes' subsistence practices will not be protected by Maine.

EPA's response

As explained earlier in this RTC document, the accuracy or inaccuracy of factual statements such as this one is not a factor that can affect the jurisdictional arrangement established by the settlement acts. EPA's earlier explanation in this document about its ability and obligation to ensure that the Maine Tribes' sustenance fishing practices are protected under Maine's WQS program shows how the Tribes' concerns about Maine's future intentions are being addressed by EPA in accordance with CWA requirements. See EPA's Decision Support Document for a more detailed discussion.

II. Tribal comment: Even if EPA approves Maine's WQS to apply in waters in Indian Territory, EPA should ensure that the Tribes have a "decisive role in decision-making that affects its waters."

EPA's response

Prior to EPA's decision today to approve and to disapprove certain of Maine's WQS, EPA complied with its obligations to consult with the Maine Indian Tribes about Maine's WQS submissions. EPA carefully considered the Tribes' views, interests, and policy and legal arguments, along with all other pertinent information, including public comments and other sources of information in the administrative record, in reaching its decision to approve and to disapprove certain of Maine's WQS for waters in Indian lands. EPA will continue to act within the confines of the CWA consistent with the trust responsibility in reviewing any future new or revised WQS by Maine that would affect tribal waters and

[9] Tribes have argued that in addition to fishing for their individual consumption, the definition of sustenance traditionally incorporated other components, including but not limited to barter and exchange. Commission Saltwater Fisheries Report, at p. 22-33. EPA is not deciding in its approval and disapproval of certain of Maine's new and revised WQS whether any of these other components, beyond the Tribes' individual consumption of fish, are properly part of the definition of the term "sustenance" as those other components are not, in any event, relevant to development of human heath criteria under the CWA.

uses. EPA will ensure that the Maine Tribes remain involved in any such matters through the government-to-government consultation process EPA is committed to follow.

III. Tribal comment: Even if EPA approves Maine's WQS to apply in waters in Indian Territory EPA should put written procedures in place to moderate between the State and Tribes.

EPA's response

See response to comment immediately above. In addition, EPA agrees that such written procedures would be very helpful, and EPA is prepared to facilitate discussions among the Maine Tribes and Maine. However, EPA notes that there is no legal basis for EPA to *demand* that such written procedures exist as a precondition to the State exercising its jurisdiction to establish WQS in waters in Indian lands.

IV. Tribal comment: EPA must ensure that "designated uses" are protected.

EPA's response

EPA's disapproval of certain of Maine's WQS demonstrates that EPA is fulfilling its CWA obligation to ensure that designated uses under the CWA are protected by water quality criteria. See EPA's Decision Support Document for a detailed discussion and explanation.

V. Tribal comment: A fundamental Congressional purpose in creating the Southern Tribes' reservations was to protect the sustenance fishery.

EPA's response

EPA agrees that a fundamental purpose behind creation of the Southern Tribes' reservations was to protect the sustenance fishery. As discussed earlier in this document, and in greater detail in EPA's Decision Support Document, this Congressional purpose supports EPA's decision to insist on criteria that protect the sustenance fishing rights associated with waters in the Southern Tribes' reservations in Maine. At the same time, however, this Congressional purpose does not function to alter the jurisdictional arrangement among the State, the federal government, and the Maine Tribes, established by Congress in MICSA.

VI. Tribal comment: MICSA sets forth a sustenance fishing right reserved to Southern Tribes (not abrogated by any provisions of MICSA).

EPA's response

EPA agrees that MICSA sets forth a sustenance fishing right reserved to Southern Tribes that has not been abrogated by any provisions of MICSA or any other federal law. As discussed earlier in this document, and in greater detail in EPA's Decision Support Document, this fact supports EPA's decision to insist on criteria that protect the sustenance fishing use associated with the Southern Tribes' reservations. At the same time, however, the sustenance fishing right reserved to the Southern Tribes does not function to alter the jurisdictional arrangement among the State, federal government, and the Maine Tribes, established by Congress in MICSA.

VII. Tribal comment: Maine fails to recognize the Maine Tribes as separate sovereigns, for purposes of downstream water quality protection.

EPA's response

EPA has addressed earlier in this RTC document the question of the sovereign status of the Maine Tribes and the extent to which that factor does or does not play a part in EPA's analysis of whether Maine has jurisdiction to establish WQS in Indian lands and how EPA views the general trust responsibility to the Maine Tribes.

Further, as noted earlier in relation to a similar comment about Maine's interactions with the Maine Tribes, the accuracy of factual statements such as this one is not a factor that can affect the jurisdictional arrangement established by MIA and MICSA. EPA's earlier explanation in this document about its ability and obligation to protect the Maine Tribes' fishing practices under the CWA, as demonstrated by EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands, shows how the Tribes' concerns about Maine's future intentions with regard to their sustenance fishing practices under the CWA are being addressed by EPA in compliance with CWA requirements.

Additionally, any NPDES permits issued by Maine must ensure adequate protection of WQS that may apply in tribal waters. Thus, if Maine or EPA were to promulgate more stringent WQS applicable to waters in Indian lands in Maine, in response to EPA's disapproval of Maine's HHC, any NPDES permits issued by Maine must ensure adequate protection of such WQS.

VIII. Maine's comments (not already responded to earlier in this RTC document).

1. **Maine's comment: Under the operative statutes Maine has authority and responsibility to establish WQS for all state waters, including waters near or within Indian territories.**

EPA's response

EPA's letter to Maine in response to its WQS submissions indicates that EPA agrees that Maine has adequate legal authority to establish WQS for all state waters, including waters in Indian lands. See EPA's Decision Support Document for a more detailed discussion.

2. **Maine's comment: The applicable statutes don't permit EPA or the Tribes to establish WQS in the State's stead.**

EPA's response

Today, EPA is affirming that Maine has the legal authority to set WQS for waters in Indian lands. Maine's assertion that the Tribes and EPA do not have the legal authority to establish such standards instead of Maine no longer is pertinent given EPA's determination that Maine has such authority. However, if Maine does not address in a timely manner under the CWA the WQS deficiencies EPA's decision letter has identified, the CWA *requires* EPA to promulgate such standards in the State's stead. Furthermore, as noted earlier in this RTC document in relation to Maine's assertion that the Maine Indian Tribes are not eligible for TAS status under CWA section 518, EPA's decision is not addressing whether the Tribes separately have such authority.

3. **Maine's comment: EPA must make a formal finding that the State lacks jurisdiction before it can assert federal jurisdiction, which EPA cannot do under MIA and MICSA and *Maine v. Johnson*.**

EPA's response

Today, EPA is affirming that Maine has such legal authority but has found that certain of Maine's WQS are not approvable under the CWA. In addition, Maine's assertion that EPA does not have the legal authority at this time to establish such standards is no longer pertinent given EPA's determination that Maine has such authority. However, if Maine does not address in a timely manner under the CWA the WQS deficiencies EPA's decision letter has identified, the CWA *requires* EPA to promulgate such standards in the State's stead.

4. **Maine's comment: EPA approved many WQS submissions, some including in the Penobscot River, without mentioning jurisdictional issues, and also approved designated uses that do not mention anything about tribal interests or sustenance fishing. EPA's NPDES record belies EPA's own legal position.**

EPA's response

See EPA's Decision Support Document for a partial response to and discussion of the issues raised by this comment.

In addition, as of 2004, EPA's letters to Maine responding to the State's proposed new and revised water quality standards expressly stated that EPA's decision to approve or disapprove did not apply to waters within Indian Country. Consequently, there would not have been a reason for EPA to address in those letters tribal interests in waters in Indian lands, including sustenance fishing. Moreover, the fact that ME DEP may have issued NPDES permits to facilities that discharged directly or indirectly into the Penobscot River, and that EPA may not have offered any comments about those permits, does not constitute an acknowledgment by EPA that Maine's WQS had been approved by EPA to apply in waters in Indian lands.

As to NPDES permits that EPA issued to the Penobscot Nation's POTW, EPA included language that indicated, not that Maine's WQS directly applied to such discharges as a legal matter, but that as a practical matter Maine's WQS provided some guidance as to how the NPDES permit's effluent limits for pollutants should be written or determined. When EPA recited that those permits met Maine WQS that applied "in the proximity" of the discharge, the Agency very consciously used a formulation that did not recite that Maine's WQS applied at the point of discharge. Basically, EPA looked to the nearest approved WQS as guidance for the discharge limits in those permits. The State's WQS approved outside Indian lands provided that guidance. In the absence of federal, state or Indian WQS applicable under the CWA at the point of discharge, this course of action makes abundant practical sense.

5. **Maine's comment: The State has asked EPA to explain its legal basis for not applying State WQS in Indian Territory and EPA has never responded.**

EPA's response

Whether or not the State's comment is accurate is no longer a relevant point because EPA's decision today has answered that question. In addition, EPA notes that a lack of a response before its decision today would, in any event, not be able to affect the outcome of a legal analysis dictated by the settlement acts and the CWA.

6. **Maine's comment: The "trust responsibility" only applies to trust lands, not reservation lands in Maine (which are not held in trust).**

EPA's response

See discussion above beginning at page 11.

7. **Maine's comment: MICSA's savings clauses render the "the trust obligation" inapplicable in Maine.**

EPA's response

See discussion above beginning at page 38.

8. **Maine's comment: Indian Tribes in Maine are not eligible for TAS status under CWA Section 518.**

EPA's response

See discussion above beginning at page 15.

9. **Maine's comment: Maine asserts that there is no basis for EPA to treat waters within Indian territories any differently than the waters in Maine outside of Indian territories.**

EPA's response

EPA's Decision Support Document demonstrates the inaccuracy of Maine's comment and discusses in detail the reasons why EPA has determined that there is a significant difference between such waters and their uses for purposes of the CWA.

10. **Maine's comment: EPA's current review is unlawful and unnecessary.**

    a. **Statute gives EPA 90 days to act and require changes to submitted WQS. EPA did not require changes within 90 days, so EPA cannot require changes now.**

EPA's response

EPA disagrees with Maine's reading of the CWA provisions at issue. As described by the United States Department of Justice in legal pleadings filed in Maine's case filed against EPA, State of Maine, et. al. v. McCarthy et. al., Civil Action No. 1:14cv264, (United States District Court for the District of Maine 2014), no provision of the CWA or its implementing regulations preclude EPA from disapproving a state's WQS on the basis that EPA did not inform such state within 90 days of its WQS submission to EPA that

changes to the state's proposed WQS are necessary. The following description of the relevant CWA authorities sets forth the correct sequence of events in relation to a state's WQS submission and EPA's review.

States must hold public hearings for the purpose of reviewing their WQS, and, as appropriate, modifying and adopting standards, at least once every three years beginning with October 18, 1972. 33 U.S.C. § 1313(c)(1). This review and revision process is commonly referred to as the triennial review process. Any new or revised WQS adopted by a state must be submitted to EPA for a determination of whether it meets the CWA's requirements. 33 U.S.C. § 1313(c)(1) and (3); 40 C.F.R. §§ 131.5, 131.6 and 131.20. EPA's review of such WQS involves the application of EPA's legal, scientific and policy expertise. *See* 40 C.F.R. § 131.5. If EPA determines that the new or revised WQS is consistent with the CWA, then EPA shall so notify the relevant state within 60 days from the date of submission. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(1).

If EPA determines that the new or revised WQS is not consistent with the CWA, EPA shall notify the state within 90 days from the date the WQS is submitted that it is disapproved, and must specify necessary changes. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(2). If the state then fails to adopt the specified changes within 90 days of EPA's notice, EPA must "promptly" propose a federal WQS for the waters involved. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a). Then, unless the state revises its WQS and EPA approves that revision, EPA must proceed to promulgate the WQS itself. 33 U.S.C. § 1313(c)(4)(A).

In the context of its CWA citizen suit claim, Maine asserted that EPA has waived its authority to disapprove Maine's outstanding WQS, that EPA is barred from disapproving such WQS, and that EPA is required to approve such WQS, apparently on the theory that EPA loses its authority to disapprove WQS when it misses the statutory deadline to do so. Congress provided EPA with authority to approve or disapprove new or revised WQS regardless of whether EPA has met the statutory deadline for doing so under CWA section 303(c)(3).

As discussed above, new and revised WQS must be submitted to EPA for review. 33 U.S.C. § 1313(c)(2)(A). *If* EPA determines that the new or revised WQS meets the requirements of the CWA, EPA shall approve the WQS within 60 days. *Id.* at § 1313(c)(3). *If* EPA determines that the new or revised WQS is not consistent with the requirements of the CWA, EPA shall within 90 days of submission disapprove the WQS and specify necessary changes. *Id.* "On its face, this language plainly supports . . . that Congress did not intend new or revised state standards to be effective until after EPA had reviewed and approved them." *Alaska Clean Water Alliance v. Clarke*, 1997 WL 446499 * 3 (W.D. Wash. July 8, 1997). Indeed, the CWA does not even remotely suggest that Congress intended for EPA to lose its authority to approve or disapprove a WQS, or that the WQS must automatically be deemed approved, if EPA fails to act by the 60 or 90-day statutory deadlines. *See* 33 U.S.C. § 1313(c)(2)(A); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.").

Moreover, to the extent the CWA is ambiguous on this point, EPA has explained in the context of a CWA rulemaking that "the concept of a default approval of state and tribal WQS submissions is not consistent with section 303 of the CWA [because] [s]ection 303(c)(3) requires EPA to make an affirmative finding that the standards revisions submitted to EPA are consistent with the CWA." 65 Fed. Reg. 24,641, 24,646 (Apr. 27, 2000). EPA's interpretation of CWA section 303(c) as not providing for automatic approvals or disapprovals of WQS if EPA does not act within the 60 or 90 day windows of that section is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). In addition, Congress has expressly provided a remedy when EPA fails to timely respond to a WQS submission. The CWA citizen suit provision provides the district courts with jurisdiction to order EPA to perform its mandatory duty to approve or disapprove a new or revised WQS when EPA has failed to timely respond. 33 U.S.C. § 1365(a). As the Supreme Court has explained, "[w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

b. Maine's comment: There is no basis for separate federal notice and comment.

EPA's response

See EPA's introduction to this RTC document for a response to this comment.

c. Maine's comment: The Maine Tribes were well aware and participated in the State's action.

EPA's response

EPA reviewed Maine's notice to the public and the public's comments on Maine's proposed WQS revisions. In the first instance, while the Tribes in Maine participated in the State's public process, their comments focused entirely on the adequacy of the state standards and whether they would protect sustenance fishing. The Tribes' comments did not focus on the State's authority to set standards for waters in the Tribes' lands. It is reasonable to assume that the Tribes were concerned about how Maine's WQS might impact sustenance fishing opportunities in waters outside Indian lands. It was not clear that Maine's notice alerted the public and the Tribes to the State's assertion of jurisdiction to set WQS for waters in the Tribes' lands.

Ultimately, EPA determined that, in light of the great deal of interest in the jurisdictional and technical issues involved in Maine's proposal, it would be prudent to err on the side of caution by taking additional steps to ensure that the Maine Tribes and other members of the public had clear notice of the implications of Maine's proposed WQS revisions.

EPA had never before approved or disapproved in Maine WQS revisions to be applied to waters within Indian lands. Moreover, EPA received additional comments from the Maine Tribes and from the ME DEP and the Maine Office of the Attorney General that were not part of Maine's administrative record for its WQS revisions at the state level; and to that extent the record before EPA is now more complete.

d. Maine's comment: Maine accuses EPA of bad faith, "creating" jurisdictional controversy where there is none.

EPA's response

As set forth in great detail in EPA's Decision Support Document, EPA's decision has two essential components, a legal jurisdictional component and a scientific/technical component. The latter required a complex assessment by EPA of the adequacy of Maine's criteria in relation to the designated uses of the waters in Indian lands, once EPA determined that Maine had jurisdiction. The complexity of the issues with which EPA was confronted, demonstrated by the content of its decision documents both as to the jurisdictional analysis and technical determinations, shows that EPA was not creating a jurisdictional controversy where there was none. In fact, it is a significant mischaracterization of the issues confronting EPA, and of EPA's deliberative process, to portray EPA's activities and process as nothing more than "creating" a jurisdictional controversy.

In the end, EPA concluded that there is no valid legal basis to distinguish or depart from the First Circuit's reasoning and decision in *Maine v. Johnson* that Maine has jurisdiction to implement the CWA NPDES program in Indian lands. A careful analysis was warranted, however, due to the arguable differences between the NPDES and WQS programs, and due to the copious substantive comments EPA received from the State and Maine Tribes on the jurisdictional question. For EPA not to have ensured that its decision had the benefit of the full explanation of the State's and the Tribes' views on this question could have led to a decision for which there was an incomplete and possibly flawed administrative record.

11. Maine's comment: Maine's submitted WQS are approvable and there is no basis upon which EPA may disapprove them.

EPA's response

EPA's Decision Support Document explains in detail the bases upon which EPA has decided to disapprove Maine's HHC for waters in Indian lands. EPA disagrees with Maine's assertion that "there is no basis upon which EPA may disapprove" any of Maine's WQS. In summary, EPA's disapproval of Maine's HHC for waters in Indian lands is based on the fact that Maine did not use a fish consumption rate that results in criteria that are sufficient to protect the designated use of sustenance fishing in those waters. EPA's Decision Support Document also contains an explanation of EPA's

identification of the sustenance fishing designated uses for waters in Indian lands that derives from Congress's purpose in confirming and establishing, through the settlement acts, sustenance fishing in the Southern Tribes' reservations and in the trust land waters of the Southern and Northern Tribes. We refer the reader to EPA's Decision Support Document for more detailed information relevant to Maine's comment.

12. Maine's comment: Maine's WQS protect sensitive subpopulations that engage in sustenance fishing.

EPA's response

EPA's Decision Support Document discusses EPA's determination, consistent with the requirements of the CWA, that Maine's HHC do not adequately protect the Maine Tribes' health given the Tribes' sustenance fishing practices and the designated use of sustenance fishing in waters in Indian lands. EPA also disagrees with Maine's characterization of the Maine Tribes as "sensitive subpopulations" of the State's general population. EPA's Decision Support Document explains that the Maine Tribes constitute their own *general* population in the geographic areas defined by their reservations and trust lands and that it would therefore be inappropriate to treat the Tribes merely as a "sensitive subpopulation" of Maine's general population in waters located within Indian lands. We refer the reader to EPA's Decision Support Document for more detailed information relevant to Maine's comment.

13. Maine's comment: Maine's WQS are based on technically sound and objective data and analysis regarding cancer risk, fish consumption rates and bioconcentration.

EPA's response

EPA has approved many of Maine's WQS as being technically sound regarding cancer risk, fish consumption rates and bioconcentration. However, for the reasons set forth in EPA's Decision Support Document, EPA does not agree that Maine's HHC meet CWA requirements as applied in waters within Indian lands in Maine, because the fish consumption rate on which they are based is not representative of the Tribes' sustenance fishing. See also EPA's responses to comments VIII. 10 and 11 above, regarding fish consumption rates used by Maine and the fact that it would not be consistent with the requirements of the CWA, as informed by the settlement acts, to treat the Maine Indian Tribes as a "sensitive subpopulation" of Maine's general population.

14. Maine's comment: EPA has used in the past some of this data (meaning the data used in establishing the WQS submitted to EPA in January 2013).

EPA's response

EPA has never "used" the data Maine refers to in its comment for purposes of determining whether Maine's WQS meet CWA requirements in waters within Indian lands in Maine. The fact that EPA may have considered this data in the past to approve Maine's HHC in waters outside Indian lands, including whether such criteria are protective of highly exposed subpopulations fishing in waters outside of Indian lands, is not relevant to the question whether Maine's WQS meet CWA requirements for the target population of tribal members engaged in sustenance fishing in waters located in Indian lands.

15. Maine's comment: Maine's human health criteria are grounded in the empirical, local population-specific data that EPA prefers.

EPA's response

EPA acknowledges that Maine's HHC are based in part on local, population-specific fish consumption data, and EPA has approved those criteria for waters outside of Indian lands. However, as discussed in EPA's Decision Support Document and summarized briefly in earlier responses above to some of Maine's other comments, EPA has determined that the localized data are not representative of unsuppressed tribal sustenance fish consumption in waters in Indian lands, and therefore the HHC that are based on the localized data are not adequate to protect the sustenance fishing use in those waters. Maine must use fish consumption data that are representative of unsuppressed tribal sustenance fish consumption in waters in Indian lands, such as the data from the Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Study"), which was completed in 2009, rather than the 1990 study conducted by McLaren/Hart – ChemRisk, of Portland, Maine (the "ChemRisk Study"[10]) that was actually used by Maine. See also EPA's responses above relating to Maine's calculation of a fish consumption rate and the fact that the Maine Tribes are the general population to which HHC should be targeted for waters in Indian lands.

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[10] ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers,* as revised, July 24, 1992. See also Ebert, E.S., N.W. Harrington, K.J. Boyle, J.W. Knight, R.E. Keenan, *Estimating Consumption of Freshwater Fish among Maine Anglers*, North American Journal of Fisheries Management, 13:4, 737-745 (1993); http://dx.doi.org/10.1577/1548-8675(1993)013<0737:ECOFFA>2.3.CO;2

IX. Maine Tribes' comments regarding the adequacy of Maine's WQS

1. **Tribal comment: Apart from the jurisdictional question, Maine's WQS for arsenic, phenol and acrolein are scientifically and legally flawed, and are arbitrary and capricious.**

EPA's response

EPA's Decision Support Document explains in detail the bases of EPA's decision to disapprove the three HHC identified in the comment, along with the rest of Maine's HHC, as applied to waters within Indian lands. We therefore refer the reader to that document. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

2. **Tribal comment: As to arsenic, EPA received comments from the Maine Tribes that Maine's arsenic standard failed to consider other exposure routes and synergistic effects; that the ChemRisk Study used by Maine to establish a fish consumption rate is flawed for a number of reasons; that unscientific manipulation of variables used by Maine to calculate in-stream criteria shouldn't be accepted by EPA; and that the fish consumption rate and cancer risk level used for arsenic by Maine are unacceptable.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's arsenic standard as it would apply to waters within Indian lands in Maine. While EPA's decision was not based on all of the objections raised by the Maine Tribes' comments, EPA agrees that Maine's arsenic criteria are not approvable under the CWA for waters in Indian lands. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

3. **Tribal comment: Using inconsistent fish consumption rates and cancer risk levels for different WQS is arbitrary and capricious.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. Because EPA is disapproving all of the HHC for waters in Indian lands due to an inadequate fish

consumption rate, it is not necessary at this time to consider the extent to which differing fish consumption rates or cancer risk levels for different criteria might be approvable for those waters.

4. **Tribal comment: The arsenic in-stream concentration is increasing as compared to Maine's prior in-stream concentration for arsenic, which imposes increased risks to tribal members.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC, including arsenic, as they would apply to waters within Indian lands in Maine. Because EPA is disapproving Maine's arsenic criteria as it would apply to waters in Indian lands, it is premature to address how Maine's arsenic HHC for waters in Indian lands will compare with the prior criterion.

5. **Tribal comment: The Penobscot Nation comments that the Wabanaki study contains "site specific" data, and that the CWA does not preclude the use of site-specific data from any particular time period in establishing WQS.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. EPA agrees with the Penobscot Nation that, based on the data and information available at this time, fish consumption data from the Wabanaki Study is the best available representative data and thus, barring any better data being collected, must be used in establishing HHC for waters in Indian lands in Maine. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

6. **Tribal comment: The Penobscot Nation comments that its sustenance fishing right is an "existing use" and a "designated use" as those terms are used in the CWA. The Tribe further comments that Maine's human health WQS submission shows that these uses will not be protected in waters within Indian lands.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. Included in the Decision Support Document is EPA's explanation of its identification of the designated use of sustenance fishing for waters within Indian lands and its relationship

both to CWA requirements and to Congress's purpose in establishing the Maine Tribes' reservations and trust lands under the settlement acts. EPA agrees that Maine's current HHC are not adequate to protect the designated use of sustenance fishing that applies to waters in Indian lands and therefore has disapproved those criteria. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

7. **Tribal comment: EPA has a duty to collect more accurate fish consumption rate data, and such data must account for suppression of fish consumption. Maine's WQS fail to consider and account for suppressed fish consumption.**

EPA's response

EPA does not agree that the CWA imposes a duty to collect more accurate fish consumption rate data. But states (or EPA, if EPA is developing the HHC) must use the best available fish consumption data or information to derive HHC that represent an unsuppressed fish consumption rate. EPA agrees that the fish consumption data used by Maine to establish its HHC is not representative of unsuppressed fish consumption associated with tribal sustenance fishing in waters in Indian lands. EPA's Decision Support Document explains the bases of the data derived from the Wabanaki Study and the ChemRisk Study Maine actually used. The Decision Support Document also explains EPA's basis for concluding that the Wabanaki Study provides the best available existing fish consumption data and information for deriving HHC based on an unsuppressed sustenance fish consumption rate for waters in Indian lands in Maine.

8. **Tribal comment: The situation at the Penobscot Nation is not dissimilar to that at other tribes, traditionally dependent upon a subsistence fishery. As EPA concluded in studying fish consumption rates at such tribes in the Northwest, there is "a simple relationship between tribal fish-consuming populations in the Pacific Northwest; people eat what's available to them, what's culturally preferred and at high consumption rates." EPA, TECHNICAL SUPPORT DOCUMENT FOR ACTION ON THE STATE OF OREGON'S NEW AND REVISED HUMAN HEALTH WATER QUALITY CRITERIA FOR TOXICS AND REVISIONS TO NARRATIVE TOXICS PROVISIONS SUBMITTED ON JULY 8, 2004 (June 1, 2010) at 47.**

EPA's response

See EPA's response to comment IX. 7., immediately above.