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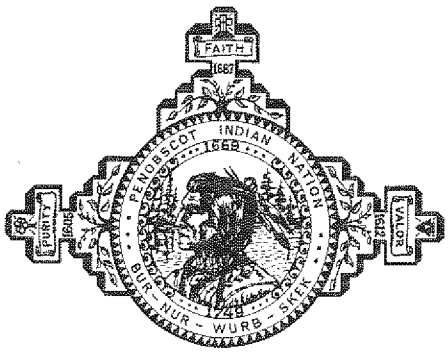

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July 30, 2018

Via Email and First Class U.S. Mail
Dunn Alexandra
Administrator
United States Environmental Protection Agency
Region I, New England
5 Post Office Square
Mail Code: ORA01-4
Boston, MA 02109-3912

Re: *Maine v. EPA,* 1:12-cv-264 (U.S. District Court for the District of Maine)

Dear Regional Administrator Dunn:

I write, on behalf of the Penobscot Nation, with respect to the above-referenced case and the merits brief EPA is required to file today under the Scheduling Order of Judge Levy.

The Penobscot Nation is concerned that EPA may breach its trust responsibility to the Penobscot Nation by failing to file a merits brief that fully defends the Agency's February 2015 decisions disapproving Maine's water quality standards as applied in the Penobscot Nation's reservation sustenance fishery.

Developments over the course of the last five weeks, starting with the EPA and Maine engaging in substantive settlement discussions without the Penobscot Nation and culminating in your announcement on Friday, July 27, 2018, that the EPA has decided to reconsider its decisions, are signs that this breach may be imminent.

The Penobscot Nation's reservation sustenance fishery is held in trust by the United States. *See* Opinion of the Office of the Solicitor Re: Penobscot Indian Reservation Land Status (June 5, 1992), attached as Exhibit A. As such, it constitutes a trust corpus, over which the United States, through the EPA, has a fiduciary obligation to protect.

Further, the United States Department of the Interior (DOI) and the EPA have long-recognized that the Nation's reservation sustenance fishing right is a treaty right and is to be protected as such under fundamental principles of federal Indian law. Those principles are at the foundation of the Agency's February 2015 decisions. They mandate that (a) the Penobscot Nation's fishing

rights "include the subsidiary right to sufficient water quality to render the rights meaningful" and (b) the EPA accordingly protect these rights pursuant to its trust responsibility. *See* Letter from DOI to EPA Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes (Jan. 30, 2015), attached as Exhibit B.

Indeed, since 1997, these have been the standing directives of DOI, the federal agency charged with administering the Maine Indian Claims Settlement Act of 1980. *See* Letter from DOI to EPA Re: Penobscot Indian Nation Request for Evidentiary Hearing Lincoln Pulp & Paper NPDES permit No. ME0002003 (Sept. 2, 1997), attached as Exhibit C. They were reaffirmed by DOI's most recent communication to EPA on April 27, 2018. *See* Letter from DOI to EPA Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes (April 27, 2018), attached as Exhibit D.

EPA has acted consistent with its fiduciary obligation to the Penobscot Nation in fully defending its decisions in this case and working closely with the Penobscot Nation as intervenor to do so. Given above-reference developments over the course of the last five weeks, however, the Penobscot Nation has grave concerns that the EPA may fail to now fully defend its 2015 decisions in its merits brief.

Accordingly, this is to put the EPA on notice that the Penobscot Nation will view such a failure to constitute a breach of the EPA's fiduciary duty to protect a treaty right of the Penobscot Nation and its reservation sustenance fishery, a trust corpus over which EPA serves as trustee on behalf of the Tribe.

Sincerely yours,

Kirk E. Francis