UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:14-cv-264-JDL
	)	
SCOTT PRUITT, in his capacity as Administrator, United States Environmental Protection Agency, *et al.*,	)	
	)	
Defendants,	)	
and	)	
	)	
HOULTON BAND OF MALISEET INDIANS, and PENOBSCOT NATION,	)	
	)	
Intervenors-Defendants.	)	

PLAINTIFFS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AS SUPPLEMENTED, WITH INCORPORATED MEMORANDUM

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GLOSSARY

Alaska Rule	EPA regulation requiring that all state-adopted WQS in effect under state law and submitted to EPA prior to May 30, 2000, became the applicable WQS in effect for CWA purposes upon their state adoption regardless of whether EPA ever approved them. 40 C.F.R. §§ 131.21(c)-(e); 65 Fed. Reg. 24641 (April 27, 2000).
AR (or Record)	EPA's administrative record. ECF 37-38, 89, 92.
CAA	The federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*
CWA	The federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*
DEP	The Maine Department of Environmental Protection.
DOI	The U.S. Department of the Interior.
EPA	The U.S. Environmental Protection Agency.
EPA's Action	EPA Region 1's letter dated February 2, 2015, containing the EPA decisions on appeal, including the approvals and disapprovals of Maine WQS for Indian Waters.
FAQ	EPA's January 2013 document entitled Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions, AR 1567-71, which EPA cites as support for its new requirement of an "unsuppressed" tribal FCR.
FCR	Fish consumption rate, which is an input parameter selected by states and used when developing HHC to protect a state's designated uses, and is measured by the amount in grams of fish and shellfish consumed per day.
HHC	Human health criteria, which are WQS and a form of water quality criteria designed to protect a state's designated uses.
Houlton Band	The Houlton Band of Maliseet Indians, which is one of the two Northern Tribes and one of the four federally-recognized Maine Tribes.
IFW	The Maine Department of Inland Fisheries and Wildlife.
Indian Waters	The unspecified waters addressed by EPA's Action in or adjacent to tribal reservations and trust lands in Maine.

JLS	The parties' Joint Legal Supplement. ECF 87, 87-1, 90, 91.
LPP	Lincoln Pulp and Paper, a longstanding EPA NPDES-permitted discharger to Maine Indian Waters.
LSD	Lincoln Sanitary District, a longstanding EPA NPDES-permitted discharger to Maine Indian Waters.
Maine Rule	EPA's final Maine WQS regulation dated December 19, 2016, which establishes new and heightened federal WQS (HHC) to protect EPA's new designated use of "sustenance fishing" in Indian Waters. 81 Fed. Reg. 92466 (Dec. 19, 2016).
Maine Tribes	The four federally-recognized Indian tribes in Maine, consisting of the Southern Tribes (PN and the Passamaquoddy Tribe) and the Northern Tribes (the Houlton Band and the Micmacs).
MEPDES	The Maine Pollution Discharge Elimination System, which is Maine's delegated state NPDES permitting program under the CWA. EPA disapproved Maine's program for discharges from certain tribal facilities, which was the subject of the First Circuit's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).
MIA	The state Maine Implementing Act, 30 M.R.S. §§ 6201-14, which was confirmed and ratified by Congress in MICSA.
MICSA	The federal Maine Indian Land Claims Settlement Act, formerly codified at 25 U.S.C. §§ 1721-35, which confirmed and ratified MIA (collectively with MIA, the 1980 Acts).
Micmacs	The Aroostook Band of Micmacs, which is one of the two Northern Tribes, and one of the four federally-recognized Maine Tribes.
MITSC	The joint Maine Indian Tribal-State Commission as provided for in MIA, 30 M.R.S. § 6212.
Northern Tribes	The Houlton Band and the Micmacs, which are two of the four federally-recognized Maine Tribes and who are fully subject to the laws of Maine.
NPDES	The National Pollution Discharge Elimination System, which is the federal permitting program under the CWA. 33 U.S.C. § 1342. Prior to EPA's approval of Maine's MEPDES program for Indian Waters, EPA consistently issued NPDES permits to dischargers in Indian Waters based on Maine's WQS.

Passamaquoddy Tribe	One of the two Southern Tribes, and one of the four federally-recognized Maine Tribes, with two separate governing bodies in Maine at Indian Township and Pleasant Point.
PN	The Penobscot Nation, which is one of the two Southern Tribes and one of the four federally-recognized Maine Tribes.
Record (or AR)	EPA's administrative record. ECF 37-38, 89, 92.
Risk Level	Cancer risk level, which is an input parameter selected by states and used when developing HHC to protect state designated uses. Risk Levels represent an additional cancer per given number of people, such as EPA's acceptable risk range between 10^{-4} (1 in 10,000) and 10^{-6} (1 in 1,000,000).
Settlement Acts	Maine's Indian settlement acts, consisting of the 1980 Acts (MIA and MICSA) as well as the 1989 state Micmac Settlement Act and the 1991 federal Aroostook Band of Micmacs Settlement Act.
Southern Tribes	The Passamaquoddy Tribe and PN, which are two of the four federally-recognized Maine Tribes. The Southern Tribes are subject to Maine law to the extent provided in MIA.
TAS	Treatment as a state, which is a tribal concept added to the CWA in 1987 allowing EPA to authorize eligible Indian tribes to be treated as states for CWA purposes, and which does not apply in Maine for regulatory purposes under MICSA. Similar TAS provisions exist under other federal statutes such as the CAA.
TEA	Tribal Environment Agreement, such as the TEA between PN and EPA dated July 1999.
Wabanaki Study	An EPA-funded tribal study that describes subsistence lifestyles based on historical fish consumption estimates from the 16th-19th centuries and that EPA used to support EPA's Action and its disapproval of Maine's FCR for use when developing HHC for Indian Waters. AR 1245-1348.
Water Program	Maine's EPA-approved Water Classification Program. P.L. 1985, ch. 698, §15 (eff. July 16, 1986), now as amended 38 M.R.S. §§ 464-470.
WQS	Water quality standards, including a state's designated uses of its waters and water quality criteria, such as HHC, designed to protect a state's designated uses.

WQS docket	An EPA repository list of approved WQS for CWA purposes that replaced EPA's annual Federal Register publication of its state WQS approvals. 65 Fed. Reg. 24641, 24649-50 (April 27, 2000); 40 C.F.R. § 131.21(f).
1980 Acts	Maine state and federal Indian settlement acts consisting of MIA and MICSA, which establish a nationally unique relationship between Maine and Maine Indians and tribes, including PN, the Passamaquoddy Tribe, the Houlton Band, and the Micmacs.
2000 Guidance	EPA Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), which is EPA's guidance on the development of HHC to protect designated uses. AR 842-1026; 65 Fed. Reg. 66444 (Nov. 3, 2000).

SUMMARY OF ARGUMENT

Plaintiffs ("Maine") seek judicial review of a series of decisions by Defendants ("EPA"), which ultimately disapprove certain Maine water quality standards ("WQS") under the Clean Water Act, 33 U.S.C. §§ 1251-1388 (2012) ("CWA") for a set of unspecified waters in or adjacent to tribal reservations and trust lands in Maine ("Indian Waters"). These EPA decisions include both CWA approvals and disapprovals of Maine WQS, and impose heightened tribal WQS on Maine by impermissibly treating tribal members and waters differently than the rest of the State for water regulatory purposes. These decisions should be vacated because they are arbitrary and exceed EPA's jurisdiction and authority, were issued without observing required procedures, are unsupported by substantial evidence, and violate Maine's Indian settlement acts, the CWA, EPA's own regulations, guidance, and practice, and Maine's EPA-approved water regulatory program. Maine also seeks declaratory relief to clarify that EPA may not base its CWA decisions on the tribal (or non-tribal) status of any Maine lands, waters, or citizens.

Maine has a nationally unique tribal-state relationship under the Maine Implementing Act, 30 M.R.S. §§ 6201-6214 (2015) ("MIA"), which was confirmed and ratified by the Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721-1735 (2012) ("MICSA")[1] (collectively the "1980 Acts"). Under these 1980 Acts, Maine has statewide environmental regulatory jurisdiction over all waters within its borders, including all Indian Waters. This was confirmed by the First Circuit in the context of water quality regulation in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), and acknowledged by EPA during this litigation. In addition, under the 1980 Acts, Maine's environmental laws apply to all Maine tribes and waters to the same extent as any

[1] MICSA, Pub. L. No. 96-420, 94 Stat. 1785 (1980), was formerly codified at 25 U.S.C. §§ 1721-1735. MICSA and other federal settlement acts remain in effect but were removed from the United States Code as of 25 U.S.C. Supp. IV (September 2016) in an effort by codifiers to improve the code's organization. For ease of reference, Maine continues to refer throughout this brief to MICSA's sections as previously codified.

other Maine citizens and waters, and no federal law that creates any special tribal status or rights under Maine's environmental laws applies in Maine.[2]

Under the CWA, states must establish WQS for all surface waters, including "designated uses" for all waters within a state's borders and criteria designed to protect the state's chosen designated uses. A state's WQS become effective for CWA purposes either upon EPA approval, or for WQS adopted, in effect, and submitted to EPA prior to May 30, 2000, upon their state adoption. In 1986, Maine adopted and submitted to EPA a comprehensive new water classification program, now codified at 38 M.R.S. §§ 464-470 (2015) ("Water Program"), which sets forth all of Maine's designated uses for all Maine waters, including Indian Waters. By 1990, EPA had fully approved all WQS in this Water Program as submitted without ever suggesting that they were not in effect in Indian Waters. By that time, these WQS had by law become the WQS in effect under the CWA for all applicable waters, including Indian Waters, and thereafter EPA consistently applied them in Indian Waters. EPA's position changed, however, around the time that Maine sought First Circuit review of an earlier EPA decision that Maine lacked jurisdiction to regulate discharges from two tribal facilities. *Johnson,* 498 F.3d 37. In 2004, EPA began limiting approvals of Maine's WQS revisions to non-Indian Waters only, and despite Maine's repeated requests, EPA took no action on them for Indian Waters. EPA continued with this approach even after the First Circuit ruled against EPA in *Maine v. Johnson* in 2007. Lacking other options, Maine originally filed this action in 2014 to force EPA to honor Maine's statewide jurisdiction and to act on Maine's outstanding WQS submissions for Indian Waters.

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[2] There are now four federally recognized Indian tribes in Maine ("Maine Tribes"), none of which were sued by Maine: Intervenor-Defendant Penobscot Nation ("PN") and the Passamaquoddy Tribe with two separate governing bodies at Indian Township and Pleasant Point (collectively the "Southern Tribes"); and Intervenor-Defendant Houlton Band of Maliseet Indians ("Houlton Band") and the Aroostook Band of Micmacs ("Micmacs") (collectively the "Northern Tribes"). This is also how EPA categorizes the Maine Tribes. AR 5307.

On February 2, 2015, while this lawsuit was pending, EPA issued the decisions on appeal along with a lengthy supporting analysis ("EPA's Action")[3] that correctly recognized Maine's authority to set WQS for all Maine waters, including Indian Waters. *See* AR 5297, 5304, 5309-12. Maine does not challenge this decision. However, in an end-run of *Maine v. Johnson*, the 1980 Acts, and the CWA, EPA also disapproved certain WQS (Maine's human health criteria or "HHC") for all Indian Waters based on a complex new rationale, *see* AR 5304-05, that Maine is now challenging. This part of EPA's Action requires special WQS for Indian Waters based on elevated tribal-specific fish consumption assumptions different from those approved by EPA for use when developing HHC for the rest of Maine – purportedly to protect a new CWA designated use of "sustenance fishing," the existence of which EPA's Action announced for the first time.

EPA's Action creates this new "sustenance fishing" designated use for Indian Waters in two ways, each based on new EPA interpretations of established Maine law. ECF 44 ¶¶ 6-8; AR 5304-05, 5332-34. First, without any authority, EPA seeks to "harmonize" the CWA with the 1980 Acts by revisiting and interpreting for the first time Maine's already-approved statewide "fishing" designated use as also constituting a "sustenance fishing" use for all Maine Tribes and Indian Waters. This EPA interpretation dramatically changes the meaning and effect of Maine law based on a misreading of the 1980 Acts and Maine's other settlement acts, and usurps the State's role under the CWA. To avoid CWA procedural requirements for amending WQS, EPA also re-writes history and asserts that no WQS, including designated uses, had ever been in effect in Maine's Indian Waters. ECF 44 ¶¶ 1-2, 5, 9, 12-14. This stunning pronouncement is contrary

[3] *See* EPA's Administrative Record ("Record" or "AR") 5297-5353, which refers to individually numbered pages of the Record as submitted by EPA, along with an index, on compact disc. ECF 37-38, 90, 92; *see also* Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23239, 23241-42 (proposed Apr. 20, 2016) (discussing history of Maine's Indian settlement acts and describing EPA's Action on appeal). Further citations to the Federal Register in this brief omit the title of and other information regarding the published material unless it has particular relevance here.

to the CWA, EPA's own regulations, and decades of statements and actions by EPA and state regulators applying Maine's approved WQS in Indian Waters. It also disregards the reliance interests of municipalities and businesses whose CWA permits are predicated on the very WQS that EPA now says were never in effect. Having created this regulatory void, EPA then purports to fill it by re-approving Maine's WQS in its Water Program for Indian Waters as if they had been submitted to EPA for the first time, but with a new "sustenance fishing" designated use for all Maine Tribes and Indian Waters, AR 5304, 5317-19, that the State itself never adopted.

As an alternative route to achieving this outcome, but for the Southern Tribes only, EPA also misinterprets and approves a portion of a MIA fish and game provision, 30 M.R.S. § 6207(4), which allows members of the Southern Tribes to take fish for their individual sustenance in their reservations only, as a separate new CWA designated use of "sustenance fishing" for those two tribes in their Indian Waters. AR 5304, 5332-33. This second EPA interpretation is also contrary to the 1980 Acts, including MIA's history and text, Maine's Water Program, and CWA requirements for creating a WQS such as a new designated use. EPA's two new interpretations also usurp Maine's authority over its waters under the CWA and the 1980 Acts. They are not based on anything Maine ever submitted to EPA for approval because Maine has never adopted any "sustenance fishing" designated use for any Maine waters or group.

After creating a new "sustenance fishing" designated use and imposing it on Maine, EPA's Action then arbitrarily disapproves all of Maine's HHC as unprotective of the new sustenance use in all Indian Waters. AR 5305, 5343-44. Instead, EPA requires more stringent WQS (new HHC) for Indian Waters using an elevated fish consumption rate ("FCR"). EPA disallows use of Maine's general FCR when developing HHC to protect EPA's new sustenance fishing use, even though Maine's FCR is one of the highest in the nation, is EPA-approved for all

non-Indian Waters, and is based on actual local fish consumption data, which is EPA's preference. AR 5339-40. Instead, and without any authority, notice and comment, or other public process, EPA requires an elevated tribal-only FCR "unsuppressed" by pollution concerns. AR 5305. As the "best" evidence for such "unsuppressed" sustenance practices, EPA also arbitrarily relies on an EPA-funded tribal study, AR 1245-1348 ("Wabanaki Study"), which is based on historical estimates from the 16th –19th centuries rather than actual consumption data, assumes a pristine pre-colonial setting, AR 1251-53, and ignores historical changes to Indian Waters, lifestyles, and other factors. AR 5341-44; 81 Fed. Reg. at 23245-47 (describing study).

These steps, which are collectively necessary for EPA to reach its outcome, each violate the Administrative Procedure Act ("APA") in various ways. 5 U.S.C. §§ 706(2)(A), (C)-(E). More fundamentally, EPA's outcome itself is unlawful. It creates two new classes of Maine waters, one tribal and one non-tribal, and subjects WQS in Indian Waters to heightened federal scrutiny based solely on impermissible tribal considerations. EPA also exceeds its authority to further tribal interests, which, outside of Maine, is limited to the CWA's tribal provisions. In Maine, however, no part of the CWA may be used to create any special tribal environmental status or rights. EPA's ill-defined Indian Waters are also vague and overbroad, and EPA's new and changed positions on Maine's WQS in Indian Waters are barred by equitable considerations.

Based on the Record as supplemented, *see* ECF 58 at 2, 74, 82 at 3, 117, Maine moves for judgment in its favor, requests that the challenged parts of EPA's Action be held unlawful in its entirety and set aside pursuant to 5 U.S.C. § 706(2), and seeks declaratory relief.[4]

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[4] With reference to its Second Amended Complaint, ECF 30, Maine seeks judgment in its favor on Count I (APA review) with respect to all parts of EPA's Action comprising or supporting EPA's disapproval of Maine's WQS for Indian Waters only, including EPA's rationale and the following decisions: EPA's approvals (for Indian Waters) of WQS that were already long-approved and in effect, including Maine's designated uses and other WQS in its Water Program; EPA's new interpretations of Maine's Indian settlement acts and Water Program; EPA's creation of a new designated use of "sustenance fishing" for

I. STATUTORY AND REGULATORY BACKGROUND

A. Under the 1980 Acts, Maine has a nationally unique tribal-State relationship.

The 1980 Acts had two purposes: to finally resolve land claims by the Maine Tribes and to establish in statute a clear jurisdictional relationship between the State and the Maine Tribes. 25 U.S.C. § 1721(b); 30 M.R.S. § 6202. To this end, MIA reflects a comprehensive negotiated settlement of tribal claims to nearly two thirds of the landmass of the State, and addresses jurisdictional issues and defines the State's relationship with the Maine Tribes. *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44-45 (1st Cir. 2007) (describing history of settlement acts); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707-08 (1st Cir. 1999) (same); 81 Fed. Reg. at 23241 (same). Congress subsequently enacted MICSA, which ratified MIA, extinguished all land claims by the Maine Tribes, federally recognized the Southern Tribes and the Houlton Band,[5] and resulted in significant tribal funding. *Aroostook*, 484 F.3d at 45; *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 320 (1st Cir. 2001) (1980 Acts resolved disputed land claims and whether tribes "should be recognized at all"); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996) (MICSA confirmed title to reservation lands, memorialized federal tribal recognition, and "opened the floodgate for the influx of millions of dollars in federal

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Indian Waters; EPA's requirement that Maine tribal members only serve as the "target" population of EPA's new "sustenance fishing" use; EPA's disallowance of Maine's FCR and requirement that any FCR used to develop HHC to protect EPA's new "sustenance fishing" designated use also be "unsuppressed" by tribal concerns about pollution; and EPA's disapproval of Maine WQS (its HHC) as unprotective of EPA's new "sustenance fishing" designated use in Indian Waters. These decisions violate the APA in several ways. *See* Section II.B & n.40, *infra*. Maine also seeks declaratory relief (Count II), but does not challenge the part of EPA's Action that correctly acknowledges Maine's statewide environmental regulatory jurisdiction and authority over all Maine waters, including Indian Waters. Maine's CWA mandatory duty claims (Count III) were dismissed on November 18, 2016. ECF 55.

[5] Under the 1980 Acts, the Southern Tribes and the Houlton Band are treated differently. *See* 25 U.S.C. § 1725(a); 30 M.R.S. § 6202; AR 1808. In 1989, Maine enacted the Micmac Settlement Act, 30 M.R.S. §§ 7201-7207, which Congress ratified in 1991 through the Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) ("ABMSA"). *Aroostook*, 484 F.3d at 45-46. These Micmac Acts (with the 1980 Acts, the "Settlement Acts") were designed to give the Micmacs the same limited settlement given the Houlton Band under the 1980 Acts. *Id.* at 58 n.20; ABMSA, § 2(a)(5); AR 5309-11.

subsidies"); *Johnson,* 498 F.3d at 43 (1980 Acts were "a compromise by which land claims were limited, federal funds paid over, and the authority of the tribes and the State redefined on a new basis, closer to Maine's historic treatment" rather than full tribal sovereignty).

As a result of the 1980 Acts, Maine has a nationally unique relationship with the Maine Tribes.[6] MIA, as ratified by MICSA, 25 U.S.C. § 1725, states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject 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***.

30 M.R.S. § 6204 (emphasis added). Likewise, MICSA establishes that the Southern Tribes and their "land and natural resources" are subject to Maine's jurisdiction as provided in MIA, 25 U.S.C. § 1725(b)(1), (f), while all other Indians (including the Northern Tribes) and any "lands or natural resources" owned or held in trust for such Indians:

> shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C. § 1725(a); *see also Johnson*, 498 F.3d at 47 (MICSA § 1725, by itself and with its cross-reference to MIA, "was the core allocation of authority between the tribes and Maine"); *Aroostook*, 484 F.3d at 50-51 ("laws of the State" clearly apply to Northern Tribes without exception). Both MIA and MICSA plainly provide that "laws of the State" include regulations and that "land or [other] natural resources" includes water, water rights, and fishing rights. 30 M.R.S. § 6203(3), (4); 25 U.S.C. § 1722(b), (d); AR 5310. Thus, unless MIA expressly provides

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[6] *See Akins v. Penobscot Nation,* 130 F.3d 482, 483 (1st Cir. 1997) (Maine tribal relations "are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement."); *Passamaquoddy,* 75 F.3d at 787 (1980 Acts created "a unique relationship," submitted the Maine Tribes and their lands to State jurisdiction, and "gave the State a measure of security against future federal incursions upon these hard-won gains.").

otherwise, the 1980 Acts contemplate equal treatment of all citizens (tribal members included) under Maine's environmental laws and regulations, including those with respect to water. The legislative history confirms that Maine's environmental laws fully apply to all tribal areas:

> The Senate Report, adopted by the House Report, declared that "State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in [the proposed bill] and Section 6204 of the Maine Implementing Act."

Johnson, 498 F.3d at 44 (quoting S. Rep. No. 96-957, at 27 (1980) and H.R. Rep. No. 96-1353, at 20 (1980), also found in the Joint Legal Supplement, ECF 87, 87-1, 90 ("JLS") 43, 44.).[7]

MICSA also contains provisions that ensure that no existing or future federal laws would be interpreted in a way that might call into question the applicability of Maine's environmental laws to Maine's Indian tribes, which would upset the jurisdictional bargain that had been negotiated. 25 U.S.C. §§ 1725(h), 1735(b).[8] The combined effect of these provisions is to bar

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[7] The Senate Report's recognition of the full application of Maine's environmental laws occurred in its analysis of the effect of MICSA § 1725(b)(1) on the Southern Tribes and their lands and natural resources. Other legislative history also reflects the unifying nature of the 1980 Acts and the clear intent to avoid multiple nations and sets of different environmental laws in Maine. *See* JLS 39 at 1100, *Hearing on S. 2829 Before the S. Select Comm. on Indian Affairs,* 96th Cong. 139 (1980) (hereinafter "Senate Hearing") (Governor: "We could never have a nation within a nation within Maine."); JLS 42 at 2362, *Hearing on H.R. 7919 Before the H. Comm. on Interior and Insular Affairs,* 96th Cong. 48 (1980) (hereinafter "House Hearing") (same from Governor's counsel); *id.* at 2392 (same from Maine Joint Select Comm. Co-Chair Post; also emphasizing the continuation of "the relationship, generally speaking, we have had for many years."); JLS 39 at 1299 (same from Co-Chair Collins); AR 1670 (tribal counsel's statement that, for the tribes, negotiating the settlement meant "understanding the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine."); AR 1651-52 (Maine Attorney General's statement that MIA would generally subject all Mainers to the same laws and avoid situations where Maine's water and air pollution control laws would be unenforceable within tribal areas); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983).

[8] 25 U.S.C. § 1725(h) states 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. § 1735(b) states that: "[t]he provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine

application of any federal law that gives special heightened status, rights, or protections to Indians and affects or preempts Maine's jurisdiction unless Congress specifically makes such law applicable in Maine. *Id.*; *see also* 68 Fed. Reg. 65052, 65057 (Nov. 18, 2003) (EPA conclusion that the combination of MICSA §§ 1725(h) and 1735(b) "prevents the general body of federal Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state.");[9] *Passamaquoddy*, 75 F.3d at 787-90 (applying § 1735(b) to prohibit application of the Indian Gaming Regulatory Act in Maine). As noted by the First Circuit, MICSA's history also reveals that these provisions were intended to bar application of any federal tribal rights that would interfere with the application of Maine's state laws on environmental regulation:

> The Senate Report stated that "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 regulation or land use."

Johnson, 498 F.3d. at 44 n.7 (quoting S. Rep. No. 96-957, at 31; JLS 43 at 2632); *see also id.* at 46 (emphasizing the Senate Report's discussion of § 1725(h) in the context of Maine's laws on matters such as "environmental regulations or land use"). Overall:

> It was generally agreed that [the 1980 Acts] set up a relationship between the tribes, the state, and the federal government different from the relationship of

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Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine."

[9] During the Senate Hearing, counsel for the tribes testified that the "general body of Federal Indian law" was excluded in Maine "in part because that was the position that the State held to in the negotiations" and because of tribal concerns over "problems that existed in the West because of the pervasive interference and involvement of the Federal Government in internal tribal matters." JLS 39 at 1142-43. During the state hearings on MIA, the same counsel explained that during the negotiations both sides increasingly "found areas of mutual interest as, for example, in the case of the General Body of Federal Indian Regulatory Law, which the Tribes came to see as a source of unnecessary Federal interference in the management of Tribal property and the State came to see as a source of uncertainty in future Tribal-State relations." AR 1670. As part of the Senate Hearing, Maine's Attorney General also stated that questions "over the legal status of Indians and Indian lands in Maine" can be answered in the context of the 1980 Acts "rather than using general principles of Indian law." JLS 39 at 1110.

> Indians in other states to the state and federal governments. . . . We therefore look not to federal common law . . . but to the statute itself and its legislative history.

Stilphen, 461 A.2d at 489.

1. With limited exceptions unrelated to environmental regulation, the Southern Tribes are fully subject to Maine law.

As the First Circuit has observed, MIA extended Maine's authority well beyond what is customary for Indian tribes elsewhere, and with "very limited exceptions," the Southern Tribes are subject to Maine law. *Johnson,* 498 F.3d at 42 (*quoting Akins*, 130 F.3d at 484); *see also id.* at 43 (noting that when 1980 Acts were adopted, the Department of the Interior ("DOI") told Congress that the Southern Tribes' lands would generally be subject to Maine law) (citing H.R. Rep. No. 96-1353, at 28; JLS 44 at 2691); *id.* at 45 & n.10.[10]

Under MIA's provisions outlining general tribal powers, the Southern Tribes are treated like municipalities and, except as otherwise provided in MIA, are subject to the laws and regulatory oversight of the State. 30 M.R.S. § 6206(1); *see also Akins*, 130 F.3d at 484 (Southern Tribes benefitted by gaining municipal powers); 30 M.R.S. § 6202 (Southern Tribes agreed to adopt Maine laws as their own); AR 4820-33 (1993 EPA legal analysis of PN's jurisdiction under 1980 Acts). The only exception in MIA § 6206(1) involves "internal tribal matters," which the First Circuit has determined does not encompass environmental or water regulation. *Johnson,* 498 F.3d at 44-46 (internal tribal matter exception does not displace Maine law on most substantive subjects, including environmental regulation, or bar Maine's regulatory jurisdiction over tribal wastewater facilities); *id.* at 46 (1980 Acts "make ordinary Maine law apply, even if only tribal members and tribal lands are affected . . . *unless* the internal affairs exemption

[10] During MIA's hearings, tribal counsel explained that the tribes were obliged to negotiate jurisdiction "to effectuate the Settlement of the monetary and land aspects of the claim," and that they negotiated "with the State concerning the question of jurisdiction not because they wanted to do so but because they were obliged to do so to obtain a Settlement that they had already negotiated with the Federal Government." AR 1668-69; *Stilphen*, 461 A.2d at 488 n.7; *see also* AR 4827-28 (EPA 1993 analysis of MIA's history).

applies," and discharges to Maine waters are not the same as "the structure of Indian government or distribution of tribal property"); *see also id.* (from a jurisdictional standpoint, MIA "does no more than give [the Southern Tribes] municipal powers and reserves tribal authority over internal matters"); *id.* at 43 (casting doubt on argument that Southern Tribes have any concurrent environmental regulatory authority in Maine and noting that if there is any such concurrent regulatory jurisdiction, it is subordinate to Maine's overriding authority under MIA § 6204).

Outside of MIA's provisions addressing the application of Maine law in Indian lands (§ 6204) and tribal powers and duties in tribal territories (§ 6206), MIA also contains a separate tribal fish and game provision. 30 M.R.S. § 6207. Under MIA § 6207, the Southern Tribes, the joint Maine Indian Tribal-State Commission ("MITSC"), *see* 30 M.R.S. § 6212, and Maine's Department of Inland Fisheries and Wildlife ("IFW") regulate hunting and fishing within Indian territories, such as the establishment of fishing rules or regulations on the "method, manner, bag and size limits and season for fishing." 30 M.R.S. § 6207(3). Within this separate fish and game provision is a limited exemption (for the Southern Tribes only) from otherwise applicable fish and game requirements regulating the taking of fish:

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of [30 M.R.S. § 6207(6)].

30 M.R.S. § 6207(4); *see also* AR 1633 (Maine Joint Select Comm.'s interpretation of the authority of the Southern Tribes and MITSC as "limited to regulating the taking and possession of fish and wildlife"); AR 1640-41 (Maine Attorney General's discussion of tribal regulation of hunting and fishing and inapplicability of state "fish and game" laws); AR 1837-38 (same). Testimony during MIA's hearings also shows how the particular wording of § 6207(4) was chosen to differentiate between commercial fishing and fishing for individual

consumption. *See* AR 1808-09 ("We didn't just use the word sustenance, we used sustenance for the individual which we construe as not covering commercial fishing operations. We believe that means consumption by the individual."); AR 1809 (noting the state law distinction between taking of fish or wildlife and its subsequent disposition or sale); AR 1633 ¶¶ 2-4 (Maine Joint Select Comm.'s interpretations of fishing provisions, which equate sustenance with consumption and subject fish stocking and propagation to state law).

2. The Northern Tribes are fully subject to Maine law without exception.

Under the 1980 Acts, there are no exceptions to the application of Maine law to the Northern Tribes, which, unlike the Southern Tribes, are not treated like municipalities and whose tribal natural resources are fully subject to Maine law to the same extent as any other person or natural resources. 25 U.S.C. § 1725(a); 30 M.R.S. §§ 6202, 6204, 6206-A, 7203, 7205; *Aroostook*, 484 F.3d at 45-46, 49-51 (Micmacs received a limited settlement similar to the Houlton Band, which was less than that of Southern Tribes); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74-75 (1st Cir. 2007); AR 5309-10; 81 Fed. Reg. at 23241.

B. States determine the uses of their waters and set WQS under the CWA.

The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). To achieve its goals, the CWA establishes "distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (CWA is a program of cooperative federalism). Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b); *see also id.* at

§ 1251(g) (requiring federal cooperation with States). Except as expressly provided, nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

The CWA provides for two sets of water quality measures: technology-based effluent limitations and WQS. *Arkansas*, 503 U.S. at 101; *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005). Effluent limitations are promulgated by EPA and restrict the quantities, rates, and concentrations of specific pollutants discharged from point sources into waters. *Arkansas*, 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1314). WQS "set the permissible level of pollution in a specific body of water without direct regulation of the individual sources of pollution." *City of Arcadia*, 411 F.3d at 1105. WQS "are, in general, promulgated by the States and establish the desired condition of a waterway," and "supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *Arkansas*, 503 U.S. at 101 (quoting *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976)).

1. The CWA requires states to promulgate WQS for all surface waters.

The CWA is comprehensive and omits no surface waters from the scope of its WQS protections. 33 U.S.C. §§ 1251, 1313; 57 Fed. Reg. 60848, 60849 (Dec. 22, 1992) (CWA ensures that "all waters are sufficiently clean"); *id.* at 60851 (EPA's initial efforts under the 1972 CWA expanded coverage to "all interstate and intrastate surface waters"). States have the primary authority and duty to create, review, and revise WQS for all surface waters. 33 U.S.C. § 1313(a)-(c);[11] *PUD No. 1,* 511 U.S. at 704 (CWA requires each state to "institute comprehensive

[11] Following enactment of the Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), the CWA required states to promulgate WQS for all intrastate waters of the United States by specific benchmarked deadlines in the early 1970s. 33 U.S.C. § 1313(a)-(b). The CWA also applies to interstate waters. 33 U.S.C. § 1313(a)(1).

water quality standards establishing water quality goals for all intrastate waters"); *Thomas v. Jackson*, 581 F.3d 658, 661 (8th Cir. 2009); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 907 (11th Cir. 2007); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997) (CWA requires state WQS for "every body of water within a state"); *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 370 (D. Me. 2012); 54 Fed. Reg. 39098, 39098-99 (Sept. 22, 1989) (CWA § 303(c) "currently" required state WQS, including designated uses, for all surface waters).[12]

The CWA's requirement that WQS be promulgated for all surface waters applies to all tribal waters within state boundaries. *See Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960) ("a general statute in terms applying to all persons includes Indians and their property interests"); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 555-57 (10th Cir. 1986) (Safe Drinking Water Act, which establishes "national policy with respect to clean water," applies to Indian lands consistent with *Tuscarora* and EPA's contemporaneous interpretations of the SDWA; to hold otherwise would contradict the clear meaning and purpose of the SDWA by creating a "vacuum of authority" and "leaving vast areas of the nation devoid of protection").

A state's WQS define the water quality goals for a waterbody by designating the uses to be made of the waters, and set water quality criteria, including HHC, to protect the state's designated uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 131.2, 131.3(b), (f) & (i), 131.6, 131.10, 131.11; *see also Nat. Res. Def. Council v. EPA*, 16 F.3d 1395, 1399-1401 (4th Cir. 1993) (describing primary role of states and EPA's "sole" reviewing function with respect to

[12] EPA's regulations and historical WQS publications also emphasize the primary role of states in setting WQS for all surface waters. *See* 40 C.F.R. §§ 131.1, 131.2, 131.3(j), 131.4, 131.10; ECF 45-4 at 2, question no. 4 (WQS apply to all interstate and intrastate waters); *id.* at 2-3, no. 6 (states must establish WQS for all intrastate waters); *id.* at 3, no. 8 (states set classifications and criteria and EPA may promulgate WQS only when states fail to timely adopt WQS consistent with CWA); *id.* at 9 (outlining deadlines in 1972-1973 for promulgation of all intrastate WQS); ECF 45-5 at 2, question no. 2 (states establish WQS); *id.* at 4, no. 9 (WQS apply to waters of the U.S.); *id.* at 3-4, no. 12 (outlining how states establish uses); ECF 44-10 at 5, question nos. 7 (WQS should be adopted for each waterbody within a state's boundaries) & 8 (states adopt WQS), *id.* at 6, no. 10 (WQS apply to all waters of the U.S.).

WQS); *Olsen*, 839 F. Supp. 2d at 370-71. Whenever a state revises or adopts new WQS, it submits the WQS to EPA for review, and EPA then has a duty to either approve the WQS within sixty days or disapprove the WQS within ninety days. 33 U.S.C. § 1313(c)(2)-(3); 40 C.F.R. § 131.21. EPA's review of state WQS is limited and includes determinations of whether the state has adopted designated uses consistent with the CWA and whether the state has adopted criteria to protect its designated uses based on sound science. 40 C.F.R. §§ 131.21(b), 131.5(a)(1)-(2). A state's designated uses must be consistent with the provisions of 33 U.S.C. §§ 1251(a)(2) and 1313(c)(2). 40 C.F.R. §§ 131.6(a), 131.10(a); *see also Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1081 (D. Idaho 2000) (CWA does not obligate states to designate any particular uses, but favors CWA § 101(a)(2) fishable/swimmable uses); 40 C.F.R. § 131.10(k) (allowing states to remove or revise non-CWA § 101(a)(2) uses without any use attainability analysis).

If EPA determines that new or revised state WQS meet the requirements of the CWA, then EPA approves the WQS, which "shall thereafter be" the WQS for CWA purposes for the "applicable waters of that State." 33 U.S.C. § 1313(c)(3); *see also* 40 C.F.R. § 131.21. If EPA disapproves new or revised WQS then EPA must notify the state of the deficiencies in the WQS and specify changes required for EPA approval within ninety days of the state's submission. *Id.*

Under EPA's "Alaska Rule," all state-adopted WQS that were in effect under state law and submitted to EPA prior to May 30, 2000, became the applicable WQS in effect for CWA purposes upon their state adoption ***regardless*** of whether EPA ever approved them. 40 C.F.R. §§ 131.21(c)-(f); *see also* ECF 45-9 (*Policy & Guidance: EPA Review and Approval of State and Tribal WQS* (Apr. 2000)) & 45-10 (*Review and Approval of State and Tribal WQS – Alaska Rule Questions and Answers* (Sept. 12, 2000)); 65 Fed. Reg. 24641, 24642 & 24645-46 (§§ III(A),

(C)) (Apr. 27, 2000); 65 Fed. Reg. 66444, 66449 (§ II(E)) (Nov. 3, 2000); *Save the Lake v. Schregardus*, 752 N.E.2d 295, 302 (Ohio Ct. App. 2001).

The EPA Administrator may promulgate new or revised WQS for a state, such as a new designated use or water quality criteria, only through published regulations setting forth the WQS. 33 U.S.C. § 1313(c)(4); 40 C.F.R. § 131.22. *But see* 54 Fed. Reg. at 39103 (federal WQS are inconsistent with intent of CWA §§ 303(c) and 518(e) to provide states and authorized tribes with first opportunity to set WQS). Absent a determination that a state WQS submission is inconsistent with the CWA, *see* 33 U.S.C. § 1313(c)(4)(A), the EPA Administrator must make a formal determination that a federal WQS is "necessary" to meet CWA requirements before publishing such a proposed WQS regulation. *Id.* at § 1313(c)(4)(B); 40 C.F.R. § 131.22(b) (2014); *see also Puget Soundkeeper All. v. EPA*, No. C13-1839-JCC, 2014 WL 4674393, at *4-5 (W.D. Wash. Sept. 18, 2014) (under § 1313(c)(4)(B), EPA Administrator's discretionary power to *sua sponte* propose WQS must be based on a necessity determination, is infrequently exercised, and has not been delegated). Review of EPA-promulgated WQS centers on two issues: whether EPA's disapproval of the state's WQS was proper; and whether EPA properly promulgated a substitute WQS. *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980).

Prior to changing any WQS, such as adding a new designated use or sub-category of a use, a state (or the EPA Administrator if, for instance, a necessity determination is made pursuant to 33 U.S.C. § 1313(c)(4)(B)) must provide notice and an opportunity for a public hearing with respect to the change in the WQS. 33 U.S.C. § 1251(e); 40 C.F.R. § 131.10(e) (2014) (requiring notice and opportunity for hearing under 40 C.F.R. § 131.20(b) "[p]rior to adding or removing any use, or establishing sub-categories of a use") (removed and reserved eff. Oct. 20, 2015); *see also* 40 C.F.R. §§ 131.20(b), 131.22(c) (EPA subject to state public participation requirements).

2. States may also obtain EPA-delegated CWA permitting authority.

In addition to their duty to set WQS for all state waters, states may also apply to EPA for authorization to regulate point sources of pollution under the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342(b); *Johnson*, 498 F.3d at 39-40. In November 1999, Maine applied for such NPDES permitting authority and submitted its Maine Pollution Discharge Elimination System ("MEPDES") program to EPA for approval for all Maine waters, including Indian Waters. *Johnson*, 498 F.3d at 40. On January 12, 2001, EPA approved Maine's MEPDES program for all non-Indian Waters, but deferred taking action for Indian Waters. *Id.*; 66 Fed. Reg. 12791, 12795 (Feb. 28, 2001). In October 2003, EPA partially approved Maine's MEPDES program for Indian Waters, but disapproved the program for two facilities operated by the Southern Tribes that discharged to Indian Waters. *Johnson*, 498 F.3d at 40.[13] In 2004, Maine appealed that EPA action to the First Circuit, which resolved the matter in Maine's favor under the 1980 Acts. *Id.* at 49; *see also* Section I.F, *infra*.

3. The CWA's 1987 tribal amendments do not apply in Maine under MICSA.

In 1987, Congress amended the CWA and added § 518, which for the first time addressed Indian tribes under the CWA. 33 U.S.C. § 1377. As a result, eligible tribes may now apply to be treated as a state ("TAS") under the CWA for purposes of regulating waters within tribal borders, including setting WQS and issuing NPDES permits in such waters. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8; *see also City of Albuquerque v. Browner,* 97 F.3d 415, 418, 423 n.9 (9th Cir. 1996); 54 Fed. Reg. at 39103 (expectation that tribes with TAS status will adopt WQS on schedules similar to states under 1972 amendments expanding WQS to

[13] EPA determined that MICSA "unambiguously" granted Maine authority to administer its MEPDES program in the territories of the Southern Tribes. 68 Fed. Reg. at 65055. EPA also acknowledged that the 1980 Acts prevent "the general body of Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state," *id.* at 65057, and rejected arguments that the Southern Tribes had concurrent environmental regulatory jurisdiction with Maine over Indian Waters, *id.* at 65058-59.

all intrastate waters); *id.* at 39104 (until tribes obtain TAS authority and adopt tribal WQS, EPA will when possible "assume that existing [WQS] remain applicable").[14] Tribal WQS promulgated with TAS authority may then be enforced through NPDES permits against upstream dischargers beyond tribal reservation boundaries. *See Browner*, 97 F.3d at 423-24.

Under MICSA, however, CWA § 518's TAS provisions do not apply in Maine for any regulatory purpose. 25 U.S.C. §§ 1725(h), 1735(b); *Johnson*, 498 F.3d at 43 n.5, 44 n.7. The Congressional Record said this expressly, and by citing § 1725(h), clarified that neither the CWA nor the new TAS provisions may be used to create any special tribal rights in Maine:

> This section does not override the provisions of the Maine Indian Claims Settlement Act (25 U.S.C. 1725). Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes . . .

Water Quality Act of 1987, Section-by-Section Analysis, 133 Cong. Rec. H 131, § 506 (Jan. 7, 1987); *as reprinted in* 1987 U.S.C.C.A.N. 5, 43; *Johnson*, 498 F.3d at 43 n.5. EPA itself reached much the same conclusion in a 1993 legal analysis. AR 4819-22. In any event, and as far as Maine is aware, no Maine Tribe has ever obtained TAS approval from EPA to issue NPDES permits or administer a WQS program in Maine, *see, e.g.*, ECF 48 at 2 n.2, ECF 49 at 3 n.1, and there is no Record evidence of any such TAS approval for any Maine Tribe. Thus, only Maine, as opposed to any Maine Tribe, has the authority to regulate and designate the uses of Maine's waters.

C. All Maine water classifications and designated uses are in its Water Program.

Maine's Water Program was enacted in its current form in 1986. P.L. 1985, ch. 698, § 15 (eff. July 16, 1986) (codified as amended at 38 M.R.S. §§ 464-470); AR 393 (July 16, 1986 EPA approval of "major portions" of Maine's Water Program that "in many ways strengthens"

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[14] The 1987 TAS amendments also directed EPA to create a dispute resolution mechanism to address unreasonable consequences that might result from the promulgation of differing WQS by states and tribes with TAS status on common bodies of water, 33 U.S.C. § 1377(e); 40 C.F.R. § 131.7, which implicitly recognized situations where state WQS were already promulgated and in effect for waters in tribal areas.

Maine's WQS).[15] Maine's Water Program is comprehensive and includes WQS setting forth all classifications and designated uses for all Maine waters, including Indian Waters, as well as water quality criteria for each such classification. 38 M.R.S. §§ 464 (classifying all "waters of the State"), 464(1) (objectives), 361-A(7) (broadly defining "waters of the State"), 464(2-A)(F) ("designated use" means the uses specified in WQS for each waterbody or segment under 38 M.R.S. §§ 465 to 465-C (standards for classifications) and 467-470 (classifications)); *see also Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 6, 97 A.3d 115 (explaining Water Program). Maine's classifications designate "the minimum level of quality which the Legislature intends for the body of water" and are "intended to direct the State's management of that water body." 38 M.R.S. § 464(1). The Maine Legislature has sole authority to make any changes to Maine's classifications and designated uses of its waters, including the creation of any subcategory of a designated use. 38 M.R.S. §§ 464(2)(D), 464(2-A)(E); *Olsen*, 839 F. Supp. 2d. at 371.

1. Maine has never adopted any "sustenance fishing" designated use.

Consistent with the CWA, *see* Section I.B.1, *supra*, all segments of Maine's surface waters are classified under the Water Program. 38 M.R.S. §§ 467-469. The program's goals include water quality sufficient to protect "fish, shellfish and wildlife and provide for recreation in and on the water." 38 M.R.S. § 464(1)(C); *see also* 12 M.R.S. § 402(1) (restoration goal of allowing fishing and swimming). Thus, all classifications of Maine's surface waters include designated uses of "fishing" and "recreation in or on the water," *see* 38 M.R.S. §§ 465 to 465-B, which meet the goals and requirements of the CWA. 33 U.S.C. § 1251(a)(2); 40 C.F.R. §§ 131.2,

[15] Maine has had a water program since the 1950s. *See, e.g.* R.S. ch. 79, § 2 (1954). Before the current Water Program, Maine's WQS were codified at 38 M.R.S. §§ 363-364, 368-369, and 370-371, and were approved by EPA on February 20, 1985, without qualification as to their effect in Indian Waters. *See* 50 Fed. Reg. 29758, 29760 (July 22, 1985); Op. Me. Att'y Gen. 1986-6-A, 1986 WL 288885, at *3 (Maine's WQS adopted as of March 10, 1986, including designated uses and criteria for all Maine waters, were codified in 38 M.R.S. §§ 363 to 363-B and were EPA-approved). These WQS provisions were repealed when Maine enacted its new and current Water Program. P.L. 1985, ch. 698, §§ 4-14.

131.3(q), 131.6(a), 131.10(a); AR 929-30 (state WQS for human health protect CWA § 101(a) fishable and swimmable uses). Maine has never adopted any designated use of "sustenance fishing" for any waters or group and its Water Program does not mention sustenance fishing.[16]

In 2002, the Maine Legislature considered but rejected a controversial proposal to create a similar new designated use of "subsistence fishing" for a limited stretch of the Penobscot River only within Maine's Water Program. L.D. 1529, §§ 1, 13, 27, Summary (121st Legis. 2003); ECF 45-12 at 15, 27-28, 41 (same).[17] The original proposal (L.D. 1529) was amended to remove all reference to the proposed "subsistence fishing" use and was enacted without the new use in 2003. Comm. Amend. A to L.D. 1529, No. H-373 (121st Legis. 2003); ECF 45-12 at 42-43, 45, 47 (same); P.L. 2003, ch. 317 (eff. Feb. 13, 2003). Maine is unaware of any other action by the Maine Legislature regarding any "subsistence" or "sustenance fishing" designated use.

2. EPA fully approved Maine's Water Program by December 20, 1990.

On July 16, 1986, EPA approved the majority of Maine's Water Program, including all of Maine's classifications and designated uses for all of its surface waters. State WQS; Annual Listing of State Reviews, 53 Fed. Reg. 4209, 4210 (Feb. 12, 1988); AR 393-97; *see also* AR 403-05 (describing EPA's July 1986 approval and the limited issues remaining to be addressed by Maine). With one unrelated exception, EPA approved all remaining aspects of Maine's Water Program on December 20, 1990. State WQS: Annual Listing of EPA Approvals, 57 Fed. Reg. 21087, 21088 (May 18, 1992); AR 423-24 ("[w]ith this approval" Maine was "in compliance"

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[16] Maine's enactment in 1986 (just six years after the 1980 Acts) of its comprehensive new Water Program, but without any designated use of sustenance fishing for any Maine waters, is also evidence that no such designated use was ever intended as a result of MIA's sustenance fishing provision, 30 M.R.S. § 6207(4), or any other provision of Maine law. *See Bakala v. Town of Stonington*, 647 A.2d 85, 87 (Me. 1994) (quoting *Mundy v. Simmons*, 424 A.2d 135, 137 (Me. 1980) (if prior legislation is ambiguous, enactments by subsequent Legislature may clarify legislative intent of previously enacted legislation)).

[17] The "subsistence" portion of L.D. 1529 was not intended to alter the 1980 Acts, but was designed to recognize for the first time, as a matter of state policy, a new and more specific kind of fishing use within Maine's Water Program for a limited portion of the Penobscot River only. ECF 45-12 at 14.

with the federal regulations governing WQS). These EPA approvals did not limit Maine's designated uses or other WQS to non-Indian Waters only, recognize any "sustenance fishing" designated use for any Maine waters or group, or raise any question regarding application of Maine's WQS in Indian Waters. 53 Fed. Reg. at 4210; 57 Fed. Reg. at 21088; AR 388-424.[18]

On June 21, 1999, Maine submitted its then "complete and current" set of WQS to EPA. AR 373-77. This comprehensive list of approved Maine WQS was sent for inclusion in EPA's new CWA state WQS "docket," which was created as part of EPA's Alaska Rule and replaced EPA's annual Federal Register publication of state WQS approvals. *See* 65 Fed. Reg. at 24649-50; 40 C.F.R. § 131.21(f); AR 372, 425-27.[19] Maine's WQS docket submission did not include sustenance fishing or any part of MIA, including 30 M.R.S. § 6207, as a designated use or other kind of WQS. AR 372-77, 425-27. In its June 28, 1999 acknowledgment, EPA did not mention sustenance fishing or MIA § 6207, limit its approvals of Maine's WQS in any waters, or object to the content of Maine's docket submission, which EPA then put out for public comment. *Id.*; *see also* 65 Fed. Reg. at 24649 ("EPA assembled a draft CWA WQS docket and solicited public comments on its content as part of the proposal for today's final rule."). Maine is unaware of any subsequent comments on the scope or content of Maine's WQS docket or its submission to EPA.

D. States have flexibility when developing HHC for groups they choose to protect.

States, including authorized tribes with TAS status, have the primary authority to develop water quality criteria, including HHC, to protect their designated uses. Section I.B.1, *supra*; 40

[18] Because the WQS in Maine's Water Program were adopted by Maine, in effect, and submitted to EPA before May 30, 2000, they also became, as of the date of their state adoption, the WQS in effect for CWA purposes for all applicable waters, including all Indian Waters, under EPA's Alaska Rule regardless of whether EPA ever approved them for Indian Waters. 40 C.F.R. § 131.21(c)-(e); 65 Fed. Reg. at 24645-46; ECF 45-9, 45-10; *see* Section I.B.1, *supra*.

[19] As part of its proposed Alaska Rule, EPA assembled a draft CWA WQS docket for each state and authorized tribe, which EPA believed contained all current WQS in effect as of July 9, 1999. 64 Fed. Reg. 37072, 37077 (July 9, 1999). The June 1999 "complete and current" set of WQS that Maine submitted to EPA was the CWA WQS docket list for Maine at that time. AR 372-77, 425-27.

C.F.R. § 131.11(a)(1); AR 3498; *see also* 33 U.S.C. § 1251(b) (primary role of states). When developing such criteria, states may adopt values based on EPA's recommended national CWA § 304(a) criteria, or may develop modified site-specific criteria or their own criteria based on sound science and using EPA's guidance and methodology.[20] 33 U.S.C. § 1314(a)(1)-(3); 40 C.F.R. §§ 131.11(b), 131.3(b) & (c); *see also* 65 Fed. Reg. at 66445 (2000 Guidance updates methodology for § 304(a) criteria and provides guidance for state and tribal development of HHC); AR 845 (distinguishing between EPA's § 304(a) criteria recommendations and state development of criteria under § 303(c)(2)); AR 864 (describing relationship of WQS to criteria).

Multiple related factors are considered together when developing HHC, including a FCR, measured by the amount in grams of fish and shellfish consumed per day ("gm/day"), and a lifetime cancer risk level ("Risk Level") representing an additional cancer risk per given number of people, such as EPA's acceptable risk range of 10^{-4} (1 in 10,000 people) to 10^{-6} (1 in 1,000,000 people).[21] As EPA explains, Risk Levels are relative to other intake assumptions such as FCRs:

> [T]he incremental cancer risk levels are *relative*, meaning that any given criterion associated with a particular cancer risk level is also associated with specific exposure

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[20] *See* AR 842-1026 ("2000 Guidance"); 65 Fed. Reg. at 66444 (same) & 66449 (EPA will approve criteria developed pursuant to its 2000 Guidance as scientifically defensible); AR 5336; *see also* AR 875 (assumptions for EPA's national CWA § 304(a) criteria recommendations protect the "high end of the general population," which is "reasonably conservative and appropriate to meet the goals of the CWA and the 304(a) criteria program"); *id.* (EPA's target protection goal is satisfied if HHC protect the "population as a whole"); AR 876 (EPA's § 304(a) criteria recommendations are based on assumption values that protect a "majority of the population," which is "EPA's goal"). In June 2015, after EPA's Action, EPA updated its § 304(a) criteria recommendations, which were based on the 2000 Guidance and superseded EPA's prior recommendations. *See* ECF 45-1 at 1 & n.1; 80 Fed. Reg. 36986, 36987 (June 29, 2015).

[21] *See* AR 5335 n.23 (HHC are based on interrelated considerations, including exposure (*i.e.*, FCRs) and Risk Levels); AR 3498 & 3503 (same); AR 872 (describing EPA's range of acceptable Risk Levels for the general population so long as states and authorized tribes "ensure that the risk to more highly exposed subgroups (sportsfishers or subsistence fishers) does not exceed the 10^{-4} level"); AR 880 ("EPA believes that both 10^{-6} and 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level"); AR 3506 (EPA regulates carcinogens "in the range of 10^{-6} and 10^{-4} to protect average exposed individuals and more highly exposed populations"); 65 Fed. Reg. at 66452 (same); *id.* at 66449 (publishing EPA values for inputs such as Risk Levels and FCRs that result in "criteria protective of the general population"); 82 Fed. Reg. 58156, 58158 (Dec. 11, 2017).

> parameter assumptions . . . . When these exposure values change, so does the relative risk. For a criterion derived on the basis of a cancer risk level of 10^{-6}, individuals consuming up to 10 times the assumed fish intake rate would not exceed a 10^{-5} risk level. Similarly, individuals consuming up to 100 times the assumed rate would not exceed a 10^{-4} risk level. Thus, for a criterion based on EPA's default intake rate (17.5 gm/day) and a risk level of 10^{-6}, those consuming a pound per day (i.e., 454 grams/day) would potentially experience between a 10^{-5} and a 10^{-4} risk level). (Note: Fish consumers of up to 1,750 gm/day would not exceed the 10^{-4} risk level).

AR 881; *see also* 65 Fed. Reg. at 66449 (if criteria are derived using a Risk Level of 10^{-6}, "individuals consuming up to 10 times" the assumed FCR would still be protected to an EPA-acceptable Risk Level of 10^{-5}); *id.* at 66452 (for states that have adopted a Risk Level of 10^{-6}, use of EPA's national default FCR of 17.5 gm/day "would, in turn, be protective for fish intakes of up to 1,750 g/day at the 10^{-4} Risk Level," which is acceptable for highly exposed groups such as subsistence fishers); AR 872 (describing EPA's acceptable Risk Level range and default FCR of 17.5 gm/day, but urging use of FCRs derived from more local data).

Choosing FCRs and cancer Risk Levels for use in developing HHC are risk management decisions made by states,[22] which have the flexibility to select the particular population(s) they wish to protect, including their general populations or more highly exposed populations such as subsistence fishers.[23] When developing criteria to protect their selected population of concern,

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[22] *See* 65 Fed. Reg. at 66448 (criteria "inherently" require risk management decisions at the state or tribal level, including selection of FCRs and Risk Levels); *id.* at 66468 (same); AR 845 (same); AR 3498 (states may make their own judgments within reasonable scientific bounds on factors such as FCRs and Risk Levels); AR 3503 (same); AR 869 ("[C]hoice of default [FCRs] for the protection of a certain percentage (i.e., the 90th percentile) of the general population is clearly a risk management decision."); AR 878 (same; choice of Risk Level is also risk management decision; defining risk management process).

[23] *See* AR 875 (population selection is an "important decision," and HHC can protect "average or 'typical' exposures" or offer greater protection to those "more highly exposed"); *id.* (CWA § 304(a) criteria protect the general population); AR 945 (by providing additional values for more exposed groups such as sport and subsistence fishers, EPA allows flexibility to provide added protection for such groups); AR 940 (states have "flexibility to choose alternative intake rate and exposure estimate assumptions to protect specific population groups that they have chosen."); 65 Fed. Reg. at 66468 (recommending added protection for highly exposed groups if a state determines they would not be adequately protected by HHC for the general population); AR 952 (states may use high-end (90th or 95th percentile) or average values "for an identified population that they plan to protect (e.g., subsistence fishers, sport fishers, or the general population)"); AR 954 (states that have not identified separate well-defined populations of high-

states may use EPA's default assumptions for inputs such as FCRs, or make alternative estimates based on local data, which is EPA's preference.[24]

For purposes of its HHC, Maine uses a FCR of 32.4 gm/day coupled with a Risk Level of 10^{-6} for all pollutants other than inorganic arsenic, and a FCR of 138 gm/day with a Risk Level of 10^{-4} for arsenic. 06-096 C.M.R. ch. 584, §§ 4, 5 (2012); AR 30-31, 5339. As EPA acknowledges, Maine's general FCR of 32.4 gm/day is based primarily on statewide fish consumption data from a survey of Maine resident anglers (eleven percent of which were Native American), is designed to protect the higher-consuming subgroup of Maine recreational anglers who frequently consume sport fish, and represents the 97th percentile FCR for recreational anglers and the 94th percentile for Native American anglers in Maine. AR 5339-40. Maine's FCR of 32.4 gm/day coupled with a Risk Level of 10^{-6} represents one of the most protective state FCRs in the nation. AR 3592-98 (EPA January 2013 comparison of FCRs).[25]

In contrast, and at the time of EPA's Action, EPA used a national default FCR of 17.5 gm/day for the general population, which is an estimate of the 90th percentile consumption rate

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consumers and believe that EPA's national data are representative may use those FCRs). *But see* AR 5337 (EPA's Action acknowledges flexibility and "considerable discretion in determining which populations to target for protection using either statewide criteria or more geographically focused site-specific criteria," but asserts that EPA's 2000 Guidance does not address Maine's "unique situation" and that the 1980 Acts "lead EPA to consider the Tribes to be the general target population in their waters").

[24] When selecting FCRs for state populations of concern, EPA prefers that states base their FCRs on (in order of preference): 1) local fish consumption data; 2) data reflecting other similar groups; 3) national data; or 4) EPA's default intake rates. AR 951-54; *see also* AR 861 (2000 Guidance provides states and authorized tribes with flexibility in establishing WQS by providing "scientifically valid options for developing their own water quality criteria that consider local conditions"); AR 952 (EPA's first preference is use of local survey results to establish FCRs "representative of the defined populations being addressed for the particular waterbody"); 65 Fed. Reg. at 66459 (use of EPA's default Risk Level and FCR protect the general population; also encouraging use of values "more representative of local conditions if data have been collected supporting the alternative values").

[25] Based on EPA's January 2013 comparison, Maine had the third most protective state FCR/Risk Level combination behind only Oregon and New York. AR 3592-98. Many states use lower FCRs, such as a FCR of 6.5 gm/day, which according to EPA's WQS Handbook in effect in 2015 represented an average (rather than high-end) fish consumption level by the U.S. population, AR 3500, or EPA's then-default FCR of 17.5 gm/day for the general population, AR 872. AR 3592-98.

for the U.S. adult population, and is recommended by EPA for use by states when developing criteria to protect the general population or sport anglers. AR 872-73, 940, 951, 953-54, 5336; *see also* 65 Fed. Reg. at 66465 (assumptions for EPA's CWA § 304(a) criteria, including its FCR of 17.5 gm/day, protect waters with designated uses consistent with CWA § 101(a)); *id.* at 66470 (EPA considered Maine's angler study in developing its default FCR for sport fishers).[26] EPA also permits use of Risk Levels less protective than Maine's conservative Risk Level 10^{-6}:

> EPA believes that both 10^{-6} or 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level. States or Tribes that have adopted standards based on criteria at the 10^{-5} risk level can continue to do so, if the highly exposed groups would at least be protected to the 10^{-4} risk level . . . . EPA understands that fish consumption rates vary considerably, especially among subsistence populations, and it is such great variation among these population groups that may make either 10^{-6} or 10^{-5} protective of those groups at a 10^{-4} risk level . . . . In cases where fish consumption among highly exposed populations groups is of a magnitude that a 10^{-4} risk level would be exceeded, a more protective risk level should be chosen. Such determinations should be made by the State . . . .
>
> Adoption of a 10^{-6} or 10^{-5} risk level, both of which States and authorized Tribes have chosen in adopting water quality standards to date, represents a generally acceptable risk management decision, and EPA intends to continue to provide this flexibility to States and Tribes . . . . A State or authorized Tribe may use existing information . . . in making [a determination that highly exposed subpopulations are adequately protected] . . . .

AR 880; *see also* 65 Fed. Reg. at 66452; AR 5338; n.21, *supra*. Because Risk Levels and FCRs are relative, Maine's general FCR of 32.4 gm/day at a Risk Level of 10^{-6} is the equivalent of a FCR of 324 gm/day at a Risk Level of 10^{-5}, or of 3240 gm/day at a Risk Level of 10^{-4} – both FCRs that exceed EPA recommendations for any group, including subsistence fishers, within EPA's range of acceptable Risk Levels. AR 953-54; *see also* AR 30-31 (EPA May 16, 2013 approval for non-Indian Waters of Maine's revised FCR of 138 gm/day at a revised Risk Level of 10^{-4} (from 10^{-6}) for arsenic, which was consistent with EPA recommendations for "estimating

[26] EPA's June 2015 updates to its national CWA § 304(a) criteria recommendations occurred after EPA's Action and are based on a FCR of 22 gm/day, which represents the 90th percentile consumption by the general U.S. population based on updated national data from 2003 to 2010. 81 Fed. Reg. at 23244.

[FCRs] for subsistence fishers and is appropriate to ensure that highly exposed subpopulations are not exposed to a risk level greater than 1 in 10,000"); AR 5211-14, 5281-83, 5285, 5288, 5290-91 (Maine Department of Environmental Protection ("DEP") background and responses to comments on Maine's WQS revisions and changes to its FCR and Risk Level for arsenic).

E. Around 2004, EPA changed its position on Maine's WQS in Indian Waters.

Prior to 2004, when approving Maine's WQS, EPA approved them for all applicable waters without comment on their effect in Indian Waters. AR 372-77, 388-427 (EPA approvals from 1985-1999, including Maine's Water Program and June 1999 complete CWA WQS docket); AR 5306 n.2, 5316; Section I.C.2, *supra*. Beginning in 2004, however, EPA started limiting its approvals of Maine's WQS revisions to non-Indian Waters only. AR 5303, 5306, 5316.

In addition, prior to 2005, EPA made multiple requests for CWA § 401 certifications from Maine,[27] issued multiple NPDES permits,[28] and issued at least one administrative order by EPA's Region 1 Administrator,[29] all relating to discharges to Indian Waters, and these actions each

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[27] When EPA issues a federal permit, it must obtain a CWA § 401 state certification that it complies with state WQS. 33 U.S.C. § 1341; *PUD No. 1,* 511 U.S. at 707-08; 40 C.F.R. § 131.4(b)-(c).

[28] *See* AR 3688-95 (1985 EPA-issued NPDES permit and fact sheet for the Passamaquoddy Tribe at Pleasant Point applying Maine's Class SB-1 WQS); AR 3696-3701, 3709-12 (1986 EPA NPDES permit and fact sheet for the Passamaquoddy Tribe at Indian Township applying Maine's Class GPA WQS); ECF 46-16 (June 1988 EPA acknowledgement of application of Maine's Class GPA WQS to Indian Township waters); AR 4173, 4176, 4178 (EPA NPDES permit fact sheet for Lincoln Pulp and Paper ("LPP") applying Maine's Class C WQS; also noting non-attainment of Maine's WQS as reflected on DEP's CWA § 304(l) "short" list, which EPA approved in June 1989); AR 4166 (EPA Jan. 1997 response to comments stating that EPA's LPP permit protected a FCR of 110 gm/day at a Risk Level of 10^{-5} – the equivalent of a FCR of 11.0 gm/day at Maine's Risk Level of 10^{-6} – which is a "reasonable level of risk"); AR 3647-49, 3661-70 (prior 1985 EPA LPP permit and fact sheet, and DEP certification, applying Maine's Class C WQS); AR 3724-34 (2000 EPA NPDES permit for Lincoln Sanitary District ("LSD") applying Maine's Class C WQS); ECF 45-13 (2000 LSD fact sheet applying Maine's WQS and noting (at 6) non-attainment of Maine's WQS); *see also* 66 Fed. Reg. at 12795 app. 1 (identifying permitted dischargers in Indian Waters, including the Passamaquoddy Tribe, PN, LPP, and LSD).

[29] In December 1998, EPA's Region 1 Administrator issued a compliance order against LSD based on findings of violations of Maine's WQS. ECF 45-3; *see also* ECF 45-13 at 3, 11-13 (history of EPA's LSD compliance order); AR 3736-37. On May 31, 1996, the Region 1 Administrator had also declined a PN request to set federal WQS on the Penobscot River, instead espousing thoughtful application of

stated explicitly or implied that Maine's WQS applied in such Indian Waters. ECF 44 ¶ 13.[30] EPA also historically treated Maine's WQS as being in effect in Indian Waters for other CWA purposes, such as CWA § 303(d) and Maine's list of impaired waters not attaining applicable Maine WQS.[31] *See* AR 442-43 (June 10, 1998 EPA letter to DEP asserting that, despite Maine's "great strides in protection of water quality and human health," portions of the Penobscot River still failed to meet Maine's WQS and needed "to remain on [Maine's] 1998 § 303(d) list"); *see also* AR 4832 (EPA 1993 legal discussion of a June 1, 1992 agreement between PN and Maine acknowledging Maine's obligation to maintain a water quality monitoring plan for all state surface waters "including the Penobscot River").[32]

Even after EPA began limiting its approvals of Maine's WQS to non-Indian Waters only, EPA continued to apply Maine's WQS in Indian Waters for CWA purposes. In January 2006, while *Maine v. Johnson* was pending, EPA renewed a NPDES permit for discharges from PN's wastewater facility to Indian Waters (the Penobscot River), which applied Maine's Class B WQS, discussed past non-attainment of those WQS, and superseded prior EPA-issued permits

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"current" standards and the permit process based on Maine's WQS, including Maine's dioxin criterion that "remains in effect." AR 428-30.

[30] EPA's position, which it had never explained until EPA's Action, is that its pre-2005 actions applying Maine's WQS to Indian Waters were all mistakes. ECF 44 ¶ 14; AR 5317 (suggesting that mistakes were by "mid-level Agency officials" that could not revise considered EPA policy).

[31] *See* 33 U.S.C. § 1313(d) (CWA § 303(d) requiring states to identify waters not attaining applicable state WQS); 40 C.F.R. § 130.10(b)(2) (requiring state submittal of § 303(d) lists of impaired waters); 40 C.F.R. § 130.7(b), (d); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d. 210, 215-16 (D.D.C. 2011) (describing relationship between failure of waters to attain applicable state WQS and a state's inclusion of such waters on its § 303(d) list submitted to EPA).

[32] In addition to being required by the CWA and EPA's rules, *see* Section I.B.1, *supra*, EPA's historical application of Maine's WQS in Indian Waters was also consistent with EPA's longstanding policy that, until tribes obtain TAS approval and establish separate WQS for tribal waters, EPA would assume that existing state WQS applied. ECF 45-6 at 4-5 (EPA 1988 "Jensen Letter"); ECF 45-7 at 55 (1994 EPA WQS Handbook); 54 Fed. Reg. at 39103-04; 56 Fed. Reg. 64876, 64890-91 (Dec. 12, 1991); ECF 44 ¶¶ 10-11 (Jensen Letter first articulated EPA approach to WQS in tribal areas under 1987 CWA amendments; EPA removed references to Jensen Letter and tribes from WQS Handbook in Sept. 2014).

that also applied Maine's WQS. AR 3599-3613; 66 Fed. Reg. at 12795 app. 1; *see also* AR 3675-87 (prior 1985 EPA permit and fact sheet, and DEP certification, applying Maine WQS).

F. In 2007, the First Circuit sided with Maine in *Maine v. Johnson.*

EPA's shift in position on the application and effect of Maine's WQS in Indian Waters began around the time that Maine initiated its appeal in *Maine v. Johnson*. In October 2003, EPA disapproved Maine's MEPDES program for two wastewater facilities operated by the Southern Tribes under the theory that operation of those facilities constituted "internal tribal matters" not subject to Maine's regulation under the 1980 Acts. *Johnson*, 498 F.3d at 40; 68 Fed. Reg. at 65053; Section I.B.2, *supra*.[33] In early 2004, Maine appealed that EPA disapproval to the First Circuit, which in 2007 confirmed Maine's statewide environmental regulatory jurisdiction and authority to issue MEPDES permits for all facilities discharging to Indian Waters, including tribal facilities. *Johnson*, 498 F.3d at 42, 44-46. Based on the history and text of the 1980 Acts, the First Circuit narrowly interpreted MIA's jurisdictional exemption for "internal tribal matters" under 30 M.R.S. § 6206(1) so that it "does not displace general Maine law on most substantive subjects, including environmental regulation," *Johnson*, 498 F.3d at 45, and held that regulation of discharges of pollutants to Indian Waters is not an internal tribal matter because it 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," *id.* at 46. The First Circuit also observed that if MIA's jurisdictional exemption negated Maine's environmental regulatory authority over Indian Waters, it would be "hard to see what would be left of the compromise restoration of Maine's jurisdiction" set forth in the 1980 Acts. *Id.* at 45.

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[33] In December 2002, and for purposes of EPA's record for the action at issue in *Maine v. Johnson*, EPA's Office of Regional Counsel (ORC) requested a memo on whether discharges from the two tribal facilities were meeting existing Maine WQS. AR 3748. This request reflects EPA's position, at least at that time, that Maine's WQS applied in Indian Waters for CWA purposes.

EPA delayed responding to *Maine v. Johnson* and did not approve Maine's program for the remaining two tribal facilities until March 28, 2012. 77 Fed. Reg. 23481, 23482 (Apr. 19, 2012) (delegating state authority over facilities but not addressing tribal authority for separate NPDES programs).[34] After *Maine v. Johnson*, Maine asked EPA to confirm that Maine's WQS applied in Indian Waters, AR 431, and later asked EPA to specifically identify all Indian Waters and what (if any) WQS EPA believed were in effect for such waters. AR 209, 331. In the years prior to EPA's Action, EPA did not provide this information or respond to Maine's requests.

G. After the 1980 Acts, EPA developed a national tribal policy and separate regulatory relationship with the Maine Tribes.

In November 1984, EPA issued its Policy for the Administration of Environmental Programs on Indian Reservations, AR 475-78 ("1984 Policy"), which committed EPA to working directly with Indian tribes on a "one-to-one" or "government-to-government" basis, AR 476, giving "special consideration to Tribal interests" in making EPA policy, AR 475, and recognizing tribes as the primary parties for "setting standards, making environmental policy decisions and managing programs for reservations," AR 476. *See also* 54 Fed. Reg. at 39098-99 (background on 1983 federal policy and 1984 Policy). The 1984 Policy also committed EPA to "remov[ing] existing legal and procedural impediments" to working directly with tribes on reservation programs, AR 477, and "effectively institutionaliz[ing]" the policy's goals, AR 478. Subsequent executive actions and EPA policies affirmed and built on such tribal commitments. *See* AR 522-25 (2000 executive order requiring federal agencies, when formulating or implementing policies with tribal implications, to encourage tribal development of program objectives, consult with tribes, and "where possible, defer to Indian tribes to establish standards."); AR 479-80 (discussing same); AR 512-21 (2011 policy outlining EPA guiding principles, including

[34] EPA continued to take no action on Maine's MEDPES program in the areas of the Northern Tribes, 77 Fed. Reg. at 23482, and to Maine's knowledge has yet to take any such action.

recognizing and working with tribes as the primary authority over tribal lands and not as state subdivisions, and giving special consideration to tribes when EPA actions "may effect Indian country or other tribal interests"); AR 481-83 (EPA standard for tribal consultation).

Since the 1990s, EPA has communicated separately with the Maine Tribes about Maine environmental regulatory matters including water quality in tribal areas. *See, e.g.*, ECF 46-5, 47, 56 at 25; AR 484-89, 490-504, 511, 526, 527-31, 1349-99, 3464-74. Some EPA communications expressly support tribal environmental goals without involving Maine. For instance, in July 1999, EPA and PN, in furtherance of "mutual environmental-governmental goals" in their "government-to-government" relationship, and pursuant to EPA's alleged environmental trust responsibility,[35] entered into a Tribal Environment Agreement ("TEA") that applies EPA's 1984 Policy and contains a confidentiality agreement committing EPA to using "best efforts" to protect all communications between EPA and PN, including those predating the TEA "requested under the Freedom of Information Act." ECF 47 §§ 3, 5. This TEA notes PN's goal of restoration of the Penobscot River for sustenance fishing purposes and EPA's intent to use "[e]nvironmental justice principles" (*see* AR 1060, 1068, 1156-59) in its decision-making "including placement of a high priority on tribal cultural concerns such as subsistence needs and traditional practices and uses of natural resources."[36] ECF 47 §§ 3, 4. EPA's 1984 Policy and TEAs represented a new approach to furthering tribal water quality goals outside of the CWA's TAS process. *See* ECF 46-5 (June 1995 EPA Region 1 memo to New England tribes, including the Maine Tribes, stating

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[35] For any federal duty to manage tribal resources to exist, substantive statutes and regulations must expressly create a fiduciary relationship giving rise to defined obligations. *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007). Under Maine's Settlement Acts, no such environmental trust responsibility exists because there is no such express relationship with respect to either environmental regulation or the quality of Maine's waters. *See* Sections I.A-I.A.2, *supra*; Section III.F & n.43, *infra*.

[36] Maine learned after-the-fact of EPA's 1999 TEA with PN and many of the other EPA communications with the Maine Tribes, which generally occurred as a result of Maine's own efforts, including public records requests, discovery requests in other litigation, and independent research.

that "[i]t looks like EPA has finally woken up!"; that "Tribes will be able to decide if they want to set their own [WQS] even if they have not received 303 [33 U.S.C. § 1313] authority"; that formulating such WQS "could be a part of the TEA"; that "Tribes need not be at the will of the States" for WQS; and that EPA must work with tribes as the governing bodies in their areas).

More recently, in March 2013, EPA separately consulted with the Maine Tribes, AR 490-504,[37] regarding Maine's WQS revisions (including for arsenic) submitted to EPA on January 14, 2013. AR 208-327; *see also* AR 484 (Apr. 2013 agenda). In May 2013, EPA approved those revisions for non-Indian Waters only. AR 29-32. On August 14, 2013, EPA issued a notice regarding application of those revisions in Indian Waters and invited comment on whether to approve them for Indian Waters. AR 5172; *see also* AR 485, 489 (Oct. 2013 agenda and sign-in).

Thereafter, EPA and PN further communicated regarding the administration of the CWA on PN's reservation and PN's intent to promulgate separate tribal WQS for PN's Indian Waters. *See* AR 527 (Jan. 2014 letter seeking EPA input on "competing authorities" between EPA, Maine, and PN with respect to WQS on PN's reservation); AR 528, 486 (follow-up communications by PN and EPA); AR 487-88 (Mar. 2014 agenda and sign-in). In June 2014, PN published draft tribal WQS for PN Indian Waters. AR 529. In October 2014, PN applied to EPA for TAS status for a separate WQS program and for approval of its proposed tribal WQS for PN Indian Waters. AR 509-10, 530, 5315; *see also* Section I.B.3, *supra*.

H. EPA's Action occurred contemporaneously with its reaffirmation of its 1984 Policy and its announcement of a new approach to protecting tribal rights.

In December 2014, the EPA Administrator issued an agency-wide memo commemorating the 30th anniversary of EPA's 1984 Policy, AR 505-06, which again stressed EPA's government-

[37] These letters acknowledge EPA's guidance allowing "states and tribes to use cancer risk levels between 10^{-6} and 10^{-4} as long as sensitive subpopulations are protected to at least the 10^{-4} cancer risk," and that Maine had identified subsistence fishers as the "most sensitive subpopulation" of Maine's general population (as opposed to a separate "target" population of any use). AR 490, 493, 496, 499.

to-government relationship with and "trust responsibility" to tribes, and emphasized that EPA's programs "should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so," AR 505. *See also* AR 507-08 (Nov. 2014 memo noting a forthcoming "clear policy statement regarding the role of tribal treaty rights in the context of EPA's activities" under which EPA will have "opportunities to exercise [its] discretionary authority to enhance the protection of treaty rights," and a subsequent EPA-wide effort to develop an "analytical framework" for evaluating such treaty rights).

On February 2, 2015, while this action was pending, EPA issued the WQS approvals and disapprovals and lengthy supporting analysis on appeal here. AR 5297-5353.[38] EPA's Action first stated EPA's two new interpretations of Maine's existing "fishing" use and MIA § 6207 as creating a new "sustenance fishing" designated use for Indian Waters, which interpretations were never the subject of any public notice, comment or other process. ECF 44 ¶¶ 6-8. EPA's Action also first stated EPA's positions that Maine tribal members only must be the "target" of EPA's new "sustenance fishing" use and that "unsuppressed" tribal FCRs must be used to develop HHC for Indian Waters, both of which were also never subjected to any public notice, comment or other process. *Id.* ¶¶ 15-16. Apart from EPA's August 14, 2013 notice regarding Maine's January 2013 WQS revisions submission, AR 5172, Maine is unaware of any other EPA notice regarding EPA's Action. *See* AR 5305-06 at § 1.1 (describing EPA's notice regarding whether to approve Maine's Jan. 14, 2013 WQS submission for Indian Waters); AR 5354-56 (same; but noting that in EPA's "judgment" the comments "extend equally" to all decisions in EPA's Action, and that the "principles" of EPA's responses apply to all of its WQS decisions).

[38] Since EPA's Action, EPA has withdrawn disapprovals of some Maine HHC for Indian Waters because those HHC were either not based on any FCR or were as stringent as (if not more stringent than) EPA's own June 2015 updates to its CWA § 304(a) national criteria recommendations. ECF 44 ¶¶ 3-4, 45, 45-1.

Since EPA's Action, EPA has announced similar new tribal WQS requirements elsewhere based on its reaffirmed 1984 Policy and new analytical approach. *See* 81 Fed. Reg. 85417, 85422-24 & n.32-39 (Nov. 28, 2016) (citing 1984 Policy, 30th anniversary memo, and constitutional principles in support of assertion that the CWA must be read in "harmony" with treaty rights, and concluding that the State of Washington's existing fish and shellfish harvesting designated use also includes a "subsistence fishing" use, as informed by state-specific 19th century treaties); *id.* at 85424-25 (concluding that the CWA requires that tribal members comprise the "target" population of the new subsistence fishing use, rather than a subpopulation of the general population, and applying EPA's 2000 Guidance "for the general population to the tribal target population"); *id.* at 85425-26 (asserting that an "unsuppressed" FCR, while an important CWA "goal," is "necessary" and, if adequate data are available, "must" be used to protect a subsistence fishing use).

II. STANDARD OF REVIEW

This dispute is being resolved through motions for judgment on the Record, ECF 58 at 2-3, 74, 82 at 3, 84, 117, as supplemented, ECF 44 (joint stipulations), ECF 44-1 to 44-17 & 45 to 45-13 (stipulated documents); ECF 56 at 25 (allowing consideration of ECF 46-5, 46-16, & 47).

A. APA review and deference

Under the APA, the Court decides all relevant questions of law. 5 U.S.C. § 706. Determining the meaning of a statute is a purely legal question, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 691 (1st Cir. 1994), the "chief objective" of which is to "give effect to the legislative will." *Passamaquoddy*, 75 F.3d at 788. EPA typically gets a measure of deference in applying ambiguous terms in statutes it administers such as the CWA. *Johnson*, 498 F.3d. at 41. However, where (as here) EPA speaks not through a regulation but with "something less than the force of law," its interpretations are entitled to deference only to the extent that they have the power to persuade, which involves consideration of a mix of factors, including the thoroughness

of EPA's consideration, the consistency of its interpretations with other pronouncements, and most important, the validity of its reasoning. *Merrimon v. Unum Life Ins. Co. of America*, 758 F.3d 46, 54-55 (1st Cir. 2014); *see also Wilcox v. Ives*, 864 F.2d 915, 924-25 (1st Cir. 1988) (deference to agency must be tempered by analysis of statute's language, purpose, and history, and is further diminished where interpretation is inconsistent with past agency positions). Under these principles, DEP, which has the delegated CWA responsibility to administer and enforce Maine's WQS through its MEPDES program, is also entitled to deference with respect to its interpretations of laws it administers, such as Maine's Water Program.[39] The Court, however, is the final authority on issues of statutory construction, and if legislative intent is clear there is no deference to any agency. *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 719 (1st Cir. 1999).

When interpreting Maine's Settlement Acts, which are not within EPA's purview, EPA gets no deference. *Johnson,* 498 F.3d at 45*; see also Montana v. EPA*, 137 F.3d 1135, 1140 (9th Cir. 1998) (scope of tribal authority is outside EPA's expertise and is a legal question for which EPA gets no deference); *Passamaquoddy*, 75 F.3d at 793-94 (deference is inappropriate where Congress has spoken directly, agency does not administer a statute, and agency's position rests predominantly on its reading of judicial decisions); *Johnson,* 498 F.3d at 45 & n. 9-10 (discounting DOI opinion as non-authoritative and in apparent tension with its 1980 testimony to Congress regarding Maine's broad jurisdiction under the 1980 Acts); JLS 44 at 2691.

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[39] DEP administers Maine's Water Program, WQS, and MEPDES program. 38 M.R.S. §§ 341-A, 341-B; 68 Fed. Reg. 65052 (Nov. 18, 2003); Sections I.B.2, I.F, *supra*. Some courts have held that state agencies with day-to-day delegated responsibility to administer and enforce CWA regulations get deference with respect to their interpretations of those regulations, which are treated as their own. *See In re Cities of Annandale & Maple Lake NPDES/SDS Permit Iss. for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 511-13, 516 (Minn. 2007); *Assateague Coastkeeper v. Md. Dep't of Env't*, 28 A.3d 178, 206-07 (Md. Ct. Spec. App. 2011). Because this matter involves competing interpretations of CWA provisions and regulations by federal and state agencies each charged with administering those authorities, any deference with respect to the CWA here should be canceled out. *See also Am. Farm Bureau Fed. v. EPA*, 792 F.3d 281, 301-03 (3rd Cir. 2015) (discussing "federalism canon," which has been applied to avoid deference to agency interpretations that impinge on traditional state powers including those over land and water use).

B. The APA's arbitrary and capricious standard

Courts shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[40] Agency action is arbitrary if the agency relies on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016). Courts "must ensure that 'an agency's decreed result [is] within the scope of its lawful authority' and that 'the process by which it reaches that result [is] logical and rational.'" *Id.* (quoting *Michigan v. EPA*, 135 S.Ct. 2699, 2706 (2015)); *see also Penobscot Air Servs.*, 164 F.3d at 720 (for agency action to pass muster, courts must carefully review the record and determine that the action is rational); *P.R. Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993) (agency's outcome "must make sense"; "arbitrariness" concept "embraces a myriad of possible faults" and depends heavily on the circumstances). An agency must also provide good reasons for changes in policy or position, which:

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[40] In addition to violating 5 U.S.C. § 706(2)(A), EPA violates the APA in other ways. EPA violates § 706(2)(C) (in excess of statutory authority) by revisiting and approving decades-old WQS, including Maine's statewide fishing designated use, that were already long-approved by EPA and in effect for CWA purposes. *See* Sections I.B.1, *supra*, III.A.3, *infra*. EPA violates § 706(2)(C) because Congress has said that the CWA may not be used to create any special tribal status or rights in Maine, and, in any event, no Maine Tribes have obtained regulatory TAS status. *See* Sections I.A, I.B.3, *supra*, III.A.2, III.E.2, *infra*; *Michigan v. EPA*, 268 F.3d 1075, 1083-87 (D.C. Cir. 2001) (EPA lacked authority and jurisdiction in disputed Indian country because its only authority to act for tribes under Clean Air Act ("CAA") first required a finding of tribal TAS jurisdiction). EPA also violates § 706(2)(D) (without observing required procedures) by creating new WQS, including EPA's new sustenance fishing designated use, and requiring use of an unsuppressed tribal-only FCR, without any necessity determination, or any notice, opportunity for hearing, or other public process. *See* Sections I.B.1, I.H *supra*; Sections III.A.3, III.B.6, III.D, *infra*. EPA also violates § 706(2)(E) (unsupported by substantial evidence) by disapproving Maine's FCR without support and by relying on historical tribal consumption estimates as the best evidence of a FCR to protect designated uses in Indian Waters. *See* Sections III.C, III.D.1, *infra*. Because these arguments are all also raised in support of Maine's argument that EPA's Action is arbitrary and violates § 706(2)(A), and to avoid repetition, they will not be separately restated in this brief. Finally, on a technical note, EPA also violates § 706(2)(E) by failing to consider or include in the Record evidence of the many state administrative proceedings underlying all of Maine's many WQS that EPA now claims, *see* AR 5298, were never approved and were only first acted on for Indian Waters by virtue of EPA's Action.

> ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126-27 (2016) (agency must display awareness of a change in position, have good reasons for its new policy, and be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account; an unexplained inconsistency in policy is reason for holding an interpretation to be an arbitrary change from agency practice; such an arbitrary action is unlawful and receives no deference).

III. ARGUMENT

A. EPA unlawfully revisits and interprets Maine's existing "fishing" designated use as a "sustenance fishing" designated use for all Maine Tribes and Indian Waters.

Maine itself has never adopted a designated use of "sustenance fishing" for any waters or group, *see* Sections I.C-I.C.1, *supra*, and EPA unlawfully creates one for ***all*** Maine Tribes and Indian Waters through a new and unsupported interpretation of Maine's statewide "fishing" use.

1. EPA misinterprets the purpose of tribal lands under the Settlement Acts.

Despite plain language and history to the contrary, *see* Sections I.A-I.A.2, *supra*, EPA incorrectly determines that there are sustenance fishing protections for ***all*** Maine Tribes and Indian Waters under the Settlement Acts. AR 5304, 5319-29, 5333-34. To reach this result for the Northern as well as Southern Tribes, EPA wrongly asserts that the Settlement Acts were intended to create land bases for all Maine Tribes, the "key" and "over-arching" purpose of which was to "ensure" that members of all Maine Tribes could freely engage in traditional cultural practices, including sustenance fishing, AR 5319-20 – despite clearly expressed intent that Maine's water laws would apply in the same way statewide. Nothing in the Settlement Acts or their history supports EPA's new take on the alleged purpose of tribal lands in Maine.

For support, EPA cites to MIA § 6207(4) and its history, AR 5320-21, 5323-24, even though that fish and game provision, which does not encompass water quality regulation, *see* Sections IV.B-IV.B.6, *infra*, is expressly limited to Southern Tribal reservations and thus undercuts EPA's argument that there is an equivalent right to take fish for the Northern Tribes.[41] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). EPA also cites general federal Indian law to support its assertion that Congress implicitly provided for fishing rights for all four Maine Tribes, AR 5322-23, 5329-30, even though the general body of federal Indian law was not intended to apply in Maine. *See* Section I.A (discussing 25 U.S.C. §§ 1725(h), 1735(b)), n.9, *supra*. EPA also cites a portion of the Senate Report addressing acculturation, even though that language references tribal governance, internal matters, and Indian cultural programs, but not fishing rights or water quality. AR 5320, 5325.

EPA further suggests that because the Settlement Acts contemplate acquisition of tribal "lands or natural resources," which as defined includes water and fishing rights, this implicitly creates sustenance fishing rights for all Maine Tribes in acquired trust lands. AR 5323, 5325-27. This does not logically follow and, as noted above, is inconsistent with the limited nature of MIA's § 6207(4). It also turns the 1980 Acts on their head by ignoring the plain requirement that all tribal lands and natural resources (including all water and fishing rights) are to be uniformly regulated under Maine's environmental laws "to the same extent" as other non-tribal resources.[42]

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[41] EPA also arbitrarily cites MIA's history and § 6207(1), (3) as support for a "sustenance fishing" designated use in Southern Tribal trust lands, AR 5323-24, even though MIA's sustenance fishing provision, § 6207(4), applies only in Southern Tribal *reservations*. *See* Section III.B.5 & n.51, *infra*.

[42] EPA also ignores the abundant legislative history supporting the intent to avoid any differential application of Maine's environmental laws in tribal areas. *See* Sections I.A, I.B.3, & n.7, *supra*.

30 M.R.S. § 6204; 25 U.S.C. § 1725(a). There are no exemptions to this rule for any environmental purposes; the Northern Tribes are fully subject to Maine law like other citizens, *see* Sections I.A, I.A.2, *supra*, while the limited exemptions for the Southern Tribes do not apply with respect to the environmental regulation of water. *See* Section I.A.1, *supra*; Sections III.B-B.6, *infra*. In any event, even if the Settlement Acts could be reasonably read to implicitly create sustenance fishing protections for all Maine Tribes outside of MIA's § 6207 (which they cannot), there is nothing in the history or text of those acts that supports any additional bootstrapped rights to enhanced water quality in any Maine waters. *See* Section III.B.1, n.49-51, *infra*.

2. EPA has no authority to protect tribal rights through any new interpretation of Maine law purporting to "harmonize" the CWA and the Settlement Acts.

EPA creates its new sustenance fishing use for all Maine Tribes and Indian Waters by revisiting Maine's existing fishing use and adding a new interpretation to that use to "harmonize" the CWA with EPA's new view of the alleged purpose of the Settlement Acts. AR 5304, 5333-34. This new interpretation under the CWA "relates to a special status or right" for all Maine Tribes and affects Maine's regulatory jurisdiction, including its laws "relating to land use or environmental matters," and thus does not apply in Maine. *See* 25 U.S.C. § 1725(h); Sections I.A, I.B.3, *supra*. In 1987, Congress re-emphasized that neither the CWA nor its TAS provisions may be used to create any special tribal status or rights in Maine. *Id.*; 1987 U.S.C.C.A.N. 5, 43. EPA also has no CWA authority to compel state recognition of alleged tribal rights in this way; it has only a limited role in reviewing state WQS and no role in creating new designated uses. 40 C.F.R. § 131.10; Sections I.B-I.B.3, *supra*; *Michigan v. EPA*, 268 F.3d at 1083-87.[43] EPA's new

[43] EPA has recently taken the position, which was upheld, that treaties that do not create any specific trust duties to tribes (which are analogous to the 1980 Acts) do not affect EPA's authority under the CWA or impose any additional obligations. *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, *11-12 (W.D. Wash. Mar. 16, 2015); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (gathering cases and noting that government trust obligation to tribes imposes no duty on

interpretation also usurps Maine's role under the CWA and the Water Program with respect to designating uses of its waters. *See* Sections I.B-I.B.1, I.C, *supra*; 33 U.S.C. §§ 1251(b), 1370.[44]

3. EPA has no authority to revisit and approve Maine's already-approved WQS, including Maine's existing statewide "fishing" designated use, which does not also encompass a "sustenance fishing" use.

Decades ago EPA fully approved Maine's Water Program, including all designated uses and classifications for all of Maine's surface waters. *See* Section I.C.2, *supra*. By law, these approved WQS, including Maine's existing statewide "fishing" use (but without EPA's new interpretation of that use), became the WQS in effect for CWA purposes for the "applicable waters of that State," including all applicable Indian Waters, at the time of their original approval by EPA. *See* 33 U.S.C. § 1313(c)(3); Section I.B.1, *supra*. The Water Program was not intended to and does not contain any designated use of "sustenance fishing" for any population or waters. *See* Sections I.C-I.C.2, n.16, *supra*, Section III.B.2, *infra*. Thus, Maine's statewide "fishing" designated use was by law already in effect for all Indian Waters at the time of EPA's Action, and EPA had no occasion or authority to revisit and approve that WQS a second time in order to imbue it with new meaning as a "sustenance fishing" use for Indian Waters. 40 C.F.R. § 131.21.

Absent a "necessity" determination by the EPA Administrator regarding the need for new or different WQS to meet CWA requirements, EPA has no CWA authority to revisit, reinterpret, or reapprove any Maine WQS that were already approved and in effect, including Maine's existing fishing designated use. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(b) (2014). No such necessity determination regarding any of Maine's designated uses, including its statewide

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government to "take action beyond complying with generally applicable statutes and regulations"); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (unless specific duty is placed on government with respect to Indians, its responsibility is discharged by compliance with general regulations and statutes not specifically aimed at protecting tribes); n.35, *supra*; Section III.F, *infra*.

[44] *See also Nat. Res. Def. Council*, 16 F.3d at 1405 ("States have exclusive responsibility to designate water uses."); *Costle*, 625 F.2d at 1276 (even more so than water quality criteria, designation of uses of waters is "closely tied to the zoning power Congress wanted left with the states"); 40 C.F.R. § 131.10.

fishing use, was ever made here.[45] But even assuming that such a determination had been made by the Administrator, it would have required further federal rulemaking to create a new "sustenance fishing" designated use, which also did not occur here. *See* Section I.B.1, *supra*. If upheld, EPA's new method of using an after-the-fact "interpretation" to alter existing WQS under state law would also set an arbitrary and unlawful precedent by allowing EPA to re-write state law and ignore CWA requirements in order to impose new or altered WQS at its whim.

4. EPA arbitrarily asserts that no WQS were ever in effect for Indian Waters.

To avoid CWA requirements governing changes to existing WQS, EPA claims that no Maine WQS (or designated uses) were ever in effect in Indian Waters because Maine never expressly applied to implement WQS in Indian Waters and EPA had not first found that Maine had jurisdiction in such waters. ECF 44 ¶¶ 1-2, 5, 9, 12; AR 5316-17; 81 Fed. Reg. at 92478-79. This position, used to justify EPA's approval of Maine's "fishing" use as a new WQS in Indian Waters (but with a new interpretation of that use creating a "sustenance fishing" use for Indian Waters), AR 5317-19, 5332-33, is also arbitrary.[46] The Maine WQS that EPA already approved without qualification prior to 2004, including all of Maine's classifications and designated uses

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[45] The only "necessity" determination ever made by the EPA Administrator regarding Maine's WQS in Indian Waters occurred as part of EPA's proposed HHC for Indian Waters following the disapprovals in EPA's Action. 81 Fed. Reg. at 23242-43. That determination concluded only that new elevated federal HHC were necessary to protect EPA's "sustenance fishing" designated use, which EPA assumed was lawfully created by EPA's Action. *Id.*; *see also* 81 Fed. Reg. 92466, 92468 & n.7 (Dec. 19, 2016) (final "Maine Rule"). The EPA Administrator, however, has never made any necessity determination or proposed any regulation with respect to Maine's designated uses, including the new sustenance fishing use – presumably because Maine's designated uses are all already EPA-approved (at least for non-Indian Waters) and thus meet all CWA "fishable" and "swimmable" requirements. *See* Section I.B.1, *supra*.

[46] Even under this position, EPA was still required to propose a regulation, solicit comments, and hold a hearing with respect to its 2015 interpretations of Maine law creating a new WQS for Maine (EPA's new "sustenance fishing" use), which did not happen here. *See* Sections I.B.1, I.H, *supra*; ECF 44-10 at 16, no. 11. EPA's only process was its August 14, 2013 notice regarding Maine's January 14, 2013 WQS revisions for arsenic, acrolein, and phenol, AR 5172, which invited comment on whether to approve those WQS revisions for Indian Waters only, and was silent about any new EPA interpretations of Maine law creating a "sustenance fishing" use and any corresponding EPA rationale. *See* Section I.G, *supra*.

in its Water Program, apply by their own terms (and thus by law, 33 U.S.C. § 1313(c)(3)) to all applicable waters, including Indian Waters. *See* Sections I.B.1, I.C, I.C.2, *supra*; AR 5319.

Nothing in the CWA or the 1980 Acts requires Maine to separately ask EPA for an additional approval for Indian Waters already covered by Maine's WQS submissions, requires EPA to first establish Maine's jurisdiction over Indian Waters before acting on WQS for such waters, or permits EPA to refrain from acting on Maine's WQS submissions for Indian Waters.[47] To the contrary, Congress required that states such as Maine set WQS for ***all*** intrastate waters by express deadlines in the 1970s (which Maine did), and the CWA's comprehensive scope does not allow for a regulatory void of the kind EPA now claims existed in Maine's Indian Waters. *See* Section I.B.1, *supra*; *Tuscarora*, 362 U.S. at 116; *Phillips Petroleum*, 803 F.2d at 555-57.

EPA's claim that no WQS were ever in effect in Indian Waters also ignores its own regulations. Under EPA's Alaska Rule, 40 C.F.R. § 131.21(c)-(e), all WQS that were adopted by Maine, in effect under state law, and submitted to EPA for review prior to May 3, 2000, including all of Maine's designated uses, classifications, and other WQS in its Water Program (eff. July 16, 1986), became the WQS in effect for CWA purposes for all applicable waters upon state adoption regardless of whether EPA ever approved them for any waters, Indian or otherwise. *See* Section I.B.1, n.18-19, *supra*. EPA's current assertions to the contrary are thus arbitrary and unlawful.

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[47] Because EPA's positions regarding the timing and method of establishing Maine's jurisdiction over Indian Waters are based on EPA's new interpretation of existing federal law (the CWA) that accords special rights to tribes and affects Maine's environmental jurisdiction and laws, they do not apply in Maine. *See* Sections I.A-I.A.2, III.A.2, *supra*; 25 U.S.C. §§ 1725(h), 1735(b). This is also the case with respect to the "basic principles of federal Indian law" that EPA cites to support its assertion that Maine must first demonstrate its jurisdiction before EPA may act on Maine's WQS for Indian Waters, AR 5316-17, 81 Fed. Reg. at 92478-79, because that body of law was not intended to and does not apply in Maine. *See* Section I.A, n.9, n.13, *supra*. In any event, Maine's regulatory jurisdiction and authority to set WQS in all Indian Waters stems from the 1980 Acts and not from the timing of EPA's recognition of Maine's authority, AR 5309-12. *See Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (objective meaning and effect of federal Catawba act became fixed when adopted, and later pronouncements simply explained, but did not create, the operative effect). EPA's positions, which create a regulatory void in Indian Waters, are also contrary to the CWA's comprehensive scope and protection of state roles over their waters. *See* Sections I.B-I.B.1, *supra*; 33 U.S.C. §§ 1251(b), 1370.

5. EPA arbitrarily departs from its historical approval and application of Maine's WQS in Indian Waters for CWA purposes.

EPA's new interpretation of Maine's "fishing" designated use and its position that no such use or other WQS were ever in effect for Indian Waters are major and inadequately explained reversals by EPA, as evidenced by its history of fully approving and accepting Maine's Water Program and WQS without qualification, and then applying Maine's WQS in Indian Waters for CWA purposes. *See* Sections I.C.2, I.E, *supra*. EPA arbitrarily dismisses decades of its own historical application of Maine's WQS in Indian Waters (and all resulting reliance interests) by simply labeling its prior actions as mistakes, and now suggests that such mistakes by "mid-level" officials cannot revise its "considered" agency position. AR 5317. EPA's application of Maine's WQS in Indian Waters, however, was not confined to a few actions by mid-level officials, but occurred consistently over a span of decades and included actions by EPA's top official in Region 1, the Regional Administrator. *See* Section I.E, n.28-30, *supra*. EPA also fails to acknowledge, let alone give any good reason for, the change from its prior considered policies requiring and applying state WQS for all surface waters, and assuming without deciding that existing state WQS apply until a tribe obtains TAS authority. *Id.*; Sections I.B.1, II.B, n.32, *supra*.

B. EPA misinterprets MIA § 6207, a non-jurisdictional fish and game provision, as a "sustenance fishing" designated use for the Southern Tribes.

Thirty-five years after the 1980 Acts, EPA first interpreted MIA § 6207(4) not only as a limited right to take fish, but also as an implicit tribal right to enhanced water quality. AR 5332-33; ECF 44 ¶¶ 6-8. But § 6207(4) says nothing about the quality of any waters or fish, *see* Section I.A.1, *supra*, and plainly does not constitute a CWA designated use of any Maine waters.

1. EPA's interpretation of § 6207 is contrary to MIA's history and text.

EPA claims that MIA § 6207(4) is a new WQS because it articulates a "specific fishing use" and sets forth the "desired condition" of Southern Tribal waters through use of the word

"sustenance." AR 5333.[48] However, as reflected by MIA's structure and history, use of the word "sustenance" was intended as a limitation on the right in § 6207(4) only, allowing the taking of fish in Southern Tribal reservations free from otherwise applicable IFW or MITSC fish and game restrictions on things such as the "method, manner, bag and size limits and season for fishing," 30 M.R.S. § 6207(3), provided that such fish are taken for individual sustenance (*i.e.*, consumption) only, and not for any commercial or other purpose. *See* Sections I.A-I.A.1, *supra*; AR 1808-09; AR 1633 ¶¶ 2-4;[49] *see also* JLS 42 at 2392 (describing MIA's "limited, but albeit special provisions" for tribal fish and game issues, which involved legislative discussions on handling "live bait"); AR 1640-41 (discussing general inapplicability of State "fish and game" laws); AR 1643 (discussing limited effect of 1980 Acts on coastal waters). Moreover, no part of MIA or § 6207 was intended to create a tribal right to any heightened quality of water or fish or a designated use for any waters, which would result in the kind of two-tiered environmental regulatory system that Maine sought to avoid during negotiations. *See* n.7, *supra*.[50]

EPA's new interpretation of MIA § 6207 also conflicts with the core jurisdictional principles of the 1980 Acts, including the intended uniform application of Maine's

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[48] EPA's two interpretations creating a "sustenance fishing" designated use are new, as they first occurred in 2015. ECF 44 ¶¶ 6-8. When EPA originally approved Maine's WQS and Water Program, and when EPA accepted and published Maine's CWA WQS docket for comment, EPA never suggested that § 6207(4) or any other part of MIA constituted a designated use or other kind of WQS. *See* Sections I.C.1-2, *supra*; 50 Fed. Reg. at 29760; 53 Fed. Reg. at 4210; 57 Fed. Reg. at 21088.

[49] Maine courts have also historically distinguished between activities for sustenance (*i.e.* consumption) and those for economic benefit or profit. *See McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 20, 39, 28 A.3d 620; *Bell v. Town of Wells*, 557 A.2d 168, 173, 178 (Me. 1989); *see also Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W. 2d 895, 903 (Mich. 2005) (equating food consumption with sustenance).

[50] Other courts have cast doubt on whether a right to take fish implies any further right to a certain quality of water or fish based on environmental conditions. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 215-16 (W.D. Wis. 1996) (gathering cases and noting that tribal assertions of rights to environmental servitudes requiring protection of fishing habitats from environmental degradation have "not fared well" in courts; also distinguishing between on and off-reservation rights to take fish), *aff'd*, 161 F.3d 449 (7th Cir. 1998). *But cf. United States v. Washington*, 853 F.3d 946, 962-66 (9th Cir. 2017) (state culverts barring fish passage violated rights under mid-19th century Stevens Treaties entitling tribes to a portion of off-reservation fish harvest), *cert. granted*, (Jan. 12, 2018) (No. 17-269).

environmental regulatory laws and authority to both Indian and non-Indian lands, waters and natural resources. 30 M.R.S. § 6204; 25 U.S.C. § 1725(a), (h); Section I.A, *supra*. Given the importance of this principle during negotiations, one would expect a significant exception to the general rule of uniform environmental regulation to be expressly stated. If § 6207(4) also carried with it a right to enhanced water quality in Indian Waters, MIA's jurisdictional provisions would surely have addressed the issue with the clarity and specificity otherwise found throughout the Act. That is not the case. *See, e.g.*, 30 M.R.S. §§ 6206(1) (outlining Southern Tribal rights), 6204 (applying Maine law to Indian lands), 6202 (findings and declaration of policy), 6210 (tribal law enforcement). Courts will not construe vague or ancillary provisions as altering the fundamental terms of a statute. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("[Congress] does not – one might say – hide elephants in mouseholes.").

EPA's position is also inconsistent with the rest of MIA § 6207, which does not mention water quality and makes sense only in the context of otherwise applicable fish and game laws, regulations, and ordinances.[51] EPA's new interpretation of § 6207 also conflicts with the First Circuit's analysis in *Maine v. Johnson*.[52] Like the "internal tribal matters" exemption at issue in

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[51] MIA §§ 6207(1) & (3) allow consideration of tribal "sustenance" for purposes of tribal ordinances and MITSC rules on fishing, but like § 6207(4), do not contemplate regulation of (or even mention) water quality. MIA § 6207(3) also provides for a regulatory transition that maintains Maine's "fishing" laws, rules, and regulations only, again without reference to water quality. MIA § 6207(6), which limits §§ 6207(1), (3), & (4), permits IFW's Commissioner (who has no authority over WQS or water quality, *see* n.39, *supra*) to adopt remedial measures to protect depleted stocks outside of tribal or MITSC jurisdiction such as rescission of tribal or MITSC rules and enforcement of Maine's generally applicable laws and regulations. MIA § 6207(5) requires posting of lands or waters regulated by MITSC or the Southern Tribes. MIA § 6207(7) allows transportation of fish lawfully taken from tribal waters (*i.e.*, pursuant to §§ 6207(1), (3), or (4)) that would presumably be unlawful under State fish and game laws and rules. All of these provisions make collective sense in the context of fish and game restrictions only, and do not make sense in the context of water quality regulation.

[52] *See Johnson*, 498 F.3d at 42-44 (rejecting tribal arguments against Maine's environmental jurisdiction in Indian Waters under MIA § 6204, and noting the "background rule" that "Maine law on natural resources governs the tribes and their territories"); *id.* at 46 (MICSA's basic jurisdictional allocation is

that case, if MIA § 6207(4) is interpreted by EPA in a way that negates the uniform application of Maine's environmental laws and regulations to all tribal and non-tribal lands and natural resources, it would be equally "hard to see what would be left of the compromise restoration of Maine's jurisdiction" set forth in the 1980 Acts. *Johnson*, 498 F.3d at 45.

2. All of Maine's classifications and designated uses are set forth in its Water Program, which does not include or reference MIA § 6207.

Maine's Water Program is self-contained within M.R.S. Title 38, Art. 4-A, and the standards for the classifications in that program expressly list all of Maine's designated uses intended for each classification. *See* 38 M.R.S. § 464(1) (Maine Legislature intended "by passage of this article" to establish the Water Program based on WQS that "designate the uses and related characteristics of those uses for each class of water," and to assign each Maine surface water body a classification designating the minimum water quality that "the Legislature intends for the body of water" to "direct the State's management of that waterbody"); 464(2-A)(F) ("designated use" means the uses for each waterbody or segment under 38 M.R.S. §§ 465-465-C (standards for classifications) and 467-470 (classifications)); Section I.C, *supra*. For instance, the Water Program classifies the Indian Waters in the main stem of the Penobscot River as Class B and C waters, 38 M.R.S. §§ 467(7)(A)(1)-(7), and all designated uses for Class B and C waters are expressly listed (using the words "designated uses") in 38 M.R.S. §§ 465(3)(A) and 465(4)(A). This is the full extent of the minimum water quality intended for the Indian Waters in the main stem of the Penobscot River by the Maine Legislature, which has sole authority to make changes to Maine's classifications and designated uses of its waters, including the creation of any subcategory of a designated use. 38 M.R.S. §§ 464(2)(D), 464(2-A)(E). MIA § 6207 does not

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in § 1725, which makes Maine law applicable to all Maine tribes and lands, save that MIA controls by reference for the Southern Tribes, but "does no more than give those tribes municipal powers and reserves tribal authority over internal tribal matters."); Sections I.A.1, I.F, *supra*.

factor into the equation because no part of it is referenced by the Water Program or even purports to govern the water quality of any such waters. *See* n.51, *supra*.

Unlike Maine's classifications and standards, MIA §§ 6207(1), (3), & (4) (which each use the word "sustenance") do not use the words "designated use" or set forth any use or water quality characteristics for any waters. It also makes no sense that a separate designated use for waters already expressly addressed by Maine's self-contained Water Program would implicitly exist outside of that program (and Title 38) in MIA § 6207. This would be contrary to the plain language confining all aspects of the Water Program to "this article" (Title 38, Article 4-A). 38 M.R.S. § 464(1). It would also be inconsistent with the Water Program's structure assigning specific designated uses to each defined water classification, and would create new and unwritten tribal sub-classifications for each class of Indian Waters. *See* Section III.E.1, *infra*.

Moreover, the Maine Legislature enacted the Water Program in 1986 just a few years after MIA, and was thus aware of § 6207 but chose not to include or reference any part of that provision in its comprehensive new program. This is evidence that no part of MIA § 6207 was ever intended to be a designated use. *See* n.16, *supra*. This is further bolstered by the Maine Legislature's consideration but rejection of a 2002 proposal for a similar but far more limited "subsistence fishing" use for portions of the Penobscot River only. *See* Section I.C.1, *supra*.

3. EPA arbitrarily changed its position with respect to MIA § 6207.

EPA's new interpretation of § 6207(4) as a WQS (a "sustenance fishing" use) 35 years after the 1980 Acts arbitrarily ignores EPA's unqualified acceptance of Maine's June 1999 WQS docket submission as the complete set of Maine WQS, which did not include § 6207 and was the subject of EPA's own public notice. *See* Section I.C.2, *supra*. It also arbitrarily ignores EPA's historical approval and application of Maine's WQS in Indian Waters for CWA purposes and the resulting reliance interests of permitted dischargers. *See* Sections I.E, II.B, III.A.5, *supra*.

4. EPA incorrectly interprets MIA § 6207 as a reserved aboriginal right.

EPA wrongly claims that the right to take fish in MIA § 6207 is a reserved aboriginal right "rooted in treaty guarantees that were upheld through the settlement acts." AR 5320-21.[53] This is contrary to the 1980 Acts, which reflect a settlement and resolved and extinguished all actual or theoretical tribal claims involving rights to land and natural resources, including all aboriginal water and fishing rights.[54] All rights existing after passage of the 1980 Acts stem from those acts alone. *See Stilphen*, 461 A.2d at 487-89 (1980 Acts precisely lay out Maine's tribal-state relationship and were intended to change the prior relationship; MIA and its history govern that relationship rather than federal common law); 30 M.R.S. § 6202 (MIA's purpose was to implement a settlement agreement). In any event, EPA's new interpretation of MIA § 6207 as a reserved aboriginal right allegedly rooted in treaty rights, to the extent it is not otherwise extinguished by MICSA, is also barred by 25 U.S.C. § 1723(a)(2)-(3) (broadly barring the United States from asserting claims on behalf of Indians arising from transfers of land or natural resources, including transfers in treaties) and 25 U.S.C. §§ 1725(h), 1735(b).

5. EPA arbitrarily expands application of MIA § 6207 to trust lands.

EPA applies its new expansive interpretation of MIA § 6207 not only to the Southern Tribes' reservations, AR 5320, 5332-33, but also to their trust lands. AR 5323-24, 5334 ("MIA

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[53] For support EPA cites, AR 5321, 5305, a new January 30, 2015 DOI opinion, AR 542-52, which, like the opinion in *Maine v. Johnson*, 498 F.3d at 45 & n.9-10, is non-authoritative and conflicts with DOI's House Hearing testimony, and should not be considered here. *See* JLS 42 at 2352, 2355, 2498 (DOI statements that all aboriginal claims are extinguished under MICSA); *id.* at 2442, 2479-80.

[54] The 1980 Acts ratified and approved all prior tribal transfers of land or natural resources, 25 U.S.C. § 1723(a)(1); 30 M.R.S. § 6213, and extinguished all aboriginal title and claims regarding the transferred land or natural resources as of the date of the transfers. 25 U.S.C. §§ 1723(b)-(c). "Transfer" is broadly defined, 25 U.S.C. § 1722(n); 30 M.R.S. § 6203(13), to include essentially any change in possession or control over land or natural resources, which in turn includes water, water rights, and fishing rights. 25 U.S.C. § 1722(d); 30 M.R.S. § 6203(3); Section I.A, *supra*. The legislative history also confirms that the sweeping nature of this language was intentional. S. Rep. No. 96-957, at 21; JLS 43 at 2622 (Transfer "cover[s] all conceivable events and circumstances under which title, possession, dominion or control of land or natural resources can pass"); House Hearing at 165-66; JLS 42 at 2479-80.

codifies an express provision for sustenance fishing in the Southern Tribes' trust lands"). Even if § 6207 was intended as a designated use, which it plainly was not, such a designated use would not extend beyond reservation boundaries per the express limitation in § 6207(4).[55]

6. EPA's new interpretation of MIA § 6207 ignores CWA requirements when new WQS are created.

EPA was required to provide notice and an opportunity for a hearing when it issued its new February 2015 interpretation of MIA § 6207 as a "sustenance fishing" use for the Southern Tribes because it created a new WQS. *See* 33 U.S.C. § 1251(e); 40 C.F.R. §§ 131.20(b), 131.22(b)-(c); 40 C.F.R. § 131.10(e) (2014) (removed and reserved eff. Oct. 20, 2015); Section I.B.1, *supra*. EPA unlawfully failed to do so here. ECF 44 ¶¶ 6-8; n.45-46, *supra*.

C. EPA arbitrarily disallows use of Maine's FCR when developing HHC to protect designated uses in Indian Waters.

After creating a new "sustenance fishing" designated use and imposing it on Maine, EPA then disapproves certain Maine WQS (its HHC) for all Indian Waters by arbitrarily rejecting use of Maine's general FCR of 32.4 gm/day when deriving HHC to protect uses in Indian Waters. AR 5343-44; *see also* n.38, *supra*. Because there is no sustenance fishing designated use in Maine, EPA's disapproval of Maine's HHC and FCR used to develop those HHC as unprotective of such a use in Indian Waters was arbitrary. It was also arbitrary because Maine's general FCR of 32.4 gm/day is based on actual local consumption data (EPA's preference, *see* n.24, *supra*) from a cross-section of Maine anglers (11% of which were tribal members), AR 5339-40, and at

[55] In *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 218-22 (D. Me. 2015), which involved a dispute between Maine and PN over the extent of PN's reservation, this Court (Singal, J.) recently held that PN's reservation did not include the Penobscot River, but that the right to take fish for individual sustenance under MIA § 6207(4) extended beyond PN's reservation and into the main stem of the river. On appeal, the First Circuit vacated the sustenance ruling and dismissed that PN claim. *Penobscot Nation v. Mills*, 861 F.3d 324, 336-38 (1st Cir. 2017) (PN lacked standing to pursue sustenance fishing claim, which was unripe for review), *reh'g requested*. Neither decision, however, addressed what MIA's right to take fish entails, or whether it is a CWA designated use or requires enhanced water quality for any waters or group.

Maine's Risk Level of 10^{-6}, it is one of the most protective state FCRs in the nation. AR 3592-98; n.25, *supra*. Because FCRs and Risk Levels are relative, *see* Section I.D, *supra*, Maine's FCR/Risk Level combination is equivalent to and protects fish consumption levels of 324 gm/day and 3240 gm (over seven pounds)/day at EPA-acceptable Risk Levels of 10^{-5} and 10^{-4} respectively.[56] These relative protections exceed all EPA recommendations for all groups, including the general population and subsistence fishers. *See* AR 953-54 (2000 Guidance using FCRs of 17.5 gm/day for the general population and 142.4 gm/day for subsistence fishers); n.26, *supra* (June 2015 EPA criteria updates using a FCR of 22 gm/day); 81 Fed. Reg. at 92472-73 (EPA Maine Rule setting federal tribal HHC using FCR of 286 gm/day based on historical estimates); 82 Fed. Reg. at 58158 (Dec. 2017 proposed withdrawal of federal HHC for California based on new EPA-approved state HHC that protect sensitive subpopulations at Risk Levels between $10^{-4.55}$ and $10^{-4.91}$ and do not exceed the 10^{-4} level). In addition, because Maine's FCR was already approved by EPA for use outside of Indian Waters, AR 5335-36, there is no dispute that Maine's HHC and FCR are based on sound science and defensible methods and are consistent with the CWA – at least in all non-Indian Waters. *See* 40 C.F.R. § 131.11. EPA has no non-tribal basis for disapproving Maine's HHC or FCR for Indian Waters. EPA's rationale is based entirely on new tribal requirements that have no CWA support and are inconsistent with EPA's own regulations, guidance, and practice, and the 1980 Acts.

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[56] Nothing requires use of or protection to a 10^{-6} Risk Level. When setting federal WQS, EPA sometimes uses a 10^{-5} Risk Level. *See* 40 C.F.R. 131.36(d)(1)(iii) (10^{-5} level for Rhode Island); *see also* 57 Fed. Reg. at 60864 ("EPA agrees that establishing a single risk level for all States departs from Agency policy"); *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1524 (1995) (noting EPA's argument that a 1 in 10^{-6} Risk Level in state WQS for the general population does not necessarily reflect state legislative intent to provide the highest protection for all subpopulations and can reasonably be construed to allow for lower yet adequate protection of specific subpopulations); *Nat. Res. Def. Council v. EPA*, 806 F. Supp. 1263, 1275-76 (E.D. Va. 1992) (affirming EPA approvals of FCRs of 6.5 gm/day and reduced Risk Levels of 10^{-5} despite claims of higher consumption), *aff'd*, 16 F.3d 1395 (4th Cir. 1993); AR 4166 (LPP permit protected FCR of 110 gm/day at the 10^{-5} level (or 11.0 gm/day at the 10^{-6} level), which is a "reasonable level of risk"); AR 30-31 (approving Maine's revised 10^{-4} level for arsenic in non-Indian Waters).

D. EPA arbitrarily requires a heightened and "unsuppressed" tribal-only FCR to protect designated uses in Indian Waters.

After creating a new "sustenance fishing" designated use, and to support its disapprovals of Maine's FCR and HHC for Indian Waters, EPA also requires that tribes serve as the "target" population of its new sustenance use and that heightened and "unsuppressed" tribal FCRs be used to develop HHC to protect that use. AR 5304-05; ECF 44 ¶¶ 15-17; *see also* 81 Fed. Reg. at 23245; 81 Fed. Reg. at 92472. EPA lacks authority for these new requirements, which are unsupported by the CWA and EPA's regulations and guidance,[57] and are contrary to: 1) the 1980 Acts, *see* Sections I.A-I.A.2, *supra*; 2) the CWA's express protection of state control over planning and management of state waters, *see* Section I.B, *supra*; and 3) EPA's limited CWA authority (in the TAS provisions) to further tribal goals. *See* Sections I.B.3, *supra*, III.E.2, *infra*. These new tribal requirements were also never the subject of any public notice or opportunity for hearing, as would be required. *See* ECF 44 ¶¶ 15-17; Sections I.B.1, III.A.3, n.45-46, *supra*.

The new requirement that tribes comprise the "target" population of any fishing use in Indian Waters is also contrary to EPA's guidance recognizing the authority of states to define the populations that they choose to protect. *See* Section I.D, n.23, *supra*.[58] With respect to fishing, and consistent with the 1980 Acts, the CWA, and EPA's regulations and guidance, Maine made a policy decision (reflected in its Water Program) to protect its general population and not to adopt any other designated use specific to tribal members for any waters. Maine later considered but rejected a subsistence fishing use, which if adopted would have protected all (not just tribal)

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[57] Subsequent EPA commentary also reflects the lack of CWA or other legal authority for EPA's new "unsuppressed" FCR concept. *See* 81 Fed. Reg. at 23245 ("Maine's FCRs do not reflect the best available information regarding the tribes' sustenance level of consumption unsuppressed by pollutant concerns, which EPA determined in its scientific and policy judgment was necessary and appropriate…").

[58] In focusing solely on tribal members as the "target" of its new designated use, EPA also arbitrarily disregards the presence of other non-tribal anglers in Indian Waters. AR 5338 n.29; *see also* 81 Fed. Reg. at 23245 & n.27 (recognizing the Maine public's right to access and fish in Indian Waters); 30 M.R.S. §§ 6207(1) & (3) (Southern Tribal and MITSC fishing ordinances and rules must be nondiscriminatory).

subsistence fishers for a limited stretch of the Penobscot River only. *See* Section I.C.1, *supra*. This is something that Maine could have voluntarily done, but that EPA cannot lawfully require.

The other new requirement of an "unsuppressed" tribal FCR for Indian Waters also arbitrarily turns an EPA recommendation from a January 2013 Frequently Asked Questions document, AR 1567-71 ("FAQ"), into a legal WQS requirement.[59] The FAQ states only that it is "important" to avoid suppression effects that may occur when a FCR for "a given subpopulation" reflects diminished consumption "for that subpopulation because of a perception that fish are contaminated with pollutants." AR 1568. But as the FAQ and EPA acknowledge, this was only a recommendation and not a legal requirement. AR 1567 (disclaimer that FAQ imposes no "legally binding requirements" on EPA, states, tribes, and regulated community); *see also* 81 Fed. Reg. at 23244 (EPA "generally recommends, where sufficient data are available, selecting a FCR that reflects consumption that is not suppressed by concerns about the safety of available fish or fish availability") & n.17 (citing FAQ).[60] This new suppression requirement arbitrarily appeared for the first time in EPA's Action without any CWA or other legal authority and without any public notice or opportunity for hearing. AR 5304-05. It also appears to have been developed in consultation with the Maine Tribes, but without Maine. 81 Fed. Reg. at 23247 (noting consistency with PN approach to "deriving a current, unsuppressed FCR to protect

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[59] EPA's only alleged support for its new requirement of an "unsuppressed" tribal FCR comes from its 2000 Guidance and its 2013 FAQ document. ECF 44 ¶¶ 15-17. However, only the FAQ mentions EPA's new suppression concept, which is not specifically addressed in the 2000 Guidance. Federal agencies may not stray outside their statutory authority by relying on policy documents and other non-statutory material. *See, e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 931 (5th Cir. 2012).

[60] The FAQ is also inconsistent with EPA's Action in other ways. By focusing on "subpopulations," it undermines EPA's other new requirement that tribal members only must serve as the more specific "target" general population of Maine's fishing designated use in Indian Waters, as opposed to comprising a subset of Maine's general population or anglers that may consume fish at elevated rates regardless of tribal membership. The FAQ, like EPA's 2000 Guidance, also recommends that incremental cancer risks not exceed Risk Levels of 1 in 10^{-6} or 1 in 10^{-5} for the general population, nor exceed a Risk Level of 1 in 10^{-4} "for any sensitive sub-population (such as those who may consume a great deal more fish because of a subsistence lifestyle)." AR 1570; *see also* Section I.D, *supra*.

sustenance fishing"); *see also* Section I.G, *supra*. As discussed below, it is also arbitrarily based on speculative historical estimates from a bygone era instead of sound science and actual data.

1. EPA arbitrarily relies on the Wabanaki Study as the best evidence of FCRs.

Criteria such as HHC, in addition to protecting designated uses, must be based on sound science. 40 C.F.R. § 131.11(a)(1). For Indian Waters, however, EPA arbitrarily rejects use of Maine's FCR, which was scientifically developed consistent with EPA's guidance, *see* Section I.D, *supra*, and relies on the Wabanaki Study as the best available information to derive a FCR to protect Maine's designated uses.[61] AR 5305, 5343. Unlike the study underlying Maine's FCR, AR 1449-1551, which relied on modern local fish consumption data, AR 5339-41, the Wabanaki Study is not based on any actual consumption data, but attempts to recreate bygone tribal FCRs using historical estimates of diets from the 16th – 19th centuries based on anthropological and ethnographic sources. AR 1251-53, 5341-44; AR 1259-60 (consumption scenario "is essentially a reconstruction" based on anthropological and ethno-historical literature). The Wabanaki Study thus has no bearing on any actual tribal FCRs, either current or at the time of the 1980 Acts, but focuses instead on "traditional uses, not contemporary uses. . ." AR 1252.[62] By relying on this

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[61] The Wabanaki Study describes "subsistence lifestyles," AR 1246, 1254, 1260, which relate to a type of designated use that was expressly rejected by the Maine Legislature in 2002. *See* Section I.C.1, *supra*.

[62] The Wabanaki Study admittedly reflects no actual current (or even 1980) tribal consumption patterns. AR 1258 ("Unfortunately, detailed and accurate information about activity, food, and water usage patterns for the Maine Tribes and other indigenous communities does not currently exist."); *id.* (acknowledging that current natural resource utilization rates are lower than historical consumption rates); AR 1263 ("large statistical distributions for subsistence exposure factors are not available and cannot be developed"); *see also* 81 Fed. Reg. at 23246 ("There has been no contemporary local survey of current fish consumption, adjusted to account for suppression, that documents fish consumption rates for sustenance fishing in the waters in Indian lands in Maine."); *id.* at 23246-47 (acknowledging "uncertainties associated with a lack of knowledge about tribal exposure in Maine Indian waters," and stating that "contemporaneous populations of anadromous species in Penobscot waters are too low to be harvested in significant quantities" and that the "Wabanaki Study presented estimates" of historical consumption and "not the amount consumed"). Despite conceding that present-day conditions may not allow a fully traditional lifestyle, the Wabanaki Study claims that it "is still an 'actual' and not 'hypothetical' lifestyle" that will help ensure that information collected on the Maine Tribes "will not be biased by contemporary consumption rates." AR 1246.

study, EPA arbitrarily elevates reconstructed historical consumption levels over its preference for actual local data, *see* n.24, *supra*, and violates 40 C.F.R. § 131.11. The CWA and EPA's regulations do not permit such an abandonment of sound science and actual data in favor of speculative historical estimates to support present-day FCRs. This is also bad policy, as WQS should be based on empirical studies and determinations regarding fish levels actually consumed to ensure that such consumption does not present unacceptable risks to the general public.

EPA's reliance on the study is also an arbitrary and unexplained change in position as EPA has historically rejected this kind of speculative FCR. *See Nat. Res. Def. Council*, 16 F.3d at 1403 (rejecting argument that EPA-approved FCR of 6.5 gm/day was too low and failed to protect higher-consuming subpopulations where there was no evidence that subpopulations consumed more than 6.5 gm/day; also noting EPA's position that FCRs are not intended to protect total fish consumption and EPA's opposition to "speculative" FCRs "based on anecdotal evidence"). But even if the 1980 Acts implicitly created a tribal "sustenance fishing" designated use, which they did not, any consumption levels that such a use would arguably protect would be limited to levels dating no farther back than the 1980 Acts – not reconstructed levels based on estimates from unreliable and unscientific accounts going back to the 16th century.[63]

The Wabanaki Study is also not impartial but reflects an apparently premeditated attempt to contrive a rational basis for EPA's Action on the part of EPA and the Maine Tribes, *see* Sections I.G, I.H, *supra*, at the expense of Maine's CWA role. It was conducted by the Micmacs on behalf of all Maine Tribes pursuant to an EPA grant, AR 5341-42; 81 Fed. Reg. at 23245-46,

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[63] Statutes such as the 1980 Acts must generally be interpreted based upon the intent existing at the time of enactment. *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 64 (1983); *Mundy*, 424 A.2d at 138. Leading up to the 1980 Acts, fish stocks in the Penobscot River had been greatly reduced and by 1980 were only just beginning to recover. AR 3635-46 (describing historical conditions and clean-up efforts on the Penobscot River); *see also* AR 5340-41 (noting historical fish advisories). Thus, the reconstructed consumption scenarios in the Wabanaki Study would have been impossible at the time of the 1980 Acts.

and was a "coordinated effort" by the tribes and EPA. AR 1246, 1251. When issued in July 2009 (roughly two years after *Maine v. Johnson*), the Wabanaki Study was designed to give EPA "sufficient information to protect designated tribal uses" – uses that EPA only first created and recognized over five years later in its February 2015 action on appeal here. AR 1245-46.

2. EPA arbitrarily fails to consider other factors likely affecting FCRs.

EPA's new requirement of an "unsuppressed" tribal FCR and the Wabanaki Study that EPA relies on for that FCR focus on a subsistence lifestyle "characterized by hunting, gathering, and fishing," AR 1254, that tribes are allegedly "waiting to resume." AR 1253, 5342; *see also* n.61-62, *supra*. EPA, however, fails to consider other important modern-day factors that would likely affect current FCRs and bring those levels down from estimated historical "heritage" rates. AR 5344. For instance, the Wabanaki Study that EPA relies on admittedly does not reflect "lifeways of people with semi-suburban or hybrid lifestyles and grocery-store diets." AR 1245, 1252. But EPA cites no empirical evidence and engages in no analysis of the extent to which Maine's tribal members engage in whole or part in such modern lifestyles and diets. This is 2017, and life for everyone, tribal members included, is very different from the 16th or even the 19th century. AR 1253; *see also* AR 4417 (1991 draft PN survey reflecting tribal non-use of river primarily for reasons unrelated to pollution concerns, such as lack of time, interest, proximity, and public access). EPA also avoids addressing other factors likely affecting current FCRs, such as more recent changes to fish habitat, populations, and presence in Indian Waters, as well as changes in economic conditions, social customs and makeup, and dietary preferences. *See* n.62-63, *supra*. This produces speculative, subjective, unsupported, and arbitrary action.

E. The outcome of EPA's Action is also arbitrary and unlawful.

Cutting through EPA's convoluted rationale, and considered apart from the many steps required to reach EPA's outcome, the end result of EPA's Action itself is arbitrary and unlawful.

1. EPA's creation of special tribal rights under the CWA is contrary to the core principles of the 1980 Acts and Maine's Water Program.

EPA's outcome violates the core principles of the 1980 Acts because it requires new and different WQS for Indian Waters only based on uniquely tribal factors – namely, elevated HHC based on an "unsuppressed" tribal-only FCR to protect EPA's new "sustenance fishing" designated use. This also results in new tribal sub-classifications of waters otherwise classed by Maine's Water Program. To again use the Penobscot River as an example, *see* Section III.B.2, *supra*, the Class B and C waters in the main stem of that river would, under EPA's Action, be subject to a new designated use of sustenance fishing for tribal members only that does not also apply in other non-Indian Class B and C waters – thus resulting in new (but unwritten) tribal sub-classifications of Maine's Class B and C waters outside of the Water Program. *See* 38 M.R.S. §§ 465(3)(A), 465(4)(A); *see also* 38 M.R.S. §§ 464(2)(D), 464(2-A)(E) (Maine Legislature has sole authority to change classifications and designated uses, including the creation of a subcategory of a designated use). If upheld, EPA's Action would similarly change the standards for Maine's other classifications, 38 M.R.S. §§ 465-469, to the extent they apply to EPA's unspecified Indian Waters. This violates the intent of the 1980 Acts and Maine's Water Program.

Under the 1980 Acts, and consistent with the First Circuit's holding in *Maine v. Johnson* in the context of CWA permitting, *see* Sections I.A, I.F, *supra*, EPA may not, for environmental regulatory purposes, require that Maine differentiate between Indian and non-Indian Waters or treat Maine citizens differently based on tribal membership. Under the plain text of the 1980 Acts, and unless a jurisdictional exemption expressly applies, all tribal members and lands and natural resources, including Indian Waters, are fully subject to Maine's environmental laws (including all designated uses, water classifications, and other WQS) "to the same extent" as any other person or lands or natural resources. 30 M.R.S. § 6204; 25 U.S.C. § 1725(a); Sections I.A-

I.A.2, *supra*; *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986) (under similar "unmistakably clear" language of federal Catawba act, state laws apply to tribal members "in precisely the same fashion that they apply to others"); *Aroostook*, 484 F.3d at 52-53. There is no exemption to this rule for the Northern Tribes, and the limited exemptions for the Southern Tribes do not apply to environmental regulation. *See* Sections I.A, III.B, *supra*.

Congress also intended that no existing or future federal law of any kind (including the "harmonized" CWA here) would be construed to permit such different environmental regulatory treatment under Maine law based on tribal considerations. 25 U.S.C. §§ 1725(a), (b)(1), (h), 1735(b); Section I.A, *supra*. Congress reaffirmed this intent by clarifying that the CWA's 1987 tribal TAS provisions do not apply in Maine for any regulatory purposes. Section I.B.3, *supra*.

2. EPA's outcome exceeds its authority under the CWA.

EPA imposes new tribal WQS requirements for Indian Waters that Maine, which has authority to set WQS statewide, was not consulted about and did not itself adopt or submit to EPA. Nothing in the CWA authorizes EPA to preempt state authority and further tribal interests in this way. The 1987 CWA tribal TAS amendments, 33 U.S.C. § 1377(e), are the only CWA authority addressing tribes. Under those TAS provisions, tribes may act like a state only if they receive TAS approval from EPA, which has not happened here, and as Congress has made clear, cannot happen in Maine. *See* Section I.B.3, *supra*. Outside of this TAS process, EPA has no authority to impose tribal WQS requirements on Maine. *See Michigan v. EPA*, 268 F.3d at 1083-87 (EPA lacked jurisdiction where its only CAA authority to act for tribes first required a finding of tribal jurisdiction based on TAS status); *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 192-95 (D.C. Cir. 2014); *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150 (D.C. Cir. 1996) (EPA cannot create tribal "state" status not set forth in statute). Indeed, the CWA guards against such intrusions into Maine's state role and authority over its waters. 33 U.S.C. §§ 1370, 1251(b).

3. EPA's concept of Indian Waters is vague, overbroad, and arbitrary.

EPA creates new tribal classifications and WQS, including its new "sustenance fishing" designated use, for unspecified waters. Unlike the geographically defined water segments in Maine's Water Program, 38 M.R.S. §§ 467-469, the Indian Waters in EPA's Action are not expressly identified but instead purport to include any waters adjacent to trust and reservation lands. AR 5308. This is broader than any WQS program that an authorized tribe (outside of Maine) could be approved for under EPA's TAS regulations, which contemplate WQS programs only within reservation borders. 40 C.F.R. § 131.8(a)(3).

EPA's Indian Waters are also vague. EPA acknowledges "remaining uncertainties" over their scope and that "at least some portion" of the Penobscot River's main stem is in Indian Waters. AR 5309; *see also* AR 5333 n.19 (not applying the new sustenance fishing use to unspecified inland waters incapable of sustaining fish populations). EPA also alludes to present and potential future disputes over the scope of Indian Waters in the Penobscot and St. Croix Rivers, which might require EPA to further "revisit or clarify the scope" of EPA's Action. AR 5309; *see also* AR 542 n.1 (DOI uncertainty over "exact boundaries" of Indian lands and waters, without elaborating on whether tribes "have additional fishing rights" outside such areas); n.53, 55, *supra*. EPA has also since suggested that EPA's Action may affect non-Indian Waters. *See* 81 Fed. Reg. at 23242-43 (for EPA's Maine Rule in response to EPA's Action, making a CWA § 303(c)(4)(B) determination of need for federal HHC wherever there is a sustenance fishing use and Maine's existing HHC are in effect, including any waters "for which a court in the future determines" that EPA's disapprovals of Maine's HHC were unauthorized, and any non-Indian Waters where sustenance fishing is a designated use); 81 Fed. Reg. at 92468 & n.8; *see also* Section III.B.5, n.41, n.55, *supra*. The status of Indian lands (and any Indian Waters adjacent to such lands) is also further subject to change based on future acquisitions or transfers. *See, e.g.*,

30 M.R.S. § 6205. These uncertainties in EPA's Indian Waters make EPA's Action arbitrary and further disrupt Maine's Water Program.

4. EPA usurps Maine's role over its waters and violates CWA requirements.

EPA's new "sustenance fishing" designated use and other tribal requirements, and its disapprovals of Maine's FCR and HHC, usurp Maine's role over its waters under the CWA, the 1980 Acts, and the Water Program. *See* Sections I.B-I.C, *supra*. EPA also disregards its 2000 Guidance allowing states to choose: 1) the population(s) they wish to protect through their designated uses, and 2) the overall relative level of protections of those uses within EPA's acceptable range through a state's chosen Risk Level and FCR. *See* Section I.D, *supra*. In addition, almost no notice or other process occurred regarding EPA's Action, which violates CWA requirements for new WQS and changes to designated uses. *See* Sections I.B.1, III.B.6, n.45-46, *supra*. EPA's tribal consultations and limited August 2013 notice regarding Maine's January 2013 WQS revisions, *see* Sections I.G-I.H, *supra*, represent the only process here. EPA arbitrarily kept Maine (which has environmental jurisdiction over all waters) in the dark while working separately with the Maine Tribes (which have no such regulatory authority) on separate water quality goals inconsistent with Maine's Water Program and goals. *See* Section I.B, *supra*.

F. EPA may not rely on any federal environmental trust responsibility, Indian common law, policies, or canons of construction, or DOI opinions for support.

EPA plans to "continue" to act pursuant to an alleged trust relationship and consider tribal interests as it oversees Maine's WQS. AR 5315. There is no environmental trust duty in Maine under the 1980 Acts or the CWA. *See* Sections I.A-I.A.2, I.B.3, n.35, n.43, *supra*. Any EPA reliance on general Indian common law, tribal policies, or its new DOI opinion to support special treatment or rights for the Maine Tribes, *see* AR 5317 n.5-6, is also barred by the 1980 Acts. 25

U.S.C. §§ 1725(h), 1735(b); *see also* Section I.A, n.9, n.53, *supra*; *Johnson,* 498 F.3d at 45 & n. 9-10. Indian canons of construction also do not apply. *See Catawba*, 476 U.S. at 506 & n.16.

G. The challenged parts of EPA's Action are not cured by EPA's Maine Rule.

After EPA's Action, EPA promulgated its Maine Rule, 81 Fed. Reg. 92466 (Dec. 19, 2016) setting new federal WQS (heightened HHC) to protect EPA's new "sustenance fishing" designated use in Indian Waters. This was prompted by EPA's rejection of the use of Maine's FCR to develop HHC and the resulting disapproval of those HHC, and presumes the lawful existence of EPA's new sustenance fishing use and other new tribal requirements – all of which were created by EPA's Action. *Id.* at 92468; 81 Fed. Reg. at 23241-43; *see also* n.45, *supra.* Thus, the validity of this part of EPA's Maine Rule depends on the outcome of Maine's challenge to its underpinnings here, and it cannot be used as an after-the-fact justification for EPA's Action.

H. The challenged parts of EPA's Action are barred by equitable considerations.

EPA's new and changed positions regarding Maine's WQS and its advancement of special new tribal environmental rights and protections in Indian Waters are disruptive of the Water Program, settled regulatory expectations, and the 1980 Acts, and are barred by equitable doctrines such as laches and acquiescence. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Oneida Indian Nation v. Cty. of Oneida*, 617 F.3d 114, 124-140 (2d Cir. 2010) (applying *Sherrill* and holding that laches barred remedies for disruptive treaty-based Indian claims by tribes or the U.S. on their behalf), *cert. denied*, 565 U.S. 970 (2011); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273-280 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *United States v. Washington*, 864 F.3d 1017, 1030-31 (9th Cir. 2017) (reh'g denied en banc) (O'Scannlain, J., dissenting) ("*Sherrill* made clear that laches can apply to Indian treaty rights, [so] it should not matter whether a party is seeking to apply laches in the context of sovereignty over land or the enforcement of rights appurtenant to land (the ability to fish)."); *id.*

at 1031 (*Sherrill's* logic applies to the U.S. as tribal trustee; failure by the U.S. to object for over 30 years to culverts it authorized warrants application of equitable bar); *see also* n.50, *supra*.

CONCLUSION

For the reasons above, the Court should enter judgment in Maine's favor, set aside the challenged parts of EPA's Action pursuant to 5 U.S.C. § 706(2), and declare the following:

(1) The parts of EPA's Action purporting to approve for Indian Waters for the first time those Maine WQS that were previously adopted by Maine, in effect under state law, and submitted to EPA for approval prior to May 30, 2000, or approved by EPA without qualification as to their effect in Indian Waters, including all Maine designated uses and other WQS in its Water Program, are arbitrary, in excess of EPA's jurisdiction and authority, without observance of required procedures, unlawful under the 1980 Acts and the CWA, and vacated;

(2) All such Maine WQS, including all of Maine's designated uses and other WQS in its Water Program, became the WQS in effect for CWA purposes for all applicable waters, including all applicable Indian Waters, as of the date of their original state adoption;

(3) The parts of EPA's Action comprising or supporting the disapproval of any Maine WQS for Indian Waters only are arbitrary, in excess of EPA's jurisdiction and authority, without observance of required procedures, unsupported by substantial evidence, unlawful under the 1980 Acts and the CWA, and vacated;

(4) Under the 1980 Acts, and for environmental regulatory purposes, EPA may not require that Maine adopt any special rights, protections, or WQS for members of the Maine Tribes or for Maine's Indian Waters based on uniquely tribal considerations;

(5) No part of MIA, including 30 M.R.S. § 6207(4), or any of Maine's other Settlement Acts constitutes a designated use for any Maine waters or group, or requires any heightened quality of water or fish in any waters;

(6) Maine's designated use of fishing does not also constitute or encompass a designated use of sustenance fishing for any Maine waters, or require any particular quality of water or fish based on uniquely tribal considerations; and

(7) For purposes of developing HHC in Maine, EPA may not require that Maine recognize only Indians or tribes as the target population of any designated use of any Maine waters, utilize any tribal-specific FCRs, or utilize or consider any other tribal-specific factors including alleged suppression effects on FCRs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2018, I electronically filed the above-document with the Clerk of Court using the CM/ECF system, which will send notification and a copy of such filing(s) to all counsel of record who have consented to electronic service, including the following:

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