STATE OF MAINE
OFFICE OF THE GOVERNOR
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AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

February 27, 2017

Via overnight Fed Ex and email

Mr. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue
Mail Code: 1101A
Washington D.C. 20460
Pruitt.scott@Epa.gov

Re: *Petition for EPA's partial withdrawal of EPA letter actions and repeal of EPA's final rule on Maine's water quality standards*

Dear Mr. Pruitt:

Attached is a Petition for the reconsideration and withdrawal, with one important exception, of three EPA letter actions on Maine's water quality standards, and the repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016). Also attached in support of this Petition are comments by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's final Maine rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. I hope that you give this Petition the serious consideration it deserves.

Sincerely,

Paul R. LePage

Paul R. LePage
Governor, State of Maine

PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition for EPA's reconsideration and withdrawal of all portions of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, and repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016)	Submitted February 27, 2017, to the Administrator, U.S. Environmental Protection Agency

The State of Maine, through Governor Paul R. LePage, submits this petition to the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to 5 U.S.C. § 553(e) for the following actions: 1) reconsideration and withdrawal of all aspects of EPA's letter actions and supporting rationale regarding Maine's water quality standards dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016) ("Maine Rule").

In support of this request, and in addition to the following Supporting Statement, attached are copies of comments previously submitted to EPA by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's Maine Rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, which is currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. These attached materials more fully outline the nationally unique tribal-state relationship that exists between the State of Maine and the four federally-recognized Maine Indian tribes as a result of Maine's state and federal Indian settlement acts, including the state Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA") and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA")[1] (collectively the "1980 Acts"). The materials also more fully outline the history in recent years of EPA's failure to recognize Maine's role as a state under the Clean Water Act ("CWA") and under the unique jurisdictional principles contained in the 1980 Acts.

Because this matter is also the subject of currently pending litigation, the following Supporting Statement describing the rationale for Maine's request to EPA is relatively brief. For a more in-depth discussion of background, Maine's positions, and the intricacies of Maine's

[1] MICSA was formerly codified at 25 U.S.C. §§ 1721-1735. MICSA and other 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.

unique tribal-state jurisdictional arrangement under the 1980 Acts, Maine invites EPA to follow up this Petition with a meeting with the members of the Office of the Maine Attorney General representing Maine in the pending litigation with EPA.

MAINE'S SUPPORTING STATEMENT

Under Maine's nationally-unique 1980 Acts, Maine has statewide environmental regulatory jurisdiction and authority, including in all Indian waters and lands, which was confirmed by the First Circuit Court of Appeal in the context of water regulation in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007).

Under the CWA, states like Maine must establish water quality standards ("WQS") for all surface waters, including designating the uses of all such waters and establishing water quality criteria designed to protect the state's designated uses. In 1986, Maine adopted a new and comprehensive water classification program, now codified at 38 M.R.S. §§ 464-470, which contained all of Maine's designated uses and other WQS for its waters, and which EPA fully approved by 1990 without ever suggesting that Maine's WQS in that program did not apply or were not fully in effect in Indian waters for CWA purposes. By law, under both the CWA and EPA's regulations, those approved Maine WQS became the WQS in effect for CWA purposes for all applicable Maine waters at that time, including Maine's Indian waters. Indeed, for decades prior to 2005, EPA consistently applied Maine's WQS in Indian waters for CWA purposes, which also created significant reliance interests on the part of the regulated community.

In late 2004, however, Maine sought review in the First Circuit Court of Appeals of an EPA decision that Maine had no jurisdiction to regulate certain discharges of pollutants from two tribal wastewater treatment facilities. In *Maine v. Johnson,* the First Circuit concluded that EPA was wrong and that Maine did have such jurisdiction. Under the 1980 Acts, Maine's environmental laws on water quality, including its WQS, apply in Indian waters to the same extent as in other waters, and EPA cannot require that tribal members be treated differently than the rest of Maine's citizens for any environmental regulatory or water quality purposes. Congress reaffirmed this core principle of the 1980 Acts in 1987 when it first added tribal provisions to the CWA, but expressly stated that the new CWA tribal provisions would not apply in Maine for regulatory purposes because of the 1980 Acts.

Also in 2004, and as Maine pursued its appeal in the *Maine v. Johnson* matter, EPA began limiting its approvals of Maine's WQS revisions to non-Indian waters only while taking no action for an unspecified set of Indian waters. EPA later suggested that Maine's already-EPA-approved WQS that had been governing Maine's Indian waters for decades had never actually been in effect for any CWA purposes. The implication of this EPA reversal in position was that, under EPA's new thinking, a total water regulatory void existed in all of Maine's Indian waters, which was in violation of Congressional directives in the CWA and EPA's own regulations, guidance, and past application of Maine's WQS in Maine's Indian waters. EPA's change in position also disrupted decades of settled expectations regarding the Maine regulatory structure in those areas.

Faced with this new unsettling EPA approach, Maine originally filed its federal legal action in the District of Maine in 2014 to get EPA to honor Maine's statewide regulatory jurisdiction and to approve all of Maine's outstanding WQS for Indian waters. Maine expected this to happen, especially given that even EPA now agrees that Maine has statewide regulatory jurisdiction and authority over all its waters, including Indian waters. In response to Maine's action, however, EPA did something unexpected when it issued its February 2, 2015 letter, which generally does two things. First, EPA belatedly but correctly acknowledged Maine's statewide environmental regulatory jurisdiction and authority to set WQS for all Maine waters, including Indian waters, which EPA was effectively required to do under the 1980 Acts and *Maine v. Johnson*. Maine is not asking for EPA to reconsider or withdraw this portion of EPA's February 2, 2015 letter.

But then, in a surprising end-run of *Maine v. Johnson*, the plain language of the 1980 Acts, and CWA procedural requirements, EPA's February 2, 2015 letter also disapproved various Maine WQS (Maine's human health water quality criteria) for unspecified Indian waters based on a complex and convoluted new rationale that Maine is challenging in the District of Maine litigation, and that Maine is now asking EPA to fully reconsider and withdraw here.[2] In this portion of EPA's February 2, 2015 letter, EPA claims for the first time that in exercising its jurisdiction, Maine must ensure through new and heightened tribal-specific WQS that fish in Indian waters are of sufficient quality for tribal members to subsist on at consumption levels derived from historical reconstructed estimates taken from ethnographic accounts from the 16th through 19th centuries. EPA also now claims that its decades-long prior acceptance and consistent application of Maine's WQS throughout Indian waters were all mistakes.

EPA arrived at this remarkable change in position by newly and incorrectly interpreting (in 2015) the 1980 Acts as implicitly creating a new designated use of tribal sustenance fishing for Maine's Indian waters, even though Maine's water program contains no such use. The Maine Legislature, which has sole authority to make changes to Maine's water classifications and designated uses of its waters, 38 M.R.S. §§ 464(2)(D), 464(2-A)(E), never created such a sustenance fishing use, but actually considered and rejected a controversial 2002 proposal to create a similar "subsistence" designated use for limited portions of the Penobscot River only. The new sustenance fishing designated use is entirely a creation of EPA based on its new and incorrect 2015 interpretation of Maine law.

EPA's 2015 creation of a new designated use of tribal sustenance fishing for Maine is also based on a convoluted new interpretation of the 1980 Acts and other Maine Indian

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[2] Maine is also asking EPA to reconsider and withdraw two additional subsequent letters regarding Maine's WQS dated March 16, 2015, and June 5, 2015, which EPA issued as a result of Maine's original federal action. The March 2015 letter contains some EPA tribal WQS disapprovals, as well as some non-tribal components, while the June 2015 letter contains EPA actions primarily involving non-tribal WQS. Maine asks that all three letters be reconsidered and withdrawn, in addition to the repeal of EPA's resulting Maine Rule, so that the unlawful tribal components of EPA's various actions can be undone, and so that Maine can consult with EPA to find reasonable, mutually agreeable approaches to the remaining non-tribal WQS issues outside of the adversarial context of ongoing federal court litigation to protect Maine's jurisdiction under the 1980 Acts.

settlement acts that turns those acts and the intent of Congress on their head by establishing different WQS requirements for Maine's Indian tribes than for other Maine citizens – the very thing that the 1980 Acts were designed to avoid. EPA's new interpretation is also contrary to Congress' subsequent statement that the CWA's tribal provisions do not apply in Maine for regulatory purposes because of the 1980 Acts. Moreover, by creating a new designated use of sustenance fishing for Maine, EPA has usurped Maine's role as a state under the CWA, which reserves the function of designating the uses of state waters to the states. EPA also did all of this without following CWA procedural requirements regarding the creation of new WQS such as a new designated use.

EPA began quietly pursuing this new revised approach to Maine's WQS around 2004 in order to further separate tribal environmental goals pursuant to EPA national tribal policies that were developed after 1980 and that do not apply in Maine under the 1980 Acts. Since EPA's change in position around 2004, EPA has increasingly been working on important Maine water quality issues with Maine's Indian tribes, who have no environmentally regulatory authority in Maine under either the CWA or the 1980 Acts, while excluding the State of Maine, which has full statewide environmental regulatory authority over all waters. This has unfortunately created discord and tension in Maine and has strained relationships with EPA and the Maine tribes.

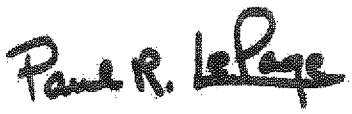
EPA's new approach to WQS in Maine is also similar to EPA actions in other states such as Washington and Idaho. The common features of EPA's recent actions in Maine and other states include new EPA requirements when states develop WQS that intrude on state policy decisions and generally eliminate state discretion, such as forcing states to use higher cancer risk levels and aspirational unsuppressed fish consumption rates for tribes. In Washington, as in Maine, EPA has created new tribal-specific federal designated uses through new EPA interpretations of existing state WQS laws, and has reformulated the states' chosen "target" populations of such designated uses based on the new EPA interpretations. The CWA requires that any federal WQS be created through rulemaking – not through new EPA interpretations of state law, which sidesteps CWA legal requirements. All of these EPA intrusions into traditional state matters are contrary to the CWA's principles of cooperative federalism and EPA's existing guidance, and represent an increasingly federalized regulatory approach to state waters.

Reconsideration and withdrawal of EPA's three letters at issue here and EPA's final Maine Rule (with the exception of EPA's long overdue acknowledgement of Maine's statewide environmental regulatory jurisdiction and authority) will honor clear Congressional and Maine legislative intent regarding Maine's unique tribal-state relationship, restore Maine's state role over the planning and management of its waters, and hopefully represent a positive first step start towards improved working relationships with EPA and the Maine Indian tribes.

CONCLUSION

For the reasons described above, as well as in Maine's Second Amended Complaint and various comments submitted on EPA's Maine Rule, Maine respectfully requests that EPA 1) reconsider and withdraw all aspects of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdraw EPA's final Maine Rule.

Dated this 27 day of February, 2017.



Paul R. Lepage
Governor, State of Maine

Docket ID. No. EPA-HQ-OW-2015-0804

COMMENTS OF MAINE ATTORNEY GENERAL JANET MILLS IN RESPONSE TO EPA'S PROPOSAL OF CERTAIN FEDERAL WATER QUALITY STANDARDS APPLICABLE TO MAINE

June 14, 2016

Maine Attorney General Janet T. Mills ("Maine AG") hereby submits the following comments in response to the Proposal of Certain Federal Water Quality Standards ("WQS") Applicable to Maine ("Proposed Maine Rule") by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* ("CWA"). 81 Fed. Reg. 23239 (April 20, 2016). The underlying basis for much of the Proposed Maine Rule (*see id.* at 23241-47) is set forth in EPA Region 1's letter action dated February 2, 2015, and its accompanying 51-page rationale (collectively the "February 2, 2015 Action"), which Maine is presently challenging in a separate federal court action pending in the United States District Court for the District of Maine, Civil Action No. 14-cv-264-JDL ("Pending Action").

1. All of Maine's arguments in its Pending Action also apply to the Proposed Maine Rule.

All portions of EPA's Proposed Maine Rule that were prompted by, taken in response to, or are otherwise based on EPA's February 2, 2015 Action (including Sections II-IV(A)-(B) of the Proposed Maine Rule) are unlawful based on Maine's arguments raised in its Pending Action, which apply with equal force to EPA's Proposed Maine Rule. Maine's Second Amended Complaint filed in the Pending Action is attached as Exhibit ("Ex.") 1, and is incorporated herein by reference.[1] The Maine AG comments more specifically as follows:

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[1] Maine requests that EPA consider as part of these proceedings and include in EPA's administrative record all exhibits to Maine's Ex. 1 (Second Amended Complaint). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

2. Maine's Indian Settlement Acts did not "expressly confirm" or establish any "aboriginal" right to tribal sustenance fishing, let alone any kind of right to any heightened quality of water and/or fish based on membership in a Maine tribe.

EPA's Proposed Maine Rule, like its February 2, 2015 Action, wrongfully asserts that an underlying purpose of Maine's various Indian settlement acts was to expand the land base for all of Maine's tribes in order to preserve their cultural sustenance practices (including sustenance fishing), and that this alleged underlying purpose in turn requires EPA, in its reviewing role with respect to Maine's WQS submissions under the CWA, to ensure a heightened quality of water and/or fish in order to protect Maine's tribes. 81 Fed. Reg. at 23241-42. Nothing in the CWA contemplates or authorizes this EPA approach. Likewise, the history and plain language of Maine's Indian settlement acts do not support EPA's interpretation of the alleged underlying (and unwritten) purpose of those acts, but instead prohibit EPA's position, which would impermissibly give Maine's tribes an enhanced status and greater rights with respect to water quality than the rest of Maine's population.

With respect to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (collectively the "Northern Tribes"), EPA's interpretation of the underlying purpose of the Maine Indian settlement acts is flatly contradicted by express provisions of the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA"), as confirmed and ratified by the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") (collectively the "1980 Acts"). Under the plain language of these 1980 Acts, the Northern Tribes are, without exception, fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources," a phrase which expressly includes water and water rights, and fishing rights. 30 M.R.S. §§ 6203(3), 6204; 25 U.S.C. §§ 1722(d), 1725(a); (Ex. 1, Second Amended Complaint, ¶¶ 47-48). Thus, under the 1980 Acts, the Northern Tribes are subject to the same

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environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, and that aspect of the settlement is unaffected by EPA's novel new interpretation of the underlying purpose of the 1980 Acts.

The Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (collectively the "Southern Tribes") are also subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, but with a limited caveat – namely, that members of these Southern Tribes may, within their respective reservations only, generally take fish free from otherwise applicable State fish and game rules regulating the method, manner, bag and size limits and season for taking fish, provided that the fish is taken for the Southern Tribal member's individual sustenance rather than for a commercial or some other purpose. 30 M.R.S. § 6207(4); (Ex. 1, Second Amended Complaint, ¶¶ 41-46). This limited right of members of the Southern Tribes to take fish arises from a hunting and fishing provision in MIA, rather than from any of the express jurisdictional provisions of the 1980 Acts, which memorialized a negotiated settlement that resolved disputed claims and expressly transferred and extinguished all aboriginal tribal rights. *See* 30 M.R.S. § 6204; 25 U.S.C. §§ 1721(a)(2), 1721(b)(2)-(4), 1723, 1725(a)-(b)(1).[2] Thus, with respect to the Southern Tribes, EPA's Proposed Maine Rule wrongfully asserts that MIA, 30 M.R.S. § 6207(4), "expressly confirmed an aboriginal right" to tribal sustenance fishing in the Southern Tribes' reservations. 81 Fed. Reg. at 23241. That limited right in MIA is not an aboriginal right, as all aboriginal rights were transferred and extinguished; it is a statutory entitlement as a result of the settlement underlying

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[2] Maine's position on the transfer and extinguishment of all aboriginal tribal rights is more fully set forth in briefs filed in the federal Maine District Court action over PIN's alleged ownership of portions of the Penobscot River, which position and briefs are incorporated herein by reference. (*See* Maine's motion for summary judgment in *PIN v. Mills*, No. 12-cv-254-GZS, attached as Ex. 2 (at pp. 33-38), and Maine's reply in support of that motion, attached as Ex. 3 (at pp. 20-25)).

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the 1980 Acts. It also has nothing to do with Maine's underlying environmental regulatory jurisdiction over the quality of all State waters, which is expressly addressed by different jurisdictional portions of the 1980 Acts that contain no exceptions to Maine's statewide environmental regulatory jurisdiction. *See* 30 M.R.S. §§ 6204, 6206; 25 U.S.C. §§ 1721(b)(2)-(4), 1725(a)-(b)(1). Thus, like the Northern Tribes, the Southern Tribes are subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality, and that aspect of the settlement is also unaffected by any new EPA interpretation of any alleged underlying purpose of the 1980 Acts.

Under MICSA's Sections 1725(a)-(b)(1) and MIA's Section 6204, all Maine tribes are subject to Maine's environmental regulatory jurisdiction with respect to the quality of Maine's waters. Under MIA's Section 6206, the Southern Tribes are treated like municipalities and are exempt from Maine's jurisdiction with respect to "internal tribal matters," which the First Circuit Court of Appeals has interpreted narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation." *Maine v. Johnson*, 498 F.3d 37, 46 (1st Cir. 2007); *see also id.* at 45 (if the internal affairs exemption negated Maine's ability to environmentally regulate within tribal 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). MIA's Section 6207(4) and its limited right to take fish free from fish and game restrictions are not mentioned in either MIA's Sections 6204 or 6206, because that limited right to "take" fish is not a general exception with respect to Maine's environmental regulatory jurisdiction – it is confined entirely to the type of fish and game rules and regulations outlined in Section 6207 such as "the method, manner, bag and size limits and season for fishing." *See* 30 M.R.S. § 6207(3).

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Moreover, no part of MIA Sections 6204, 6206, or 6207 suggests in any way that there is any implicit or bootstrapped tribal right to a heightened quality of water or fish for any reason, let alone as a result of Section 6207(4). This is because the intent and plain terms of the 1980 Acts require equal environmental regulatory treatment with respect to all Maine waters for all Maine citizens, including members of all of Maine's Indian tribes. (Ex. 1, Second Amended Complaint, ¶¶ 16-50, 62-67). EPA wrongly cites to 30 M.R.S. § 6207 (81 Fed. Reg. at 23241) as an alleged reflection of Maine's intent to create a CWA designated use of "sustenance fishing," which would violate other express provisions and the core principles of the 1980 Acts.

3. Maine has never adopted any CWA designated use of "sustenance fishing" for any waters, and Maine's existing designated use of "fishing" for all surface waters, which protects Maine's general population only, has been in effect statewide since EPA's approval of Maine's Water Classification Program in the 1980s.

EPA unlawfully bases its Proposed Maine Rule on two new EPA interpretations of longstanding Maine law as establishing a new designated use of tribal "sustenance fishing" for all Maine Indian waters in order for all Maine's tribes "to preserve their culture and lifeways." 81 Fed. Reg. at 23241-42. These new EPA interpretations, first made and announced in EPA's February 2, 2015 Action (and now echoed in the Proposed Maine Rule), and which EPA wrongfully claims flow from the 1980 Acts, are unlawful.

Since at least 1986, Maine's Water Classification Program, now codified at 38 M.R.S. §§ 464-470, has included State-adopted and EPA-approved designated uses of "fishing" and "recreation in or on the water," which reflect the fishable/swimmable goals that are generally required by the CWA. (Ex. 1, Second Amended Complaint, ¶¶ 68-77). Decades ago, EPA fully approved all aspects of Maine's water program, including Maine's designated uses of "fishing" for all Maine surface waters – without any exception for any tribal waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 68-73).

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EPA was also fully aware of the effect of the terms of the 1980 Acts prior to approving Maine's Water Classification Program in the 1980s. For instance, EPA issued an informal Maine status report (provided to Maine in March 1982) acknowledging Maine's statewide environmental regulatory jurisdiction over all of its waters, including Maine's Indian waters. (*See* Ex. 4, which is incorporated herein by reference, at p. 4, rejecting tribal rights with respect to areas under the Clean Air Act analogous to CWA designated uses, and noting that State law on environmental protection will apply in Indian territory). After EPA approved Maine's Water Classification Program (including Maine's designated use of "fishing" for all surface waters), EPA again stated its view that Maine has statewide environmental regulatory jurisdiction in a July 1993 EPA legal memorandum, which expressly limited Maine tribal rights under the CWA's new 1987 tribal provisions (Section 518) to receipt of CWA Section 106 funding grants – specifically because of the unique provisions of the 1980 Acts Maine giving statewide environmental regulatory jurisdiction over core environmental matters such as air and water quality. (*See* Ex. 5, which is incorporated herein by reference).

Until EPA's February 2, 2015 Action, EPA had never taken the position that Maine's longstanding designated use of "fishing" also encompassed an unwritten second designated use of "sustenance fishing" for the protection of anyone, let alone Maine's Indian tribes, in all (undefined) Indian waters. Likewise, until EPA's February 2, 2015 Action, EPA had never taken the position that any portion of MIA (including 30 M.R.S. § 6207(4)) was intended as or constituted a designated use of "sustenance fishing" for the reservation waters of the Southern Tribes (or any other waters). These recent EPA positions (*see* 81 Fed. Reg. at 23241-42) are contrary to the 1980 Acts, the CWA, EPA's guidance, and EPA's historical practice with respect to Maine's WQS.

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As EPA knows, for CWA purposes there has never been any State-adopted designated use of "sustenance fishing" for any Maine waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 68-77). As EPA also knows, Maine expressly considered but rejected a controversial 2002 State proposal to the Maine Legislature that would have created for the first time a designated use of "subsistence" fishing, which was analogous to EPA's newly created designated use of "sustenance fishing," but for only a limited portion of the Penobscot River as opposed to all of Maine's Indian waters. (*See* Ex. 6, which is incorporated herein by reference). Maine is aware of no other Maine effort to adopt any designated use of "sustenance" or "subsistence" fishing for any Maine waters. Moreover, as mentioned above, EPA already fully approved all aspects of Maine's Water Classification Program, including Maine's designated uses of "fishing" for all surface waters of the State, without any exception for any Maine Indian waters. Under EPA's rules, 40 C.F.R. §§ 131.21(c)-(e), these WQS, which purport to apply to all Maine waters and which were adopted by Maine and submitted to EPA for review and approval prior to May 30, 2000, have been and ***are*** the WQS in effect for CWA purposes for all Maine surface waters, including all of Maine's Indian waters.[3]

EPA's new interpretations of Maine's existing designated use of "fishing" and MIA's Section 6207(4) as incorporating a new designated use of tribal "sustenance fishing" for Maine Indian waters represent federal actions taken entirely by EPA and do not reflect any State-adopted designated use. By these new interpretations of existing Maine law, EPA has attempted to federalize Maine's WQS and create a new federal designated use in violation of both the

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[3] As of these comments, and as discussed below, EPA has never determined that Maine's existing designated uses of "fishing" for all surface waters do not meet the requirements of the CWA, which means that EPA has never lawfully promulgated any more stringent designated uses. As a consequence, Maine's designated use of "fishing" is and has been the applicable fishing use since EPA's approval of Maine's program in the 1980s. 40 C.F.R. §§ 131.21(c)-(e).

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CWA and the 1980 Acts. In the course of creating its new federal designated use of tribal "sustenance fishing," EPA also did not adhere to any of the CWA process required for new WQS, such as seeking public comment and/or holding public hearings on the new designated use. *See, e.g.* 40 C.F.R. §§ 131.21(c)-(e) (state WQS adopted and submitted to EPA prior to May 30, 2000 *are* the applicable WQS for CWA purposes until replaced by more stringent federal WQS), 131.22(c) (when promulgating WQS, EPA Administrator is subject to same process requirements as states); 40 C.F.R. §§ 131.10(e) (requiring states to provide notice and opportunity for hearing "[p]rior to adding or removing any use") (removed and reserved eff. October 20, 2015, 80 Fed. Reg. 51020, 51021-22).

4. EPA also lacks authority under the CWA to create any new kind of fishing designated use because there has never been any EPA determination that Maine's existing designated use of "fishing" for all surface waters does not meet CWA requirements.

The February 2, 2015 Action and EPA's new interpretations of Maine law creating a new designated use of "sustenance fishing," were by the EPA Region 1 Regional Administrator, who has no authority under the CWA to replace Maine's existing statewide designated use of "fishing" with a new designated use of "sustenance fishing" for any Maine Indian waters. This was something that only the EPA Administrator could have done – if she had first made a formal determination that Maine's prior adoption of a designated use of "fishing" violated the requirements of the CWA for such waters.[4] To date, no such formal determination has ever been

[4] If the EPA Administrator (rather than any Regional Administrator) determines that existing State WQS do not meet CWA requirements, or that a revised or new WQS is necessary to meet CWA requirements, then the EPA Administrator may, upon determining such a WQS is necessary, prepare and publish proposed regulations setting forth the revised or new WQS. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(a)-(b); *Puget Soundkeeper Alliance v. EPA*, 2014 WL 4674393, *5 (W.D. Wash., 2014).

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made by anyone at EPA, let alone the EPA Administrator.[5] This is presumably because it is something that EPA could not do under the CWA, as Maine's designated use of "fishing" for all surface waters, which is designed to protect Maine's general population rather than a more focused population, meets all CWA requirements and is in full keeping with EPA regulations and guidance. In any event, and as discussed above, such a determination would also violate the 1980 Acts and their prohibition against any special or heightened environmental regulatory treatment based solely on membership in a Maine tribe. 25 U.S.C. §§ 1725(h), 1735(b).

The February 2, 2015 Action and the Proposed Maine Rule try to get around this deficiency (the lack of any EPA determination that Maine's existing statewide designated use of "fishing" violated CWA requirements) by claiming that no WQS (including designate uses) had ever been approved for Maine's Indian waters, so (in EPA's view) no such determination was ever necessary and EPA was free to simply make up its own new designated use of tribal "sustenance fishing." This revisionist approach defies historical reality, as EPA not only already fully approved all aspects of Maine's Water Classification Program for all Maine waters in the 1980s, but then also consistently enforced Maine's WQS in Indian waters in a variety of ways – as was required under the CWA. (*See* Ex. 1, Second Amended Complaint, ¶¶ 93-103). EPA's position also violates the CWA's requirement that States promulgate WQS for all interstate waters, and EPA's own rules and guidance. 33 U.S.C. §§ 1313(c)(1), (2); 40 C.F.R. § 131.3(i),

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[5] The necessity determination made by the EPA Administrator in the Proposed Maine Rule involves the sufficiency of Maine's human health criteria ("HHC") for undefined Indian waters only, and presumes the existence of EPA's newly-created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23242-43 ("for the waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, EPA hereby determines... that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for such waters."). There has never been any EPA determination that Maine's existing "fishing" designated use does not meet CWA requirements for any waters, or that a new designated use of tribal "sustenance fishing" is required to meet CWA requirements for Indian (or any other) waters.

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131.4; *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994); 40 C.F.R. §§ 131.21(c)-(e).[6] It is also an absurd position, as it would result in a decades-long regulatory void based on a lack of any WQS and resulting CWA protections for all of Maine's Indian waters, which would violate the CWA and the 1980 Acts. But this is exactly what EPA claims here – that there have never been any WQS (including designated uses) for any Maine Indian waters, and that all EPA permits, enforcement measures, and other actions taken to date with respect to water quality in Maine's Indian waters were mistakes and of no effect.

5. Maine has never chosen to protect Maine tribal members only as the "general target population" of any "fishing" or other designated use for any Maine waters.

As noted above, EPA purports to have already created (as a result of its new interpretations in its February 2, 2015 Action) a new designated use of tribal "sustenance fishing" for Maine (81 Fed. Reg. at 23242-43), which EPA designed to protect a tribal-only "general target population" that Maine itself never chose to provide with heightened protections. *Id.* at 23245 ("EPA's analysis of the settlement acts also led EPA to consider the tribes to be the general target population in their waters."); (*see also* Ex. 1, Second Amended Complaint, ¶ 86).

EPA's decision to focus on protecting Maine's tribes as the intended "general target population" is a new EPA approach that unlawfully usurps Maine's primary role over its water under the CWA, as states have the primary authority and responsibility to establish WQS, including designated uses for all interstate waters. In its EPA-approved Water Classification

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[6] As EPA acknowledged in July 1983 (in a tribal discussion paper), the environmental laws that EPA administers (such as the CWA) apply to all lands within the U.S. including Indian lands, as general statutes apply to all persons including Indians. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-18 (1960). Thus, EPA understood in the 1980s that Maine was historically required to, and did, promulgate and obtain EPA-approval for its WQS (including its designated uses) under the CWA for all Maine waters, including tribal waters. This was consistent with EPA's WQS guidance issued in 1972, 1983, and 1988, each of which state that WQS are required for all waters within the U.S.

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System, Maine deliberately chose to protect Maine's entire general population only with respect to its designated use of "fishing" for all of Maine's surface waters. Under EPA's regulations, Maine's "fishing" use has been the Maine WQS/designated use in effect for CWA purposes since its adoption by Maine and submission to EPA. 40 C.F.R. §§ 131.21(c)-(e). With respect to fishing, and in keeping with EPA's guidance, Maine made a risk management decision not to protect more specific population groups such as Maine's tribes as the "general target population" of any more focused use, such as EPA's new "sustenance fishing" use. (*See* EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000), §§ 2.1 (identifying the population to protect; "criteria could be set to protect those individuals who have average or "typical" exposures. . ."), 4.3.3.1 ("If a State or authorized Tribe has not identified a separate well-defined population of high-end consumers and believes that the national data . . . are representative, they may choose these recommended rates. . ."); *see also* Ex. 1, Second Amended Complaint, ¶¶ 78-87).

In addition, and as noted above, in 2002 the Maine Legislature expressly considered and rejected a controversial proposal to establish this kind of a "subsistence" fishing designated use, which – if adopted by Maine – would have protected defined subsistence fishers as a "target" population for a limited stretch of the Penobscot River only. (*See* Ex. 6). This is something that Maine could have done voluntarily outside of the context of the 1980 Acts, but that EPA could not (and cannot) force Maine to do as a matter of federal law, as such action would violate both the 1980 Acts and Maine's State role under the CWA.

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6. **To protect its new designated use of "sustenance fishing," EPA unlawfully relies on aspirational tribal fish consumption data based on historical estimates in an EPA-funded tribal study instead of Maine's already EPA-approved actual local data.**

Even assuming that Maine had itself chosen to adopt a designated use of "sustenance fishing" in order to protect tribal members only instead of Maine's general population, which Maine purposely did not do, EPA unlawfully relies on vague historical anthropological estimates in an EPA-funded tribal study (the Wabanaki Cultural Lifeways Scenario ("Wabanaki Study")) in support of EPA's new elevated fish consumption rate ("FCR") that it claims is required when developing HHC in Indian waters in order to protect EPA's new designated use. 81 Fed. Reg. at 23245-46. EPA's reliance on this aspirational Wabanaki Study over Maine's actual local consumption data from 1990 violates the 1980 Acts, the CWA, and EPA's own guidance, and does not factually support EPA's new elevated tribal FCR.

According to EPA, the Wabanaki Study was EPA-funded and conducted by the Aroostook Band of Micmacs on behalf of all Maine Indian tribes pursuant to a grant awarded by EPA (81 Fed. Reg. at 23246), all of which occurred without the knowledge or involvement of Maine's Department of Environmental Protection ("DEP"). Maine, which has the primary authority and responsibility under the CWA to establish WQS for all Maine waters, including designated uses and HHC to protect its chosen uses, was never provided with a copy of or informed about the 2009 Wabanaki Study, even though the study was designed to support EPA's review and/or development of tribal-based WQS in Maine based on elevated tribal FCRs. 81 Fed. Reg. at 23246. In fact, Maine DEP first learned of the Wabanaki Study in connection with EPA's issuance of its February 2, 2015 Action. This secretive EPA approach is in full keeping with EPA's practice in recent years of consulting with Maine's Indian tribes only behind closed

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doors regarding the development of WQS for Maine's Indian waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 110-125).

The Wabanaki Study relied upon by EPA in the Proposed Maine Rule is also irrelevant because it is based on historical evidence from the 16th through 19th centuries and has no bearing on actual tribal FCRs, either current tribal FCRs or those at the time the 1980 Acts were enacted. Thus, even if the 1980 Acts contemplated a separate designated use of tribal "sustenance fishing," which they do not, any consumption levels that such a use could arguably protect would be those existing at the time of the 1980 Acts – not levels based on estimates from as early as the 16th century. There is also nothing in the CWA that supports EPA's abandonment of sound science in favor of historical anthropological estimates as support for present day FCRs.

EPA also states that it "consulted with the tribes in Maine about the Wabanaki Study and their sustenance fishing uses of the waters in Indian lands" (81 Fed. Reg. at 23246), but cites nothing in the Proposed Maine Rule resulting from these private consultations that would support any actual elevated tribal FCRs. Without citing any evidence, EPA also states that the Wabanaki Study reflects a former tribal lifestyle in Maine that "some tribal members practice today." 81 Fed. Reg. at 23246. EPA also cites no evidence, and Maine is aware of none, of any actual present day (or even 1980 era) FCRs for any Maine tribal population at the levels in the aspirational Wabanaki Study or in EPA's Proposed Maine Rule.

If anything, the Wabanaki Study shows that EPA's proposed elevated tribal FCR does *not* reflect any actual current (or 1980) tribal consumption patterns. *See* 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."); *see also id.* at 23246-47 (acknowledging "uncertainties associated with

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a lack of knowledge about tribal exposure in Maine Indian waters," 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 only and "not the amount consumed"). In these respects, EPA's Proposed Maine Rule is unsupported by EPA's own primary evidence.

In addition, EPA's assertion that the Wabanaki Study represents the "best currently available information" (81 Fed. Reg. at 23246) to establish FCRs for Maine Indian waters is wrong. As EPA acknowledged in the February 2, 2015 Action (Attachment A at pp. 37-38), Maine previously relied on actual 1990 local consumption data (in the form of EPA-preferred method of statewide surveys) to support its highly protective statewide FCR, which was based on sound science and approved by EPA. (*See* Ex. 1, Second Amended Complaint, ¶¶ 87-92). As EPA noted in its February 2, 2015 Action (Attachment A at p. 38), 11% of the participants in that 1990 EPA-approved, local statewide survey were Native Americans. EPA's only new concern with this data, as outlined in the February 2, 2015 Action, is that it does not reflect "unsuppressed sustenance fish consumption in tribal waters" – new EPA requirements that have no legal basis under the CWA and are unlawful under the 1980 Acts.

7. To protect its new designated use of "sustenance fishing" in Maine, EPA unlawfully adds a new tribal requirement that any FCR used to develop HHC must be "unsuppressed" by tribal pollution concerns.

In its Proposed Maine Rule, EPA proposes a significantly elevated tribal FCR (286 grams/day as compared to Maine's already EPA-approved and highly protective statewide FCR of 32.4 grams/day for the general population), which EPA, without any evidence or legal support, claims is required for purposes of its new designated use and "represents present day sustenance-level fish consumption, unsuppressed by pollution concerns." 81 Fed. Reg. at 23245-

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47. Thus, EPA's Proposed Maine Rule and its underlying February 2, 2015 Action reflect a new EPA requirement (formerly a mere preference at most), that FCRs used to derive HHC for Indian waters reflect tribal FCRs "unsuppressed by pollutant concerns." 81 Fed. Reg. at 23244-45.

Maine is aware of nothing in either the CWA or any EPA regulation under the CWA that authorizes or provides legal support for EPA's new requirement of the use of tribal FCRs "unsuppressed by pollutant concerns." Indeed, EPA cites no such CWA or regulatory authority in support of its new requirement, but instead relies on its assertion of its "scientific and policy judgment" that EPA alleges was "necessary and appropriate" to protect EPA's own newly created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23245. EPA's only cited authority for its new requirement of "unsuppressed" tribal FCRs is an informal EPA January 2013 "Frequently Asked Questions" document concerning HHC and FCRs generally, which, according to EPA, "generally recommends" the use of FCRs unsuppressed by concerns over the safety or availability of fish, *id.* at 23244 & n. 17, and which was itself never the subject of any public input or comment process.[7] In fact, EPA has never engaged in ***any*** public hearings, comment, or other process with respect to its new tribal policy of forcing States to use "unsuppressed" tribal FCRs. (*See* Ex. 7, which is incorporated herein by reference, at ¶¶ 15-

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[7] EPA's January 18, 2013 FAQ document also contains an express disclaimer that it does not "impose legally binding requirements on [EPA], states, tribes, or the regulated community..." The FAQs also undercut EPA's position by reaffirming EPA's prior guidance allowing States to lawfully choose a cancer risk level of 1 in 100,000 for the general population, and limiting the risk to 1 in 10,000 "for any sensitive sub-population (such as those who may consume a great deal more fish because of a subsistence lifestyle)." Because FCRs and cancer risk levels are relative, these EPA-approved State options, when combined with Maine's general FCR of 32.4 grams/day at Maine's conservative risk level of 1 in 1,000,000, equate to FCRs of 324 grams/day (at a risk level of 1 in 100,000) and 3240 grams/day (at a risk level of 1 in 10,000) – FCRs that greatly exceed the new FCR required by EPA in its Proposed Maine Rule (286 grams/day). In this way, Maine's existing HHC are scientifically defensible, adhere to EPA guidance, and far exceed EPA's requirements for the protection of both Maine's general population and Maine's sensitive subsistence fishers. (*See* Ex. 1, Second Amended Complaint, ¶¶ 78-92).

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17).[8] EPA's unilateral creation of this new requirement, which affords members of Maine's tribes greater rights than the rest of Maine's population, also violates the 1980 Acts and their principle of equal environmental regulatory treatment for all Maine citizens.

As far as Maine is aware, EPA's February 2, 2015 Action and its Proposed Maine Rule also represent the first instances where EPA has affirmatively required "unsuppressed" tribal FCRs anywhere in the nation. (*Id.*). A partial transcript of EPA staff testimony in December 2015 before the Idaho Board of Environmental Quality (and submitted in an EPA headquarters' proceeding for the State of Washington) shows that EPA's focus on unsuppressed FCRs is a recent effort directed by EPA's national headquarters. (*See* Ex. 8, which is incorporated herein by reference). This requirement of unsuppressed FCRs, to the extent it is being applied here in Maine, also appears to have been developed in consultation with Maine's tribes without the involvement of Maine. 81 Fed. Reg. at 23247 (noting EPA's approach was "consistent with the Penobscot Nation's approach to deriving a current, unsuppressed FCR to protect sustenance fishing").

Even assuming that there is a lawful requirement that Maine use a FCR "unsuppressed by tribal pollutant concerns" when developing HHC for Maine's Indian waters, which there is not, EPA cites no surveys or other evidence (and Maine is not aware of any) detailing any actual suppression effects based on any pollution concerns by any Maine tribal populations. *See* 81 Fed. Reg. at 23246. Neither the Proposed Maine Rule nor the Wabanaki Study reference any such surveys or evidence. The Wabanaki Study relied on by EPA focuses instead on historical

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[8] As with Ex. 1, Maine requests that EPA consider as part of these proceedings and include in EPA's administrative record all exhibits to Maine's Ex. 7 (Joint Stipulations). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

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FCR estimates from the 16th through 19th centuries, and does not establish or support any present day tribal FCRs, let alone document any actual suppressive effects on such FCRs based on pollution concerns. Indeed, other factors such as historical loss of habitat and/or other reductions in fish populations are equally (if not more) likely to explain the absence of any present day FCRs at the elevated levels in the aspirational Wabanaki Study and in the Proposed Maine Rule.[9]

8. The scope of the Maine waters subject to EPA's newly created designated use of "sustenance fishing" is overly broad, vague and indefinite, and unlawful.

The waters contemplated by EPA's February 2, 2015 Action underlying the Proposed Maine Rule are themselves vague, indefinite, and unsupported, because the February 2, 2015 Action does not define EPA's concept of "Indian waters" or the scope of that prior action. Instead, the February 2, 2015 Action (at Section 1.4.1, pp. 6-7) vaguely incorporates "waters adjacent to land held in trust" for tribes by the federal government, disputed reservations, and additional common law rights with uncertain application to Maine tribes, yet still acknowledges "remaining uncertainties" in areas such as the Penobscot and St. Croix rivers.

At the outset, the scope of EPA's vague and indefinite concept of "Indian waters" at issue in the February 2, 2015 Action (underlying the Proposed Maine Rule) is overly broad, contrary to the CWA and EPA's tribal WQS regulations, and unlawful, as the scope of those waters impermissibly encompasses indefinite waters adjacent to trust lands in addition to reservation waters. This is significantly broader than the limits of any WQS program that any authorized tribe could lawfully establish under the CWA's tribal TAS provisions and related regulations, which confine such tribal WQS programs to water resources within tribal reservation borders.

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[9] For purposes of setting its tribal FCR in the Proposed Maine Rule, EPA also simply assumes, without any evidence, that the insufficiency of anadromous fish (*i.e.* fish that is "now less available") shifted tribal diets towards inland non-anadromous species. *See* 81 Fed. Reg. at 23247. This is yet another unsupported aspect of EPA's Proposed Maine Rule.

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See 40 C.F.R. § 131.8(a)(3); *see also Wisconsin v. EPA*, 266 F.3d 741, 746 (7th Cir. 2001). In this respect, EPA is unlawfully attempting to expand tribal influence over water quality regulation beyond what is contemplated by or permissible under the CWA and EPA's own regulations.

The Proposed Maine Rule does not clarify or limit the scope of the waters affected by the rule or EPA's new designated use of "sustenance fishing," which remains overly broad, vague and indefinite, and unlawful. Although EPA provides some additional information regarding the scope of waters at issue in the Proposed Maine Rule (*see* Section II(C), 81 Fed. Reg. at 23242-43 and n.8-9, and the new EPA supporting Technical Support Document, both entitled "Scope of Waters"), the same underlying problems regarding the scope of affected waters persist, and new uncertainties are raised. For instance, the Proposed Maine Rule vaguely states that it will apply to "[a]ny waters in Indian lands in Maine for which a court in the future determines that EPA's 2015 disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect." *Id.* at 23243. In addition to undercutting the lawfulness of EPA's underlying February 2, 2015 Action as well as EPA's authority to disapprove Maine's HHC in that action, this statement also serves as proof of the inherently vague and indefinite nature of the Proposed Maine Rule.

The Proposed Maine Rule also states that the rule and EPA's new designated use of "sustenance fishing" are intended to open-endedly apply to protect the Southern Tribes ***wherever*** they ultimately have a limited right to take fish pursuant to MIA's Section 6207(4), which has yet to be finally determined. *Id.* at 23243, n.9.[10] Thus, the scope and intended effect of EPA's

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[10] EPA's technical "Scope of Waters" document (at pp. 2, 4-5) also acknowledges that portions of its Proposed Maine Rule may apply outside of Indian lands based on the holding in *PIN v. Mills*, No. 1:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015) regarding the geographic scope of

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Proposed Maine Rule are knowingly based on multiple uncertainties, which hinge on the resolution by federal courts of the Pending Action (addressing Maine's challenge to the February 2, 2015 Action, currently pending in the United States District Court for the District of Maine), *PIN v. Mills* (addressing disputes over the ownership of portions of the Penobscot River and the limited right to take fish in MIA Section 6207, currently on appeal to the First Circuit Court of Appeals), and possibly other actions.

EPA's supporting "Scope of Waters" technical document adds further uncertainty to the application of the Proposed Maine Rule and EPA's new designated use of "sustenance fishing." For instance, this document asserts (at p. 3) that the Proposed Maine Rule and the new designated use of "sustenance fishing" may apply to the "thread" (*i.e.*, generally the middle) of waters adjacent to tribal trust lands, which creates uncertainty based on the potential existence of multiple different designated uses in a single body of water, separated by an invisible line in the water representing the water's "thread." As noted above, the application of any EPA rule to waters adjacent to tribal trust lands would also be impermissibly broad, as no tribal WQS program could lawfully have such an extended reach under the CWA's tribal TAS provisions and related regulations.

The "Scope of Waters" document further suggests (at p. 3) that the waters subject to EPA's Proposed Maine Rule and its new designated use of "sustenance fishing" may also be enlarged in the future through the acquisition of additional trust lands on behalf of any Maine tribe.

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the limited right to take fish in MIA's Section 6207(4), and that the extent of the application of its new designated use of "sustenance fishing" is currently unknown.

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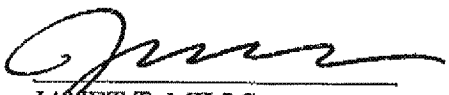
The "Scope of Waters" document also announces (at pp. 3-4) that EPA will adhere to its own expansive interpretation of the District of Maine's decision in *PIN v. Mills*, No. 1:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015). This EPA interpretation, which is contrary to the actual District Court holding and disputed by Maine, creates additional uncertainty by suggesting that EPA believes that there may be additional tribal rights in waters around the outside of the PIN reservation based on "common law riparian rights in the river."

Finally, the "Scope of Waters" document suggests (at pp. 4-5) that EPA believes that there may be similar additional tribal rights in waters in and around the reservation of the Passamaquoddy Tribe in the St. Croix River, which EPA suggests would also be subject to the Proposed Maine Rule and the new EPA designated use of "sustenance fishing." Such rights in that waterbody have never been established by law and would likely be vigorously contested by both Canadian and U.S. parties, were they to be asserted

For all of these reasons, the scope of EPA's Proposed Maine Rule is overly broad, vague and indefinite, and unlawful.

Dated: June 14, 2016

JANET T. MILLS
ATTORNEY GENERAL



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Docket ID. No. EPA-HQ-OW-2015-0804

COMMENTS OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMISSIONER PAUL MERCER ON THE EPA PROPOSED WATER QUALITY STANDARDS FOR MAINE

June 20, 2016

On April 20, 2016, EPA published proposed water quality standards ("WQS") for the State of Maine. 81 Fed. Reg. 23239 (April 20, 2016). These comments are submitted in response to those proposed standards. Overall, EPA's proposed WQS, especially to the extent that they are unique to unspecified tribal waters in the proposed Maine rule, are unnecessary and should be withdrawn. Maine presently maintains highly protective WQS statewide, which were approved by EPA over the past approximately thirty years. The following comments highlight the adverse impact EPA's proposed rule will have on the regulatory environment in Maine and the licensing process managed by the Maine Department of Environmental Protection ("Department"), as well as the lack of benefit to Maine's environment and to the protection of human health that would result from EPA's proposed new WQS.

Comments from Janet Mills, Maine Attorney General

EPA claims authority to act pursuant to Section 303(c) of the Clean Water Act ("CWA"); 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5, 131.6, 13.11 and 131.21. EPA identified its February 2, 2015 disapprovals of Maine's WQS and its proposed federal WQS in the proposed rule as being "necessary" to meet CWA requirements, most notably by claiming that existing Maine WQS (Maine's human health criteria, or "HHC") are insufficient to protect designated uses,

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including EPA's own, newly-created designated use of "sustenance fishing." 81 Fed. Reg. 23241-23247. The Department disputes EPA's underlying determination of necessity because, among other things, EPA wrongfully relies upon and presumes the lawful establishment of a new designated use of "sustenance fishing" for unspecified tribal waters, which is a use that was never adopted by Maine. This and other legal concerns with EPA's proposed Maine rule are more fully addressed by the comments filed by Maine Attorney General Janet Mills on June 14, 2016, which are incorporated into these comments in their entirety by reference. In addition to the points raised by Attorney General Mills, the Department further comments as follows:

Tribal Waters

Beyond the points raised by Attorney General Mills regarding this issue, the Department has serious concerns about the impact of the overly broad, vague and indefinite language used to define EPA's concepts of "Indian waters" and "waters where the Southern tribes have a right to sustenance fish" on the regulatory and licensing process. Without clear definitions of such waters, it is impossible for the Department's permit writers to develop permit limits that are reflective of applicable standards, make many important permitting decisions, or even identify which facilities may be affected by EPA's proposed rule.

In addition, absent a clear definition of all Maine waters covered by the proposed rule, it would appear impossible for EPA (or anyone else) to perform an accurate or meaningful economic impact analysis. Without knowing exactly which facilities will be affected by the proposed rule, the Department (and presumably EPA) cannot measure or even estimate the economic impact or cost to Maine's communities and businesses that may need to upgrade systems or engage in other capital expenditures to meet EPA's new WQS. Indeed, it is unclear

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the extent or whether the EPA factored in these possible costs to point source dischargers in its estimates. Additionally, for non-point discharges, EPA itself stated that it "did not fully evaluate the potential for costs to nonpoint discharges…" 81 Fed. Reg. 23259.

Fish Consumption Rates (FCR) and Excess Cancer Risk Factor

Beyond the points raised by Attorney General Mills regarding these issues, the Department urges EPA not to consider any values from the anecdotal Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Report") to develop FCR. 81 Fed. Reg. 23245-47. While the Wabanaki Report holds some anthropological value, extending its reach to regulatory standards is inappropriate. The Wabanaki Report is entirely subjective and aspirational, and is based on outdated historical estimates rather than on any actual consumption data for the population that EPA seeks to protect with its new designated use of "sustenance fishing." 81 Fed. Reg. 23246. The Wabanaki Report is certainly not the best available evidence for Maine FCR purposes, especially in light of the existence of the 1990 study based on actual local consumption data that was used to develop Maine's current statewide FCR of 32.4 grams/day at a 10^{-6} cancer risk level. In the Department's view, the Wabanaki Report is not even competent evidence, and is simply not the kind of reliable evidence that the Department would consider when establishing enforceable permit limits. It should not be used as support for EPA's newly proposed tribal FCR of 286 grams/day, or for any other purpose.

Even so, in light of the acceptable range of protections outlined in EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health ("2000 Guidance"), EPA's proposed HHC based on its new FCR of 286 grams/day are simply

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not required in order to achieve an acceptable level of protection (*i.e.*, to meet the requirements of the CWA) because Maine's existing statewide FCR of 32.4 grams/day at a 10^{-6} cancer risk level already achieves what EPA considers to be an acceptable level of protection. For instance, if an individual consumed 10 times the amount of fish contemplated by Maine's current FCR (or 324 grams/day), he or she would still be protected to an EPA-acceptable risk level of 10^{-5}. Similarly, if an individual consumed 100 times Maine's current FCR (3240 grams/day, *or over 7 pounds of fish per day*), he or she would still be protected to at least a 10^{-4} risk level, which, under EPA's 2000 Guidance, is also acceptable and adequately protective of sport and subsistence fishers. The Department is unaware of any evidence suggesting actual consumption anywhere near these levels, and doubts that it exists. But even assuming the existence of such consumption levels, Maine's existing FCR of 32.4 grams/day at a 10^{-6} cancer risk level is still adequately protective of all Maine-promulgated designated uses based upon the acceptable range of protections set forth in EPA's own 2000 Guidance, and there is no necessity for any higher FCR in order to meet the requirements of the CWA. Any determination of EPA necessity here is thus based purely on EPA's own, more recent risk preferences, and not on any requirements of EPA's 2000 Guidance or the CWA.

EPA's attempt to force Maine to protect tribes using an elevated 286 grams/day FCR at a 10^{-6} cancer risk level also may not result in any statistically relevant levels of protection. EPA's 2000 Guidance is structured to account for a broad range of consumption rates (90th to 99th percentile). A recent white paper by ARCADIS (Summary of Health Risk Assessment Decisions in Environmental Regulations, March 6, 2015), notes that the impact of the conservative approach of EPA's 2000 Guidance results in significantly higher levels of protection from the development of one excess cancer due to exposure to chemicals in the environment. Under

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principles of compound conservatism, protection to the 95th percentile based on exposure, and amount of fish consumed, and total number of years consuming, protects significantly more than the 95th percentile for each of those variables individually. In their example, protecting to the 95th percentile (or 9,500 out of 10,000, which is equivalent to 10^{-4} risk level) actually protects to the 99.78th percentile when considering the combined impact of each assumption in EPA's 2000 Guidance. Factoring in these same assumptions to Maine's WQS clearly results in protection for more highly exposed subgroups not exceeding the 10^{-4} level. The ARCADIS paper shows that the proposed EPA standards protect well beyond that required by EPA's 2000 Guidance, and that Maine's WQS, especially combined with principles of compound conservatism are well within the acceptable range of protection for exposed subgroups authorized by EPA's 2000 Guidance.

pH

EPA proposes a new range of pH criterion for Maine's Indian waters only. 81 Fed. Reg. 23255. The Department maintains that the original pH standard of 6.0 to 8.5 was already approved by the EPA and is the valid standard for discharges in Maine statewide. This standard is fully protective of aquatic life and protects recreation in and on the water; 99% of the river and stream miles in Maine are at Class B or higher with 95% meeting standards, including biological structure and function. Almost all of the non-attainment is due to either nutrients or an aspect of run-off (metals, chlorides, bacteria, etc.). Regardless, the pH range is the measure of stringency, not the actual values. EPA's range of 6.5-9.0 is just as protective as the former pH standard. The Department's biologists believe that a range of 6.0 to 8.5 provides better Maine habitat than does the range of 6.5 to 9.0, noting that several functioning Maine streams naturally fall below the 6.0 lower threshold. Additionally, the Department has measured pH below 6.5 where, based on the

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Department's monitoring, waters are considered to be attaining Maine's aquatic life criteria. The Department believes that a pH of 9.0, however, approaches levels toxic to Maine fish and other aquatic life. Therefore, the Department would like to maintain the current pH range of 6.0-8.5 for the health of the Maine's streams and rivers.

Bacteria

EPA proposes new recreational bacteria criteria for Maine's Indian waters in part because Maine's existing criteria do not apply to naturally occurring (*i.e.*, wildlife) fecal sources. 81 Fed. Reg. 23254. Under the CWA, States such as Maine have the primary responsibility of preventing, reducing, and eliminating "pollution," 33 U.S.C § 1251(b), which is defined by the CWA as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C § 1362(19). Thus, the CWA regulates human pollution, and not wildlife, and EPA's proposal of WQS designed to regulate "wildlife sources" of bacteria in Maine's Indian waters is beyond the scope of the CWA.

The November 5, 1997 guidance cited by EPA states that, "(f)or human health uses, where the natural background concentration is documented, this new information should result in, at a minimum, a re-evaluation of the human health designation." "Establishing Site Specific Aquatic Life Criteria Equal to Natural Background." ("1997 Guidance"). The 1997 Guidance stands for possible reevaluation of uses based on known background concentrations not establishing criteria which necessitates regulation of naturally occurring bacteria, hence, the existing Maine rule excepts bacteria sources from wildlife. Bacteria from natural sources are likely to be temporal, therefore removing a use (recreation in and on the water) simply due to a

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high level E. coli an organism that is used as an indicator of human sewage, which does not include E. coli of natural origins is, at best, unwise. EPA's source, the 2012 Recreational Water Quality Criteria ("2012 RWQC"), is unconvincing regarding the expected impact of non-human sources of bacteria causing human health risks. EPA incorrectly construes "animal sources" of bacteria from studies as equivalent to naturally occurring "wildlife sources" used in the proposed rule. When directly linking human health concerns to "wildlife" sources, EPA's 2012 RWQC indicate, "sources of fecal contamination in these waters were not identified;" or wildlife, "could not be confirmed as the primary source of the zoonotic pathogens", or worse, "found a lack of a statistical association between swimmers' illness risk and FIB (fecal indicator bacteria) levels in a rural fresh waterbody impacted by animal fecal contamination; Calderon et al. (1991)." EPA only directly cited one study to link potential human health risks with non-human sources of fecal contamination. That study, from New Zealand, linked human health risks to agricultural sources (presumably cattle, not wildlife) and qualified that the relationship was "unlikely to hold in all waters" (2012 RWQC, section 3.5 1-2).

The Department also opposes the EPA's proposal to apply these criteria year round. States may adopt seasonal uses pursuant to 40 C.F.R. 131.10. The information cited by EPA as indicating potential recreational activities in or on the water after October 1 continued for only a few days after October 1, and are located several miles upstream of any point source discharge. Neither source cited by EPA offers these activities in October 2016. These activities are unaffected by seasonal chlorination of wastewater and we found no documentation of other recreational activity specific to the Penobscot River.

The proposed rule also utilizes total coliform bacteria and makes reference to using this indicator organism as it is consistent with the National Shellfish Sanitation Program (NSSP);

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however, the NSSP program allows states to use fecal coliform bacteria as an indicator also. E. coli is an indicator organism because it is easier to detect and quantify than pathogenic organisms of concern. Maine has written permits limiting fecal coliform bacteria (not total coliform) to 15/100 ml as a geometric mean and 50/100 ml as a daily maximum in marine waters for several years. They were written this way to be consistent with Maine Department of Marine Resources sampling program which uses fecal coliform bacteria as their indicator parameter when making opening/closure decisions. The NSSP establishes a geometric mean of 14/100 ml and not more than 10% of the samples shall exceed a most probable number (MPN) of 49/100 ml. It is much easier to write and determine compliance with a permit if the daily maximum limit is one numeric value that is not conditioned 10% of samples exceeding MPN. The Department suggests EPA continue to focus on organisms and standards that are currently regulated. Both are consistent with the NSSP and a more straightforward method for addressing bacteria in shellfish areas than EPA's approach.

Temperature

EPA proposes to limit the weekly average monthly rise in ambient temperature to 1.8°F during all seasons of the year provided the weekly average summer maximum of 64.4°F is not exceeded. The summer season is defined as May 15 – September 30. EPA's proposal is less stringent during the summer season (1.8°F vs 1.5°F) more stringent than the non-summer months (1.8°F vs 4.0°F) and more stringent as a daily maximum (64.4°F vs 85°F), compared to Maine's current temperature regulations.

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The above criteria must be compared to baseline thermal conditions. The baseline thermal conditions shall be measured or modeled from a site where there is no artificial thermal addition from any source and which is in reasonable proximity to the thermal discharge (within 5 miles) and has similar hydrography to that of the receiving waters at the discharge. This will be problematic given the issues with reference sites being representative the Department has encountered over the years in the aquaculture general permit. It also begs the question: what are the seasons (assuming four seasons with summer already defined as May 15 – September 30) and should a baseline be established for each season?

Timing

In the Department's view, EPA's haste to promulgate these standards is unwise given the degree of impact expected. The need for additional time is evident for all parties, including EPA, to adequately address the process. Impacted parties and other commenters have expressed interest in extending the deadline for comments so that the impact of the proposed standards can be more carefully considered. The Department has similar concerns about whether a sufficient degree of care was used by the EPA in promulgating these standards. For instance, in addition to deficiencies in economic impact analysis mentioned, the Department has noticed errors in the WQS, such as the listing of a non-priority pollutant, Bis(2-Chloro-1-Methylethyl) Ether, in EPA figures.

EPA developed and has now proposed WQS for Maine, citing their obligation under the CWA to do so if the State has not made sufficient progress towards rectifying the disapproved standards. EPA has been informed numerous times that there are several WQS that will require

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changes in statute. EPA has been informed numerous times that the next legislature will not convene until January 2017, therefore legislative changes will have to be tabled until that time.

In addition, in docket filings dated June 16, 2016, EPA denied requests by several commenters to extend the comment period in order to address the many important issues implicated by EPA's proposed Maine rule. In its denials of those requests, EPA stated: "Our primary concern with extending the comment period is that for many pollutants there are currently no criteria for Clean Water Act purposes, including most human health criteria for waters in Indian lands." This explanation of the apparent urgency surrounding the promulgation of EPA's proposed Maine WQS makes no sense because EPA's new approach in Maine is the cause of the regulatory void that EPA now scrambles to address. EPA's current position, which the Department disputes, is that prior to EPA's February 2, 2015 action, there had never been any WQS of any kind, including HHC, in effect and requiring attainment for any CWA purposes for any of EPA's unspecified Indian waters in Maine. If EPA had truly believed that such a gaping void in protection (and a clear violation of the CWA) had always existed due to the lack of any EPA-approved WQS for such waters, as EPA now claims (and the Department disputes), EPA has had decades to address the regulatory void, as Maine's WQS date back to the mid-1980s. If there is any sudden urgency now, it is entirely the result of EPA's changed position with respect to Maine underlying its February 2, 2015 disapprovals of Maine's WQS for Indian waters and its rushed promulgation of this proposed Maine rule. EPA has already failed to provide the public with any opportunity to comment on other critical aspects of its novel new approach to WQS in Maine – most notably with respect to EPA's creation of its new designated use of "sustenance fishing" and its new requirement that "unsuppressed" tribal FCRs be used to develop criteria to protect tribal rights. EPA should not further compound the problem by

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restricting the duration of the public comment period and rushing the process with respect to this proposed Maine rule.

Conclusion

In summation, the Department maintains that the WQS approved by EPA over the past thirty years are still valid and in force, and are fully protective of all existing, Maine-promulgated uses. These comments are provided to demonstrate the potential added for unnecessary complexity in permitting and compliance activities should these proposed standards be promulgated. For these reasons, EPA should withdraw these rules.

Dated: June 20, 2016

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COMMISSIONER
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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, and AVERY DAY, in his capacity as Acting Commissioner of the Maine Department of Environmental Protection, Plaintiffs, v. GINA MCCARTHY, in her capacity as Administrator, United States Environmental Protection Agency, and H. CURTIS SPALDING, in his capacity as Regional Administrator of the United States Environmental Protection Agency (Region 1), Defendants.	Civil Action No: 1:14-cv-264-JDL

SECOND AMENDED COMPLAINT

Introduction

1. Plaintiffs State of Maine and Avery Day, Acting Commissioner of the Maine Department of Environmental Protection ("DEP") (collectively "Plaintiffs" or "Maine"), bring this action to challenge the lawfulness of certain disapprovals by Defendants (collectively "EPA") of Maine's surface water quality standards ("WQS") promulgated pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA") for unspecified waters that EPA claims may be within Indian territories and lands ("Indian Waters"). The challenged EPA disapprovals and rationale, which effectively establish different WQS for Maine's Indian tribes than for Maine's other citizens, are set forth in a letter sent by EPA's Region 1 to Maine dated February 2, 2015, and a 51-page "Attachment A" to that letter (collectively EPA's "February 2, 2015 letter," a copy of which is attached hereto as Exhibit 1).

2. Maine's environmental regulatory jurisdiction over all intrastate waters, including Indian Waters, has long been established by the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA") and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") (collectively the "1980 Acts"), and was reaffirmed by the First Circuit Court of Appeals in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007).

3. Under the 1980 Acts, Maine's WQS, including Maine's designated uses of its intrastate waterbodies (set forth in Maine's established Water Classification Program, 38 M.R.S. §§ 464 *et seq.*) and Maine's water quality criteria designed to protect its designated uses, apply throughout Indian Waters to the same extent and in the same manner as those WQS apply to other Maine waters. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

4. Similarly, under the 1980 Acts, members of Maine's Indian tribes have no special or greater status or rights with respect to water quality and are subject to Maine's WQS to the same extent and in the same manner as the rest of Maine's general population. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

5. In 2004, however, EPA began limiting its approvals of Maine's WQS to non-Indian Waters only, while taking no action on Maine's WQS for Indian Waters, in contravention of the CWA, the 1980 Acts, and *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007). As a consequence, and with no other remaining extra-judicial options, Maine resorted to filing this action in 2014, which originally sought to force EPA to honor Maine's statewide environmental regulatory jurisdiction to set WQS for all intrastate waters, including Indian Waters, and to act on Maine's outstanding WQS for its Indian Waters.

6. In response, and while this action was pending, EPA issued its February 2, 2015 letter, which generally does two things: first, it belatedly but correctly determines that Maine has

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statewide environmental regulatory authority under the 1980 Acts to set WQS for all Maine waters, including Indian Waters, consistent with *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). (Exhibit 1, Attachment A, pp. 2, 7-10). However, EPA's February 2, 2015 letter then unlawfully disapproves certain Maine WQS (human health water quality criteria) for Indian Waters based on an intricate rationale, announced for the first time in the February 2, 2015 letter, that is built on a series of unlawful determinations that EPA employs to try to get around the 1980 Acts and *Maine v. Johnson* and reach an apparently pre-determined result – EPA's disapproval of Maine's human health criteria for Maine's Indian Waters only. (Exhibit 1, Attachment A, pp. 2-3, 10-44).

7. EPA's disapprovals of Maine's WQS for Indian Waters affords members of Maine's Indian tribes special rights and a status that is greater than the rest of Maine's general population in violation of the 1980 Acts, the CWA, and *Maine v. Johnson*.

8. EPA's February 2, 2015 letter also suggests that any separate WQS ultimately implemented for Maine's Indian Waters will have a regulatory reach beyond those Indian Waters into Maine' non-Indian Waters within the same watersheds, which irresponsibly disrupts settled regulatory expectations and creates uncertainty with respect to Maine's long-standing Water Classification Program. (Exhibit 1, Attachment A, p. 11).

9. The many unlawful aspects of EPA's February 2, 2015 letter that EPA relies on to ultimately disapprove Maine's human health criteria for Maine's Indian Waters include, without limitation, the following:

- EPA unlawfully asserts that, prior to February 2, 2015, no WQS were ever in effect for Maine's Indian Waters, even though EPA historically (*i.e.*, pre-2004) approved Maine's WQS without qualification as to their effect in Indian Waters, and has acted as if those WQS were in effect for Indian Waters (Exhibit 1, Attachment A, p. 14);
- EPA unlawfully asserts that its pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters before

EPA could ever approve any Maine WQS for such Indian Waters (Exhibit 1, Attachment A, pp. 14-15);

- EPA unlawfully asserts that its historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was the result of individual mid-level EPA mistakes (Exhibit 1, Attachment A, p. 15);

- EPA unlawfully asserts that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine regulation (Exhibit 1, Attachment A, pp. 2, 17-28);

- EPA unlawfully asserts that Maine's WQS and the protection of Maine's existing designated uses of its waterbodies must be "harmonized" with EPA's flawed interpretation of the purpose of MIA, MICSA, and Maine's other Indian Settlement Acts (Exhibit 1, Attachment A, pp. 2, 28-30);

- EPA unlawfully interprets the narrow portions of MIA that permit members of Maine's Southern Tribes to take fish within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 30-31);

- EPA unlawfully issues a new interpretation of Maine's longstanding designated use of "fishing," as used throughout Maine's Water Classification Program for all Maine waters, as instead meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 31-32);

- EPA unlawfully usurps Maine's role as a State under the CWA by establishing its own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process (Exhibit 1, Attachment A, pp. 2, 30-32);

- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect the use by ensuring a higher quality of fish for tribal-only sustenance purposes (Exhibit 1, Attachment A, pp. 2-3, 12, 20-21, 27-28);

- EPA unlawfully analyzes its new designated use of tribal "sustenance fishing" in the context of a tribal-only "target" population, as opposed to Maine's general population, for purposes of establishing water quality criteria to protect that new use (Exhibit 1, Attachment A, pp. 2-3, 35-36);

- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as requiring unsuppressed tribal fish consumption rates based on a new historical tribal fish consumption "scenario" that assumes fish free from any pollution and that was

itself never the subject of any public input process (Exhibit 1, Attachment A, pp. 3, 37-41); and

- EPA unlawfully disapproves Maine's human health water quality criteria for Indian Waters as being un-protective of EPA's new tribal "sustenance fishing" designated use (Exhibit 1, Attachment A, pp. 3, 41-43).

Jurisdiction and Venue

10. The Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 1331 & 2201-2202, and 33 U.S.C. § 1365(a)(2).

11. Venue is proper in this Court pursuant to 5 U.S.C. § 703, 28 U.S.C. § 1391, and 33 U.S.C. § 1365.

The Parties

12. Plaintiff State of Maine is a sovereign state with environmental regulatory jurisdiction over all waters within its boundaries, including Indian Waters.

13. Plaintiff Avery Day is the Acting Commissioner of the Maine DEP and has primary responsibility for the environmental protection, regulation and control of all waters within the State of Maine.

14. Defendant Gina McCarthy is the Administrator of EPA and is being sued in her official capacity. EPA is an agency of the United States and has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control of waters within the United States. As Administrator, Ms. McCarthy oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

15. Defendant H. Curtis Spalding, who is also being sued in his official capacity, is the EPA Regional Administrator for Region 1 (New England), which includes the State of Maine. Within EPA's Region 1, Mr. Spalding has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control over waters within the United

States. As Regional Administrator for EPA's Region 1, Mr. Spalding oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

Maine's Indian Settlement Acts

16. There are now four federally recognized Indian tribes in Maine represented by five governing bodies: the Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (with two separate Passamaquoddy governing bodies) (collectively the "Southern Tribes"); and the Houlton Band of Maliseet Indians ("Maliseets") and the Aroostook Band of Micmacs ("Micmacs") (collectively the "Northern Tribes").

17. In 1980, Congress passed MICSA, which, among other things, resolved litigation in which the Southern Tribes asserted land claims to an area consisting of approximately two-thirds of the State of Maine's land mass. (25 U.S.C. §§ 1721 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

18. MICSA also ratified MIA, a Maine law that reflects a comprehensive negotiated settlement between the State of Maine and the Southern Tribes, and that also addresses jurisdictional issues and defines the relationship between Maine and its Indian tribes. (30 M.R.S. §§ 6201 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

19. As a result of MIA and MICSA, Maine has a nationally unique and novel relationship with its Indian tribes. (*See Akins v. Penobscot Nation,* 130 F.3d 482, 483 (1st Cir. 1997) ("The relations between Maine and the Maine Tribes 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.")).

20. In 1989, Maine passed the Micmac Settlement Act (the "Micmac Act"), which was ratified by Congress in 1991 through passage of the Aroostook Band of Micmacs Settlement Act ("ABMSA"), and which was designed to give the Micmacs the same limited settlement that had been provided to the Maliseets under the 1980 Acts (the Micmac Act, ABMSA, and the 1980 Acts are collectively referred to as Maine's "Indian Settlement Acts"). (*Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56-58 & n. 20 (1st Cir. 2007); Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 1143, §2(a)(5) ("It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefitted from inclusion in the Maine Indian Claims Settlement Act of 1980.")).

21. MIA, as ratified by MICSA, generally establishes that:

> 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), confirmed by MICSA, 25 U.S.C. § 1725).

22. Similarly, MICSA establishes that the Southern Tribes and their "lands and natural resources" are subject to Maine's jurisdiction as provided in MIA, while the Northern Tribes:

> and any lands or natural resources held in trust by the United States, or by any other person or entity, for [the Northern Tribes] 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) and (b)(1); 25 U.S.C. § 1725(f); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 50-51 (1st Cir. 2007)).

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23. Both MIA and MICSA use the same broad definition of "lands and natural resources," which expressly includes tribal water and water rights, and tribal hunting and fishing rights. (30 M.R.S. § 6203(3); 25 U.S.C. § 1722(d)).

24. As recognized by the First Circuit Court of Appeals, Congress expressly understood that, under MICSA, Maine would retain its environmental regulatory jurisdiction and authority over Maine's Indian lands and waters:

> 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." S. Rep. 96-957 at 27; H.R. Rep. 96-1353 at 20.

(*Maine v. Johnson,* 498 F.3d 37, 43-44 (1st Cir. 2007)).

25. As recognized by the First Circuit Court of Appeals, Congress also understood that, under MICSA, any special or greater environmental status or rights afforded to Indian tribes generally, such as those under the Clean Air Act (no similar tribal provisions had yet been enacted under the CWA in 1980), would expressly ***not*** apply in Maine:

> 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." S. Rep. 96-957 at 31.

(*Maine v. Johnson,* 498 F.3d 37, 44 n.7 (1st Cir. 2007)).

26. The principle that the State of Maine's jurisdiction and environmental laws extend throughout Maine and encompass Indian tribal "lands and natural resources" was central to the 1980 Acts, and in crafting MICSA, Congress carefully ensured that no then-existing federal Indian law of any kind would be interpreted in a manner that would call into question the applicability of Maine's State laws to Maine's tribes, which would upset the jurisdictional bargain that had been negotiated:

> [No] law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory, or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

(25 U.S.C. § 1725(h)).

27. Elsewhere in MICSA, Congress further secured Maine's unique tribal-State jurisdictional arrangement against ***future*** changes in federal law by using language that essentially tracks the language used in Section 1725(h):

> The 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 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.

(25 U.S.C. § 1735(b)).

28. The combined effect of MICSA Sections 1725(h) and 1735(b) is to bar the application of any kind of federal law that accords special or greater status or rights to Indians and affects or preempts Maine's jurisdiction, unless Congress expressly makes such law applicable in Maine. (25 U.S.C. §§ 1725(h) & 1735(b); *see also Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983); 68 Fed. Reg. 65052, 65057 (November 18, 2003) (EPA concluded that the combination of MICSA Sections 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."); 25 U.S.C. § 1722(d) (defining "laws" of the State to include common law)).

29. The Congressional Senate Report makes clear that the application of federal Indian canons of construction was one of the specific concerns that gave rise to MICSA's Sections

1725(h) and 1735(b), and that these provisions were intended to prevent courts from applying the common law canons to questions of interpretation involving the 1980 Acts:

> The phrase "civil, criminal, or regulatory jurisdiction" as used in [section 1725(h)] is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well as of the jurisdiction of the courts of the State. The word "jurisdiction" is not to be narrowly interpreted as it has in cases construing Public Law 83-280 such as *Bryan v. Itasca County*, 426 U.S. 373 (1976).

(S. Rep. 96-957, at 30-31).

30. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), issued just four years before passage of the 1980 Acts, illustrated how federal courts generally rely (except where Congress provides otherwise) on Indian canons of construction to resolve ambiguities in statutes against states and in favor of Indians, and the Congressional Senate Report invoked *Bryan* to clarify that the *Bryan* decision's mode of analysis – including its use of Indian canons favoring Indian tribes – was not to apply to questions arising under the 1980 Acts. (S. Rep. 96-957, at 30).

31. Indeed, during the Senate hearings, counsel for the Southern Tribes testified that the "general body of Federal Indian law" had been excluded in Maine "in part because that was the position that the State held to in the negotiations. . . [and] it is also true to say that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the federal government in internal tribal matters." (Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 181-82 (1980)).

32. Similarly, before Maine's Joint Select Committee, the same counsel for the Southern Tribes had stated:

> Increasingly [during negotiations], both sides 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.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

33. Overall, as the Maine Supreme Court summarized:

> 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 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.

(*Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983)).

34. The First Circuit Court of Appeals has concluded that, when interpreting the 1980 Acts or other Maine Indian Settlement Acts, EPA is not to be afforded any deference. (*Maine v. Johnson,* 498 F.3d 37, 45 (1st Cir. 2007); *see also id.* at 45 & n.9-10 (also discounting a Department of Interior ("DOI") opinion letter to EPA as non-authoritative and in apparent tension with DOI's 1980 testimony to Congress regarding Maine's jurisdiction under the 1980 Acts)).

The jurisdictional effect of the 1980 Acts on the Southern Tribes

35. With respect to the Southern Tribes, and as the First Circuit Court of Appeals has observed, "[a]t the time the Settlement Acts were adopted, the Interior Department, largely responsible for relations with Indian tribes, told Congress that the southern tribes' lands would generally be subject to Maine law. (H.R. Rep. 96-1353 at 28 (report of the Department of the Interior)." (*Maine v. Johnson,* 498 F.3d 37, 43 (1st Cir. 2007); *see also id.* at 45 n.10).

36. This understanding was shared by the Southern Tribes, who, through their counsel during the State hearings, explained:

> In light of all this, one might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that they were obliged to do so if they wanted to effectuate the Settlement of the monetary and land aspects of the claim.... [T]he Tribes opened negotiation 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.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 23-24; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 n.7 (Me. 1983)).

37. Counsel for the Southern Tribes further explained that, "[f]or the Indians [negotiating the settlement] meant, among other things, understanding the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine." (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

38. Similarly, the State of Maine, through the Maine Attorney General, explained that MIA would avoid a situation where Maine's water and air pollution control laws would be unenforceable within tribal areas. (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of Maine Attorney General Richard S. Cohen, *reprinted in* Me. Leg. Record (1980) at 6-7).

39. Thus, as the First Circuit Court of Appeals determined, MIA (as ratified by MICSA) "provided that 'with very limited exceptions,' the southern tribes would be 'subject to' Maine law…." (*Maine v. Johnson,* 498 F.3d 37, 42 (1st Cir. 2007) (*quoting Akins v. Penobscot Nation,* 130 F.3d 482, 484 (1st Cir. 1997); *see also Passamaquoddy Tribe v. Maine,* 75 F.3d 784, 787 (1st Cir. 1996) (the 1980 Acts were designed to "create a unique relationship between state and tribal authority" by submitting the Maine Indians and their tribal lands and resources to the State's jurisdiction and by giving the State "a measure of security against future federal incursions upon these hard-won gains.")).

40. Under MIA, the Southern Tribes were to be treated like municipalities and subject to the laws and regulatory oversight of the State with the exception of things such as "internal tribal matters," which have been determined not to encompass environmental regulation. (30 M.R.S. § 6206(1); *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997) (the Southern Tribes benefitted from the settlement by gaining municipal powers); *Maine v. Johnson,* 498 F.3d 37, 46, 47 (1st Cir. 2007) ("In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected . . . *unless* the internal affairs exemption applies;" discharge of pollutants into Maine waters was not of the same character as "the structure of Indian government or distribution of tribal property;" concluding that the internal tribal matter exception did not apply to bar Maine's environmental regulatory jurisdiction over Indian wastewater facilities); (Exhibit 1, Attachment A, pp. 8-11)).

41. Among the other very limited exceptions to the general application of Maine laws and regulations to the Southern Tribes is a provision involving certain regulatory restrictions on 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)).

42. In general, a combination of the Southern Tribes, the joint Maine Indian Tribal-State Commission ("MITSC"or the "commission"), and/or the Commissioner of Maine's Department of Inland Fisheries and Wildlife ("IFW") regulate fish catch and size limits and fishing seasons with respect to waters within or bounding on Maine's Indian territory. (30 M.R.S. § 6207).

43. Section 6207(4) of MIA merely permits members of the Southern Tribes the limited

right to take fish within their respective reservations regardless of and free from the normally applicable IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing" provided that (*i.e.*, only if) the fish being taken is for the tribal member's individual sustenance. (30 M.R.S. §§ 6207(3), (4)).

44. The use of the word "sustenance" in Section 6207(4) of MIA was intended as (and is) a limitation on the exemption from otherwise applicable IFW and/or MITSC fishing laws and regulations with respect to fishing catch and size limits and seasons only; the use of the word "sustenance" in Section 6207(4) does not provide for any kind of special or expanded tribal right to any particular quantity or quality of fish or heightened level of underlying water quality, or otherwise create a Southern Tribal-specific designated use of "sustenance fishing" for any Maine water bodies. (30 M.R.S. § 6207(4); *see also* 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification System, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465 – 465-C, 467 – 470, and not under any part of MIA); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 215-16 (W.D. Wis. 1996)).

45. During Maine's legislative hearings on MIA, there was testimony regarding whether the Southern Tribes' limited right to "take fish" under Section 6207(4) was intended to apply to commercial as well as personal fishing, which testimony clarified that the phrase "for their individual sustenance" was used merely as a way to limit the exception from Maine and/or MITSC fishing laws and regulations to personal consumption only:

> 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.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of John Paterson, *reprinted in* Me. Leg. Record (1980) at 165-66).

46. Nothing in the text or history of the 1980 Acts suggests that Section 6207(4) of MIA was intended to create any kind of special designated use of tribal "sustenance fishing" for the Southern Tribes (or any other Maine Indians), let alone entitle any Indian tribes to any kind of bootstrapped special status or rights with respect to water or fish quality, as this would have been contrary to one of the State's primary goals with respect to the settlement and the 1980 Acts – the avoidance of a two-tiered system, or a "nation within a nation" in Maine. (*See* Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 139 (1980) (Testimony of Maine Governor Joseph Brennan: "We could never have a nation within a nation in Maine. . . . So we have created a new model. . . . [O]ur Indian citizens [will] be on a substantially equal footing with their fellow citizens . . .")).

The jurisdictional effect of the 1980 Acts on the Northern Tribes

47. Under MIA and MICSA, and as recognized by the First Circuit Court of Appeals, there are no exceptions to Maine's environmental regulatory jurisdiction for the Northern Tribes, and their tribal "lands and natural resources" are fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources." (30 M.R.S. § 6202 (the Maliseets and their lands "will be wholly subject to the laws of the State"); 30 M.R.S. § 7205 (the Micmacs have no municipality status or civil or criminal jurisdiction within their lands); 30 M.R.S. §§ 6204, 6206-A, 7203; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 45-46 (1st Cir. 2007) (State Micmac Act gave the Micmacs a status similar to the Maliseets, which was different from that of the Southern Tribes)).

48. Thus, Maine's Indian Settlement Acts afford the Northern Tribes significantly less than the Southern Tribes, as their lands and resources, including their tribal water and water rights and tribal hunting and fishing rights, are wholly subject to the laws of the State to the

same extent as any other person or lands or other natural resources therein. (30 M.R.S. 7203; 30 M.R.S. §§ 6202, 6204; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 49-50 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74-75 (1st Cir. 2007); (Exhibit 1, Attachment A, p. 8)).

EPA's contemporaneous view of tribal authority under the 1980 Acts

49. Shortly after the passage of the 1980 Acts, EPA prepared a report summarizing its understanding of the terms of the 1980 Acts for EPA's internal use ("EPA Report"), which EPA forwarded to Maine in March 1982. (EPA Report, which is attached hereto as Exhibit 2 (cover letter)).

50. The EPA Report does not acknowledge any separate or special tribal right to or authority over water quality for any purpose, but instead assumes Maine's full environmental regulatory authority over all Indian Waters, while limiting tribal and/or MITSC authority over the regulation of "fish and game laws" only – implicitly for things such as fish catch and size limits and fishing seasons, and not enhanced water quality. The EPA Report states in part:

> The Maine Settlement Act establishes [Southern] tribal governments as municipalities, rather than federal reservations. They are "subject to the laws of the state and to the civil and criminal jurisdiction of the courts of the state" except for "internal tribal matters", minor crime, juvenile crime, small claims and domestic relations. . . .
>
> Tribes will have jurisdiction over hunting and over fishing on ponds of less than 10 acres. Fishing in larger bodies of water and river reaches will be controlled by the Maine Indian Tribal Commission described below. At the same time, the Indians will register game like other hunters and take part in the game census conducted by the State. The State, in turn, may overrule Indian fish and game laws after notice and adjudicatory hearing if species are threatened. . . .
>
> INDIAN AUTONOMY
>
> . . .the state and federal acts declare [Southern tribal governments] to be

> municipalities. . . the Maine Settlement Acts impose State law on the Indian territories, although minor crime, juvenile crime, small claims and domestic relations will be handled in tribal courts. . . .
>
> STATE ENVIRONMENTAL LAWS
>
> . . .state law on land use, land management, conservation and environmental protection will apply on Indian territory. "That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and not barred from application under this Act." according to the Section-by-Section Analysis of the Federal Act. . . .
>
> OPERATION AND MAINTENANCE OF WATER AND SEWER FACILITIES
> . . .
>
> Maine DEP has two staffers assigned to make regular visits and to provide training, and hope to start receiving regular lab reports in the near future. . .
>
> Although DEP has the same enforcement power against the reservations as against any other municipality, DEP is reluctant to incur tribal hostility by using it. . .

(Exhibit 2).

Maine's role as a State under the CWA

51. The CWA has deep roots within the State of Maine, as Maine's Senator Edmund Muskie was one of the CWA's chief architects. Consistent with this legacy, Maine takes seriously its responsibility and commitment to uniformly protect Maine's water quality on behalf of all citizens throughout the State of Maine, including members of Maine's Indian tribes.

52. In 1972, Congress substantially amended the Federal Water Pollution Control Act, commonly known as the CWA, which aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." (33 U.S.C. § 1251(a)).

53. In establishing the CWA's regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

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eliminate pollution, [and] to plan the development and use . . . of land and water resources . . ." (33 U.S.C. § 1251(b)).

54. Congress provided, additionally, that 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).

55. Under the CWA, States rather than EPA have the primary authority and responsibility to create, review and revise WQS for all intrastate waters. (33 U.S.C. §§ 1313(c)(1), (2); 40 C.F.R. §§ 131.3(i), 131.4; *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994); *Pronsolino v. Nastri,* 291 F.3d 1123, 1127 (9th Cir. 2002); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1400 (4th Cir. 1993); *Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 370 (D. Me. 2012)).

56. A State's WQS both define the water quality goals of intrastate water bodies (or portions thereof) by designating the uses to be made of the waters, and set numeric water quality criteria 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(i), 131.10, 131.11).

57. Prior to changing a WQS by either adding a new designated use or establishing any sub-category(ies) of use, a State (or EPA, as the case may be) must provide notice and opportunity for a public hearing. (33 U.S.C. §§ 1251(e), 1313(c)(4); 40 C.F.R. § 131.10(e); (EPA Water Quality Standards Handbook, § 6.1.2 (a copy of this and other relevant portions of EPA's WQS Handbook (chapters 3 and 6) are attached hereto as Exhibit 3)).

58. Upon adopting or revising WQS, a State must submit its WQS to EPA for review, and EPA then has the non-discretionary duty either to approve the new or revised WQS within 60 days of their submission if they meet the requirements of the CWA, or disapprove the WQS

within 90 days of their submission. (33 U.S.C. § 1313(c)(2) & (3); 40 C.F.R. §§ 131.5 & 131.21).

59. If a State's new or revised WQS are disapproved or determined by EPA not to meet the requirements of the CWA in any way, then EPA has the non-discretionary duty to notify the State of the deficiencies in the WQS and specify the changes required for EPA approval within 90 days of the State's submission of those WQS. (33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21).

60. In addition to promulgating WQS such as designated uses of intrastate waterbodies and water quality criteria to protect those uses, States may also apply to EPA for authorization to regulate point sources of pollution by prohibiting unpermitted discharges of pollutants into waters of the United States under the National Pollution Discharge Elimination System ("NPDES"). (33 U.S.C. §§ 1311(a) & 1342; *Maine v. Johnson*, 498 F.3d 37, 39-40 (1st Cir. 2007)).

61. 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. (33 U.S.C. § 1342(b); *Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007)).

Under the 1980 Acts, the 1987 tribal amendments to the CWA do not apply in Maine

62. In 1987, Congress amended the CWA by, among other things, adding Section 518, which for the first time set forth Indian tribal rights and responsibilities under the CWA and allowed Indian tribes outside of Maine to prospectively apply for "treatment as state" status under the CWA. (33 U.S.C. § 1377(e)).

63. Generally, as a result of the 1987 amendments to the CWA, a qualifying Indian tribe outside of Maine may now be granted jurisdiction to regulate water resources within its

borders in the same manner as states, including the authority to establish tribal WQS subject to EPA review and approval and to issue NPDES permits for discharges into such waters. (33 U.S.C. § 1377(e); 40 C.F.R. § 131.8; *City of Albuquerque v. Browner,* 97 F.3d 415, 418 (9th Cir. 1996)).

64. Under MICSA, however, the 1987 addition of Section 518 to the CWA does not apply in Maine and affords Maine's Indian tribes no separate status or rights because it would affect Maine's regulatory jurisdiction and because it was not made explicitly applicable to Maine. (25 U.S.C. §§ 1725(h), 1735(b); *Maine v. Johnson,* 498 F.3d 37, 43 n.5 (1st Cir. 2007)).

65. Congress considered this very issue when enacting Section 518 of the CWA:

> 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, *reprinted in* 1987 U.S.C.C.A.N. 5, at 43; *see also Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007)).

66. EPA itself also addressed this issue at length in a 1993 guidance document from the Chief of its General Law Office:

> The critical jurisdictional section of the Federal [Settlement] Act is § 1725, which ratifies the State Act, limits the application of federal Indian law in Maine if it would affect State law, and bars the application of future federal Indian law in Maine unless the federal legislation specifically notes its applicability in Maine. . . .
>
> Subsection 1725(h) is a critical provision of the Federal [Settlement] Act that explicitly and completely <u>prohibits the application to the [Maine Indian tribes] of any federal law</u> that (1) <u>gives special status to the [Maine Indian tribes] and</u> (2) <u>"affects or preempts" Maine's civil, criminal, or regulatory jurisdiction</u>. 25 U.S.C. § 1725(h). This provision <u>specifically includes state environmental law</u> and land use law. . . This subsection would seem to invalidate federal laws that might give the [Maine Indian tribes] special status, including treatment as a state, for certain environmental programs or

> purposes if it would "affect or preempt" the State's authority, including the State's jurisdiction over environmental and land use matters.
>
> The final critical provision of the 1980 Federal Act for jurisdictional analysis relates to future legislation. Future federal legislation for the benefit of Indians that "would affect or preempt" state laws (including the State Act) would not apply in Maine unless the federal legislation specifically addressed its application in Maine . . . Thus, any post-1980 special federal legislative provisions that might give Indians special jurisdictional authority (if, for example, any federal laws in the 1980's provided authority for EPA approval of a Tribal environmental program equivalent to a state environmental program delegated by EPA to the state) could not provide the [Maine Indian tribes] with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

(EPA Memorandum: Penobscot's Treatment as a State under CWA § 518(e) for Purposes of Receiving CWA § 106 Grant, at 7-8 (July 20, 1993) (emphasis in original) (a copy of this 1993 EPA Memorandum is attached hereto as Exhibit 4)).

67. To date, and as far as Maine is aware, no Maine Indian tribe has been authorized by EPA to issue NPDES permits, promulgate WQS, or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8, as such an EPA authorization would violate the 1980 Acts and be inconsistent with *Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007).

Maine's longstanding and EPA-approved Water Classification Program

68. Maine's designated uses of its intrastate waterbodies are set forth in Maine's Water Classification Program, which was enacted in its current form in 1986 to strengthen Maine's WQS. (P.L. 1985, c. 698, §15 (eff. July 16, 1986), now as amended 38 M.R.S. §§ 464 *et seq.*; 38 M.R.S. § 464(1) ("The Legislature intends by passage of this article [Title 38, c. 3, sub. 1, art. 4-A] to establish a water quality classification system. . . based on water quality standards which designate the uses and related characteristics of those uses for each class of water. . . The Legislature further intends by passage of this article to assign to each of the State's surface water

bodies the water quality classification which shall designate the minimum level of quality. . . intended to direct the State's management of that water body. . ."); 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification Program, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465-465-C and 467-470, and not under any part of MIA)).

69. Since 1986, the designated uses and other WQS set forth in Maine's Water Classification Program have applied statewide to all of Maine's surface waterbodies, including all portions of Maine's major river basins and minor drainages and Maine's Indian Waters, and have not provided any special status, rights or protections with respect to (or have even mentioned) Maine's Indian tribes or tribal sustenance fishing. (P.L. 1985, c. 698, §15 (eff. July 16, 1986); 38 M.R.S. §§ 464-470).

70. Since 1986, the designated uses set forth in Maine's Water Classification Program have included uses such as "fishing" and "recreation in or on the water," which are goals that are generally required by the CWA. (38 M.R.S. §§ 465, 465-A, 465-B; P.L. 1985, c. 698, §15 (eff. July 16, 1986); 33 U.S.C. § 1251(a)(2); EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000) (EPA's "2000 Guidance, " portions of which are attached hereto as Exhibit 5), § 4.1.1.2 (State standards for human health are set to protect CWA Section 101(a) "fishable" and "swimmable" uses)).

71. Historically, EPA communicated extensively with Maine regarding Maine's development and enactment of its Water Classification Program, including EPA's communications set forth in EPA letters to Maine dated February 20, 1985; November 12, 1985; July 16, 1986; August 20, 1986; April 24, 1987; May 21, 1987; August 31, 1987; November 3, 1988; May 11, 1989;

December 20, 1990; and June 28, 1999. (Copies of these letters are collectively attached hereto as Exhibit 6).

72. As of December 20, 1990, EPA had determined that Maine's Water Classification Program (including all of Maine's designated uses) as well as Maine's numeric water quality criteria were in compliance with the CWA and corresponding federal regulations, and EPA had not: 1) limited EPA's approval of Maine's Water Classification Program, designated uses, or water quality criteria to non-Indian Waters only; 2) recognized (or even mentioned) any kind of designated use for sustenance fishing for any Maine waterbody; or 3) raised any other question regarding the application of Maine's Water Classification Program in Indian Waters. (Exhibit 6).

73. In June 1999, Maine submitted what was then a "complete and current" set of WQS to EPA for inclusion in EPA's CWA WQS docket for Maine, and Maine's submission did not include or identify 30 M.R.S. § 6207(4) or any other portion of MIA as a WQS. In its response dated June 28, 1999, EPA raised no objection or concern regarding the absence of any portion of MIA or of Section 6207(4) in particular, which EPA now contends (as of its February 2, 2015 letter) constitutes a WQS – an alleged designated use of tribal "sustenance fishing" for the Southern Tribes' Indian Waters. (Exhibit 6).

74. The Maine Legislature has sole authority to make changes in the designated uses of the waters of the State of Maine, and has never enacted a designated use (for WQS purposes) of sustenance or subsistence fishing for any Maine surface waterbody. (38 M.R.S. § 464(2-A)(E)).

75. In 2002, the Maine Legislature considered but rejected a controversial proposal to create a designated use of "subsistence" fishing within Maine's Water Classification Program (at 38 M.R.S. §§ 466(10-A) & 467(7)(A)), which was proposed following a DEP review of Maine's Water Classification Program that resulted in suggested changes to Maine's WQS. (A copy of

DEP's recommendations, the proposed bill (L.D. 1529) and amendment, and related materials is attached hereto as Exhibit 7).

76. The rejected portion of the 2002 bill (L.D. 1529) would have created a new designated use of "subsistence" fishing for select portions of the Penobscot River only, and was not intended to affect or change the 1980 Acts in any way, but was instead designed to recognize for the first time, as a matter of State environmental policy and within Maine's Water Classification Program, a new and more specific kind of "fishing" designated use for a subset of Maine's general population that purportedly engaged in higher-than-average rates of fish consumption. (Exhibit 7).

77. L.D. 1529, however, was ultimately amended to remove any reference to the controversial proposal for a new designated use of subsistence fishing. The amendment also authorized further consideration of a new designated use of subsistence fishing in the next legislative session. (Exhibit 7, Summary of Committee Amendment A to L.D. 1529). As far as Maine is aware, no further action was taken regarding the proposal for a new designated use of subsistence fishing.

States such as Maine have flexibility when establishing numeric water quality criteria to protect those designated uses and populations that the State chooses to protect

78. States have the primary authority to determine the appropriate numeric water quality criteria levels to protect their designated uses and the human health of the populations that they have chosen to protect, and may make their own judgments, within reasonable scientific bounds, on factors such as cancer potency or systemic toxicity, exposure, and risk characterization. (Exhibit 3, § 3.1.1 ("EPA's water quality criteria documents are available to assist States in . . . adopting [WQS] that include appropriate numeric water quality criteria . . . in these situations,

States have primary authority to determine the appropriate level to protect human health . . ."); *see also* 40 C.F.R. § 131.11(b); 33 U.S.C. § 1251(b)).

79. In establishing numeric water quality criteria to protect their designated uses, States may adopt numeric water quality values based on published EPA guidance. (40 C.F.R. § 131.11(b)(1)(i) ("In establishing criteria, States should . . . [e]stablish numerical values based on . . . 304(a) Guidance. . ."); 40 C.F.R. § 131.3(c) (Section 304(a) criteria are developed by EPA based on the latest scientific information and are issued to the States for use in developing criteria); 33 U.S.C. § 1314 (EPA information and guidelines on criteria); Exhibit 3, Chapter 3 introduction (States may use EPA's published water quality criteria "as the basis for developing enforceable water quality standards") & §§ 3.1.1, 3.4.1 ("Under EPA's regulation, in addition to basing numeric criteria on EPA's section 304(a) criteria documents, States may also base numeric criteria on site-specific determinations or other scientifically defensible methods," & State Option 1)).

80. In 2000, EPA released its Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health ("2000 Guidance"), which updated EPA's methodology for deriving human health criteria and its prior criteria recommendations (published in 1980), and which was intended to provide States with flexibility when establishing WQS by providing scientifically valid WQS options that States could use as default human health criteria for various populations such as the general population. (Exhibit 5, §§ 1.2, 1.3; Exhibit 1, Attachment A, p. 34 & n. 25).

81. Multiple factors are considered together when developing human health criteria, including factors such as an individual fish consumption rate ("FCR," measured in the amount of fish and shell fish consumed per day) and lifetime excess cancer risk level ("Risk Level," which

represents a carcinogenic dose associated with a chosen target risk measured in number of people, such as EPA's accepted risk range of 10^{-4} (10,000 people) and 10^{-6} (1,000,000 people)). (Exhibit 5, §§ 1.6, 2.4 ("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."); Exhibit 3, § 3.4.1 ("EPA generally regulates pollutants treated as carcinogens in the range of 10^{-6} and 10^{-4} to protect average exposed individuals and more highly exposed populations."); 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

82. A State's chosen FCR works with and is relative to the State's selected cancer Risk Level, which is a parameter that represents what the State considers to be an appropriate level of cancer risk. Differences in Risk Levels will in turn affect the levels of FCRs that will protect human health to the State's chosen level of individual cancer risk, which EPA explains as follows:

> the incremental cancer risk levels are ***relative***, meaning that any given criterion associated with a particular cancer risk level is also associated with specific exposure parameter assumptions (i.e., intake rates, body weights). 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).

(Exhibit 5, § 2.4 (emphasis in original)).

83. EPA's 2000 Guidance permits the use of cancer Risk Levels that are lower than Maine's conservative Risk Level of 10^{-6}, and recognizes that such lower Risk Levels (10^{-5} and 10^{-4}) are and have been properly used by States and Indian tribes:

> 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} level. . . .

> 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 general acceptable risk management decision, and EPA intends to continue to provide this flexibility to States and Tribes. . .

(Exhibit 5, § 2.4; Exhibit 1, Attachment A, p. 36 (discussing EPA's approved range of Risk Levels)).

84. EPA issued additional guidance in November 2000 entitled Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Volume 2: Risk Assessment and Fish Consumption Limits, Third Edition, EPA 823-B-00-008 (November 2000) ("2000 Fish Consumption Guidance," portions of which are attached hereto as Exhibit 8), which "presents consumption limits that were calculated using a risk level of 1 in 100,000 (10^{-5})" but notes that "states may choose to calculate consumption limits based on other risk levels." (Exhibit 8, § 1.2 (Objectives)).

85. EPA's 2000 Fish Consumption Guidance also recommends default FCRs of 17.5 grams/day for recreational fishers and 142.4 grams/day for subsistence fishers using a cancer Risk Level of 10^{-5}, which EPA believes is "especially protective of recreational fishers and subsistence fishers within the general U.S. population," and which equates to a FCR of 14.24 grams/day when coupled with a Risk Level (like Maine's) of 10^{-6}. (Exhibit 8, § 1.3; *see also id.* at § 1.5 (noting that the guidance assumed an acceptable risk of 1 in 100,000 (10^{-5}) in meal consumption limits, as opposed to the July 1997 second edition, which "used an acceptable risk of 1 in 10,000, 1 in 100,000, and 1 in 100,000" (*i.e.*, 1 in 10^{-4}, 10^{-5}, and 10^{-6})).

86. EPA's 2000 Guidance affords States the flexibility to select the particular population that the State wishes to protect, and to either use EPA's default national recommendations for factors such as the FCR, or to make alternative exposure estimates for subpopulations based on more localized data – something which EPA encourages but does not (and may not) require. (Exhibit

5, § 2.1 ("An important decision . . . is the choice of the particular population to protect. For instance, criteria could be set to protect those individuals who have average or "typical" exposures . . . EPA has selected default parameter values that are representative of several defined populations . . . EPA believes that its assumptions afford an overall level of protection targeted at the high end of the general population . . . EPA also believes that this is reasonably conservative and appropriate to meet the goals of the CWA . . ."); § 4.2.2.3 (States have "the flexibility to choose alternative intake rate . . . assumptions to protect specific population groups that they have chosen."); § 4.2.4 (States are "encouraged to consider protecting population groups that they determine are at greater risk . . . The ultimate choice of. . . exposure intake rates requires the use of professional judgment"); § 4.3 ("In providing additional exposure intake values for highly exposed subpopulations (e.g., sport angler, subsistence fishers), EPA is providing flexibility for States and authorized Tribes to establish criteria specifically targeted to provide additional protection using adjusted values for exposure parameters for. . . fish consumption."); 4.3.3.1 ("If a State or authorized Tribe has not identified a separate well-defined population of high-end consumers and believes that the national data . . . are representative, they may choose these recommended rates. . . . Once again, EPA emphasizes the flexibility for States and authorized Tribes to use alternative assumptions based on local or regional data to better represent their population groups of concern."); *see also* 65 Fed. Reg. 66444-01, 66449, §C (November 3, 2000) ("For the purpose of deriving criteria based on the 2000 Human Health Methodology, EPA is publishing default values for risk level, fish intake. . . We believe these default values result in water quality criteria protective of the general population, and we will use these values when deriving 304(a) criteria. States and authorized Tribes may use other values more representative of local conditions . . ."); *but see* Exhibit 1, Attachment A, p. 35).

87. EPA's recommended criteria for potentially exposed subpopulations are non-binding options that are available should a State opt not to use EPA's recommended criteria for the general population or some other scientifically defensible criteria:

> States and authorized Tribes have the option to develop their own criteria and the flexibility to base those criteria on population groups that they determine to be at potentially greater risk because of higher exposures, yet, EPA cannot oblige the States to specific consulting agreements because, again, criteria are guidance, not enforceable regulations, and do not impose legally binding requirements. Therefore, we recommend that States and Tribes give priority to identifying and adequately protecting their most highly exposed population by adopting more stringent criteria, ***if the State or Tribe determines that the highly exposed populations would not be adequately protected by criteria based on the general population.*** In all cases, States and authorized Tribes have the flexibility to use local or regional data that they believe to be more indicative of the population's fish consumption—instead of EPA's default rates—and we strongly encourage the use of these data.

65 Fed. Reg. 66444, 66468 (November 3, 2000) (emphasis added); *see also id.* at 66454 (EPA recommended criteria serve as guidance to States, and "EPA cannot force States or Tribes to conduct their own evaluations.").

88. For purposes of Maine's human health numeric water quality criteria, Maine utilizes a general FCR of 32.4 grams/day coupled with a Risk Level of 10^{-6} for all pollutants other than inorganic arsenic, and a FCR of 138 grams/day coupled with a Risk Level of 10^{-4} for inorganic arsenic. (Exhibit 1, Attachment A, p. 37 & n. 31; EPA's January 25, 2013 comparison of State and tribal FCRs, a copy of which is attached hereto as Exhibit 9; 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

89. Thus, Maine's use of a general 32.4 grams/day FCR coupled with a cancer Risk Level of 10^{-6} is the equivalent of a FCR of 324 grams/day coupled with a Risk Level of 10^{-5}, or a FCR of 3240 grams/day coupled with a Risk Level of 10^{-4} – both FCRs that greatly exceed any EPA default FCR recommendations for any subpopulations, including subsistence fishers, within EPA-accepted Risk Levels. (Exhibit 5, § 2.4).

90. As reflected by EPA's January 2013 comparison of FCRs, Maine's FCR of 32.4 grams/day coupled with a cancer risk level of 10^{-6} represents one of the highest and most protective FCRs of all of the 50 States, and exceeds any EPA guidance on recommended FCRs for the general population. (Exhibit 9).

91. In contrast to Maine's general FCR of 32.4 grams/day, EPA's 2000 Guidance, which is currently in effect, utilizes a FCR of 17.5 grams/day for the general population, which, according to EPA represents the 90th percentile of EPA's data, is protective of the majority of the general population, and is recommended by EPA for State use as a FCR for the general population. (Exhibit 5, §§ 4.2.2.3, 4.3.3.1; Exhibit 1, Attachment A, p. 34 & n.25).

92. EPA's prior 1980 human health guidance for the general population assumed a default FCR of 6.5 grams/day, which was EPA's estimated national per capita FCR for freshwater and estuarine fish. As EPA acknowledges, many States utilize this 1980 EPA-recommended FCR of 6.5 grams/day in the development of their human health criteria, while other States such as Maine utilize a higher and more protective FCR. (Exhibit 3, § 3.1.3 ("Many States use EPA's 6.5 g/day consumption value. . ."); Exhibit 9).

Prior to 2004, EPA had already approved Maine's WQS for Indian Waters and had acted as if those WQS were fully in effect for Maine's Indian Waters

93. Historically, both before and after passage of the 1980 Acts, and throughout the 1980s and 1990s, EPA reviewed, acted on, and fully approved Maine's WQS for Indian Waters without any qualification as to the effect of those WQS within Maine's Indian Waters. (Exhibit 6).

94. Historically, EPA, including the highest members of EPA's Region 1, also acted as if Maine's WQS were in effect for Maine's Indian Waters for various CWA purposes. (Exhibit 1, Attachment A, p. 15; *but see id.* (asserting that mid-level EPA officials mistakenly assumed, without expressly considering the issue, that Maine's WQS applied within Indian Waters)).

95. For instance, in a letter dated May 31, 1996, EPA's then Regional Administrator for Region 1, John DeVillars, declined a request to EPA by PIN to begin a process of establishing federally promulgated WQS for the Penobscot River, including "waters affecting the Penobscot Indian Nation's reservation," and instead stated that he believed "the most promising approach to achieving our mutual objective is through thoughtfully applying the current [Maine] standards." The EPA Regional Administrator's letter goes on to discuss implementation of Maine's dioxin criterion ("based on EPA's national criterion") within waters "adjacent to" PIN's reservation, and states that EPA Region 1 believes that the "most efficient and effective way to address the tribe's concern at this time is through the permit process [based on Maine's WQS], rather than through a separate federal promulgation of a dioxin criterion." (A copy of this letter is attached hereto as Exhibit 10).

96. In 1997, EPA also responded to comments in connection with a proposed EPA NPDES permit for discharges by Lincoln Pulp and Paper within Indian Waters on the Penobscot River. (A copy of EPA's response to comments on Lincoln Pulp and Paper's proposed NPDES permit, along with portions of a draft fact sheet for the same NPDES permit, is attached hereto as Exhibit 11). In its responses, EPA applied Maine's WQS (including Maine's dioxin criterion) within Indian Waters, and determined that the EPA NPDES permit protected a FCR of 110 grams/day to a Risk Level of 10^{-5} [the equivalent of a FCR of 11.0 grams/day to a Risk Level of 10^{-6}], which EPA described as a "reasonable level of risk." (Exhibit 11, Response to Comments, p. 18; *see also id.*, draft fact sheet, p. 11 ("EPA seeks to apply the criterion for dioxin that Maine has adopted so as to ensure protection of human health, including the health of members of the Penobscot Nation who consume relatively large quantities of fish from this river."), p. 12 (EPA's NPDES permit protects both members of PIN and the general population; EPA has "left it to the

states to select a risk level from within an acceptable range" for human health, and has approved state human health criteria "based on risk levels ranging from 10^{-4} to 10^{-6}"), pp. 12-13 (for NPDES permit purposes, treating Maine tribes such as PIN as a "highly exposed subpopulation" of Maine's general population, and not as a separate "target population" protected by any kind of tribal-specific designated use of "sustenance fishing").

97. In addition, when EPA issues such a NPDES discharge permit, a State water quality certification that the discharge complies with the State's WQS and State law requirements is required pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. (*PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 707-708 (1994); (Exhibit 1, Attachment A, p. 15)). Historically, Maine has issued Section 401 water quality certifications for EPA-issued NPDES permits throughout Maine, including permits for discharges in Indian Waters, and EPA has never suggested that Maine's Section 401 certifications were unnecessary or that Maine's WQS were not applicable within those Indian Waters. (Exhibit 1, Attachment A, p. 15 (acknowledging EPA Region 1's historical requests for State Section 401 certifications that discharges within Indian Waters complied with Maine's WQS, but dismissing those requests as mid-level EPA mistakes).

98. In addition, EPA, in its oversight role over its CWA-delegated authority to Maine under the Maine Pollutant Discharge Elimination System ("MEPDES"), has historically reviewed draft MEPDES permits issued by Maine for discharges within Indian Waters.

99. EPA has never taken the position that any WQS other than Maine's generally-applicable WQS govern its NPDES permits, or Maine's MEPDES permits, for Indian Waters.

100. In fact, by letter dated June 10, 1998, EPA wrote DEP stating that, despite the "great strides in protection of water quality and human health Maine has taken," EPA believed that portions of the Penobscot River within Indian Waters immediately below Lincoln Pulp and Paper

still failed to meet Maine's stringent WQS applicable to those Indian Waters, which needed "to remain on [Maine's] 1998 §303(d) list." (33 U.S.C. § 1313(d) (requiring States to identify a list of those intrastate waters not attaining applicable State WQS); a copy of EPA's June 10, 1998 letter is attached hereto as Exhibit 25).

101. In addition, on January 26, 2006, EPA, through the Director of EPA Region 1's Office of Ecosystems Protection, renewed NPDES permit No. ME 0101311 issued to PIN for discharges into the Penobscot River from PIN's wastewater facility in Indian Island, Maine, which permit was governed by Maine's WQS and superseded prior EPA-issued NPDES permits stretching back to 1985 and 1990, which were also governed by Maine's WQS. (A copy of this EPA-issued renewal of PIN's NPDES permit in Indian Waters is attached hereto as Exhibit 12).

102. EPA's January 2006 renewal of PIN's NPDES permit clearly applies Maine's WQS to Indian Waters and documents EPA's historical acceptance and application of Maine's WQS within Indian Waters for things such as prior NPDES permits, Penobscot River modeling, and non-attainment findings with respect to Maine's WQS:

> B. NARRATIVE EFFLUENT LIMITATIONS
>
> . . .
>
> 5. The discharge shall not cause a violation of state water quality standards (Maine Law, 38 M.R.S.A. 467(15)(1)(4) which classifies the Penobscot River as a Class B waterway in the proximity of the discharge.
>
> . . .
>
> <u>FACT SHEET</u>
>
> . . .
>
> RECEIVING WATER: Penobscot River
>
> CLASSIFICATION: Class B
>
> . . .
>
> 1. APPLICATION SUMMARY

a. Application: The applicant applied for renewal of its Clean Water Act permit on May 8, 1990. The application reflects the discharge of 0.10 MGD of secondary treated municipal wastewater from the Penobscot Indian Nation's publicly owned treatment works facility to the Penobscot River, Class B, in Indian Island.

b. History: The most recent relevant licensing/permitting actions include the following:

November 21, 1985 – The U.S. Environmental Protection Agency (EPA) reissued NPDES permit No.ME0101311 authorizing 0.07 MGD of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

1990 – Maine DEP upgraded section of Penobscot River (previously classified as Class C)

May 8, 1990 – The U.S. Environmental Protection Agency (EPA) received a complete application from the Penobscot Indian Nation.

March 30, 2000 – The Maine Department of Environmental Protection (DEP) issued Waste Discharge License WDL#W002672-59-B-R authorizing 0.07 MGD (based on a monthly average) of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

October 31, 2003 – EPA approved Maine to implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program in the territories of two Maine Indian tribes, the Penobscot Indian Nation and Passamaquoddy Tribe. However, EPA did not [at that time] authorize the state to regulate two tribally owned and operated sewage treatment facilities: the Penobscot Indian Nations' Water Pollution Control Facility on Indian Island and the Passamaquoddy Tribe's Pleasant Point Facility.

. . .

2. RECEIVING WATER QUALITY CONDITIONS

The Penobscot River is classified as a class B waterway in the proximity of the discharge. Refer to state water quality standards (Maine Law, 38 M.R.S.A. § 467(15)(1)(4)). Class B waters require that a minimum dissolved oxygen level of 7 ppm and 75% of saturation be maintained at all times. A Penobscot River Modeling Report (April 2003) recommended that all municipal wastewater discharges should be capped at current phosphorus input levels. . . . This study of the Penobscot River from Millinocket to Bucksport (103 miles) began in the summer of 1997 involving the DEP and a number of stakeholders such as the Penobscot Nation, Great Northern Paper, International Paper, USEPA, and the Lincoln Sanitary District. A second round of monitoring was conducted in the summer of 2001. . . .

Non-attainment of class B dissolved oxygen criteria was observed at one location in 1997, but at ten of fourteen (10/14) locations sampled in 2001. . .

. . .

3. EFFLUENT LIMITATIONS & MONITORING REQUIREMENTS

. . .

Limits for pH are consistent with Maine Water Quality Standards for the adjacent receiving waters. (Class B).

Limits on e. coli bacteria are consistent with Maine Water Quality Standards for the adjacent receiving waters (Class B). . .

4. ENDANGERED SPECIES ACT ASSESSMENT

. . .

Receiving Water
The secondary treated wastewaters are discharged to the Penobscot River – Maine Class B upstream of the Veazie Dam and downstream of the confluence of the Stillwater River.

. . .

6. DISCHARGE IMPACT ON RECEIVING WATER QUALITY

As permitted, the EPA has determined the existing water uses will be maintained and protected and the discharge will not cause or contribute to the failure of the water body to meet standards for Class B classification.

- Discuss any recent plant improvements to improve water quality impacts
- Discuss WQ assessment results

. . .

(Exhibit 12). As EPA's own permit reflects, EPA has historically not recognized or applied any designated use of tribal "sustenance fishing" for Indian Waters in the Penobscot River, but has instead recognized and applied Maine's designated uses set forth in its established Water Classification Program. (*Id.*).

103. Maine's EPA-delegated authority to issue MEPDES permits for PIN's facility on Indian Island, as well as for the Passamaquoddy Tribe's Pleasant Point Facility, was subsequently confirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

EPA's disapproval of Maine's 1999 application for NPDES permitting authority for tribal facilities, and the Maine v. Johnson decision

104. In January 2001, EPA approved Maine's 1999 application for its MEPDES permitting program for non-Indian Waters only and EPA took no "final action on the issues related to the State's jurisdiction and the applicability of State law in Indian country for the purposes of implementing the NPDES program in those areas." (*Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007); 66 Fed. Reg. 12791, 12,795 (February 28, 2001)).

105. Thereafter, in October 2003, EPA approved Maine's MEPDES permitting program for all non-Indian facilities discharging into Maine's Indian Waters, but not for two Indian wastewater facilities operated by the Southern Tribes that discharged into Indian Waters under the EPA theory that the operation of those two facilities constituted "internal tribal matters" not subject to Maine's regulation under the 1980 Acts. (*Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007); 68 Fed. Reg. 65052, 65053 (November 18, 2003)).

106. In the course of reaching this October 2003 decision, EPA 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," 68 Fed. Reg. 65052, 65057 (November 18, 2003), and rejected arguments that the Southern Tribes had concurrent environmental regulatory jurisdiction with Maine over Maine's Indian Waters. (*Id.* at 65058-65059).

107. In any event, Maine appealed and ultimately prevailed on its challenge to EPA's refusal to fully approve Maine's MEPDES permitting program for Indian Waters in *Maine v. Johnson*, which confirmed Maine's statewide environmental regulatory authority as well as Maine's authority to issue MEPDES permits for all facilities discharging into Indian Waters, including Indian facilities. (*Maine v. Johnson*, 498 F.3d 37, 42, 45-46 (1st Cir. 2007)).

108. Based on the history and text of the 1980 Acts, the First Circuit Court of Appeals interpreted the "internal tribal matters" exception in the 1980 Acts (*see* 30 M.R.S. § 6206(1)) narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation," and held that regulation of the discharge of pollutants into Maine's Indian Waters was not an internal tribal matter because it is "not of the same character as tribal elections, tribal membership or other examplars that relate to the structure of Indian government or the distribution of tribal property." (*Maine v. Johnson*, 498 F.3d 37, 46 (1st Cir. 2007); *see also id.* at 45 (if the internal affairs exemption negated Maine's ability to environmentally regulate within tribal 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)).

109. Following the decision in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), Maine's DEP wrote EPA in mid-2008 stating:

> I hereby request that U.S.E.P.A. amend its January 2001 delegation decision to make it consistent with the Maine v. Johnson decision. We expect that this amendment will include acknowledgement both of D.E.P.'s jurisdiction over all dischargers within the State, and that Maine's water quality standards apply uniformly throughout the State. . . .
>
> As you are aware, we are in the midst of relicensing all dischargers on the Penobscot River. . .
>
> As we have discussed with both you and George Frantz, the State is in very close communications with the Penobscot Indian Nation in regards to pending licenses. . .

(A copy of this letter is attached hereto as Exhibit 13).

110. EPA delayed responding to the order on remand in *Maine v. Johnson,* 498 F.3d 37, 49 (1st Cir. 2007) for over four years, and did not take action to fully approve Maine's delegated NPDES permitting authority over the two remaining Indian wastewater facilities until March 28, 2012. That EPA Region 1 March 28, 2012 action states in part:

> On December 17, 1999, EPA determined that the State of Maine had submitted a complete application to administer the NPDES permitting program in the state under the Clean Water Act. . .
>
> On January 12, 2001, EPA approved the State of Maine's application to administer the NPDES program for all areas of the state other than Indian country. . .
>
> On October 31, 2003, EPA approved the State of Maine's application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, with the exception of any discharges that qualified as "internal tribal matters" under MICSA and MIA. . . .
>
> On August 8, 2007, the U.S. Court of Appeals for the First Circuit issued its opinion in *Maine v. Johnson*, 498 F.3d 37. . . . The court's mandate was issued on October 2, 2007. . . .
>
> EPA proposed to implement the court's order by modifying its approval of Maine's NPDES program to authorize the State to issue NPDES permits for all discharges within the Indian territories of the Penobscot Nation and Passamaquoddy Tribe. . . . As a result, the state will assume responsibility from EPA for issuing and administering the permits for the Penobscot Nation Indian Island treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672) and the Passamaquoddy Tribal Council treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672). Neither tribe has applied to EPA to implement the NPDES permit program, so this action does not address the question of either tribe's authority to implement the program.

(77 Fed. Reg. 23481, 23482 (April 19, 2012)). As noted above, these NPDES permits for tribal wastewater discharges into Indian Waters were (and are) governed by Maine's WQS, and before its February 2, 2015 letter, EPA never raised any objections or concerns about the application of Maine's WQS in those Indian Waters.

111. Shortly thereafter, by letter dated May 29, 2012, and without informing Maine, PIN wrote EPA requesting a determination that PIN "qualifies pursuant to section 518 of the Clean Water Act for the purposes of seeking NPDES permit program approval for pollution discharges in the Penobscot River." (A copy of this letter and certain other communications between EPA and Maine's tribes are attached hereto as Exhibit 14).

112. By letter dated July 17, 2012, and without informing Maine, EPA initiated "consultation and coordination" with PIN regarding PIN's "request for a determination that the PIN qualifies

for treatment in the same manner as a state (TAS), pursuant to Section 518" of the CWA for purposes of PIN's attempt to obtain NPDES permit program approval from the EPA for discharges into the Penobscot River. (Exhibit 14).

113. By letter dated August 23, 2012, and without informing Maine, EPA wrote to PIN as a follow-up to a meeting between PIN and EPA Region 1 staff held on July 25, 2012, which EPA described as "a very positive and productive meeting, as one step in EPA Region 1's ongoing efforts to consult with the PIN and deliberate upon your request for a TAS determination for purposes of NPDES program authorization." (Exhibit 14).

EPA's secret communications with Maine Indian tribes regarding tribal WQS for and NPDES permitting authority over Maine waters

114. Beginning as early as 1999, and without informing Maine, EPA has been communicating with Maine Indian tribes regarding environmental matters such as a separate set of WQS (different from Maine's WQS) for Maine's Penobscot River. (Exhibit 14).

115. For instance, in July 1999, and without informing Maine, EPA and PIN, "in order to better achieve mutual environmental-governmental goals in the[ir] government-to-government relationship," entered into a Tribal Environment Agreement that contemplates EPA's implementation of its alleged federal trust responsibility towards PIN, contains a confidentiality agreement regarding communications between EPA and PIN, and commits EPA to using "best efforts to protect all such communications, including those that predate this agreement that are requested under the Freedom of Information Act." (A copy of this agreement is attached hereto as Exhibit 15).

116. By letter dated February 4, 2000, and without informing Maine, EPA wrote PIN stating that EPA would "fully consider" PIN's request that EPA promulgate separate WQS and administer CWA programs for PIN's reservation in Maine. (Exhibit 14).

117. Without informing Maine, EPA sent letters dated March 6, 2013, to all four of Maine's recognized Indian tribes, which, citing EPA's alleged "federal trust responsibility and government-to-government relationship" with Maine's tribes, initiated "consultation and coordination" with the tribes regarding certain Maine WQS revisions (including arsenic) addressed by EPA's February 2, 2015 letter. The letters each acknowledge that "EPA's guidance for the development and approval of human health criteria for carcinogenic compounds allows 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." (Exhibit 14).

118. Three months later, EPA, by letter dated June 24, 2013, informed Maine of its approval of Maine's WQS revisions for arsenic for non-Indian Waters only and of its "consultation and coordination" with Maine's tribes regarding Maine's WQS, stating that "[a]s part of EPA's trust responsibility to the tribes, EPA must consult with the tribes in Maine before determining whether to approve" Maine's human health criteria revisions for Indian Waters. (Exhibit 14).

119. To the extent that EPA claims any authority to invoke a federal "trust responsibility" with respect to Maine's Indian tribes in a manner that would affect Maine's state environmental regulatory jurisdiction, it would not apply in Maine. (25 U.S.C. §§ 1725(h) & 1735(b)).

120. Substantive statutes and regulations must expressly create a fiduciary relationship giving rise to defined obligations in order for any federal "trust responsibility" to exist with respect to Maine's Indian tribes, *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007), and no such express relationship exists in Maine. (*See also Bangor Hydroelectric Co.,* 83 FERC P 61,037, 61,085 – 61,086, 1998 WL 292768 (with limited exceptions, Indian "reservation" lands in Maine are not held in trust by the federal government)).

121. By letter dated January 23, 2014, and without informing Maine, PIN wrote to EPA referencing the "ongoing government-to-government consultations" between EPA and PIN regarding the "administration and operation of the Clean Water Act within Penobscot Indian Reservation." PIN's January 23, 2014 letter to EPA also notified EPA of PIN's intention to promulgate its own WQS pursuant to Sections 303 and 518(e) of the CWA, and sought EPA input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation." (Exhibit 14).

122. As a follow-up to its January 23, 2014 letter, PIN, without informing Maine, sent EPA a letter dated February 27, 2014, referencing its prior request to EPA for input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation," and inviting the EPA Regional Administrator and Region 1 staff to a meeting to discuss PIN's forthcoming WQS application "in relation to the overall environmental regulatory regime within the Penobscot Indian Reservation." (Exhibit 14).

123. EPA sent a letter dated April 18, 2014, apparently to all federally-recognized Indian tribes (including those in Maine), which states:

> [EPA] is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act. Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority. . . .

(Exhibit 14).

124. On or about June 10, 2014, PIN published for hearing and comment draft tribal WQS applicable to PIN Indian Waters, and on or about October 8, 2014, PIN, without informing Maine, applied to EPA Region 1 seeking TAS status for purposes of a separate PIN WQS program in Maine and EPA approval of PIN's proposed tribal WQS for PIN Indian Waters. EPA Region 1 acknowledged receipt of PIN's application by letter dated November 5, 2014, which did not copy Maine. (Exhibit 14). Maine received a copy of EPA's letter on or about December 2, 2014.

125. Maine learned after-the-fact of the 1999 Tribal Environment Agreement between EPA and PIN and many of the other communications between EPA and Maine's Indian tribes only as a result of Maine's own efforts, including Maine's requests for public records and information, discovery requests in other litigation, and independent research.

From 2004-2015, EPA refused to act on Maine's WQS for unspecified Indian Waters

126. Beginning in approximately 2004, and despite its historical approvals of and adherence to Maine's WQS within Maine's Indian Waters, EPA began to limit its approvals of revisions to Maine's WQS to non-Indian Waters only. (Exhibit 1, Attachment A, pp. 1, 4, 14).

127. For example, EPA sent a letter to Maine dated February 9, 2004, which approved certain revisions to Maine's WQS, but which stated in part:

> I hereby approve the revised water quality standards in Chapter 257. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act and 40 CFR Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. . . .
>
> EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under Section 303(d) for those waters. . . .

Thereafter, and even after the issuance of *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), EPA continued to include similar limiting language in additional EPA letters to Maine dated April 14, 2004; January 25, 2005; April 17, 2006; July 7, 2006; September 18, 2006; August 19, 2009; May 19, 2010; July 20, 2011; and May 16, 2013. (Copies of these letters are collectively attached as Exhibit 16).

128. In one such letter dated May 16, 2013, EPA formally approved (for non-Indian Waters only) Maine's revised WQS related to arsenic, including Maine's revised cancer Risk Level "used to calculate the human health criteria for arsenic from one in 1,000,000 [10^{-6}] to one in 10,000 [10^{-4}]" and Maine's revised numeric criteria for inorganic arsenic using a FCR of 138 grams/day, but EPA continued to take no action on those WQS with respect to Indian Waters. (Exhibit 16 (May 16, 2013 letter)).

129. In approving Maine's WQS for arsenic in non-Indian Waters, EPA's May 16, 2013 letter acknowledges:

> Maine's revised numeric criteria for arsenic were derived using the same general methodology and equations used to calculate EPA's current 304(a) recommended criteria for carcinogens. . .
>
> Cancer Risk Factor (RF): The State of Maine enacted LD 515 in 2011 directing DEP to revise Maine's human health water quality criteria for arsenic based on a cancer risk factor of 1 in 10,000 [10^{-4}] rather than the previous RF of 1 in 1,000,000 [10^{-6}]. EPA's recommended methodology for the derivation of water quality criteria states that 1 in 1,000,000 [10^{-6}] or 1 in 100,000 [10^{-5}] may be acceptable cancer risk factors for the general population and that highly exposed populations should not exceed a 1 in 10,000 [10^{-4}] risk level. [citing EPA's 2000 Guidance, Exhibit 5]
>
> Fish Consumption Rate (FCR): Maine's previous 32.4 g/day FCR represents the 94th percentile for Native American anglers in Maine and the 95th percentile for the total angler population in Maine, based on data from a 1990 survey of licensed Maine anglers. In deriving the new arsenic criteria, DEP used 138 g/day, which is the 99th percentile of this survey, to ensure that the criteria are protective of subsistence fishers, a highly exposed population. This approach is consistent with EPA recommendations for estimating fish consumption rates 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 [10^{-4}]. [Table 1 omitted]

. . .

> EPA approves of the WQS revision to the arsenic criteria on the basis of the demonstrated use of available sound science, including state specific data, to derive the new criteria. . . .

(Exhibit 16 (May 16, 2013 letter)).

130. EPA's refusal to act on Maine's WQS for Indian Waters continued even after the Maine Office of the Attorney General sent a letter to EPA dated October 27, 2009, stating:

> As you know, it has now been established that Maine's environmental regulatory jurisdiction, in particular regarding water resources, applies uniformly throughout the State, and that jurisdiction applies to all of Maine's waters including those in the Penobscot River basin. *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). Thus, it is clear that these standards apply to those areas previously disputed by the Maine tribes. In acting on the water quality standards set forth above, therefore, EPA should expressly confirm their applicability throughout Maine without exception.

(A copy of this letter is attached hereto as Exhibit 17).

131. EPA sent a letter dated October 16, 2012, to former Maine Attorney General William J. Schneider setting forth an apparent explanation for its recent (since 2004) failures to act on Maine's WQS for Indian Waters: "EPA's policy is that states are not authorized to implement federally approved environmental programs, like the WQS program under the federal Clean Water Act (CWA), in the territories of federally recognized tribes unless and until EPA has made clear findings on the record approving the state standards to apply in Indian country." (A copy of this letter is attached hereto as Exhibit 18).

132. This was contrary to not only the CWA and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), but also to EPA's WQS Handbook, which at least as of September 24, 2014, still stated in part:

> Until tribes qualify for the standards program and adopt standards under the Clean Water Act, EPA will, when possible, assume that existing water quality standards remain applicable. EPA's position on this issue was expressed in a September 9, 1988, letter from EPA's then General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon. This letter states: "if States have established standards

> that purport to apply to Indian reservations, EPA will assume without deciding that those standards remain applicable until a Tribe is authorized to establish its own standards or until EPA otherwise determines in consultation with a State and Tribe that the State lacks jurisdiction…"

(EPA WQS Handbook, § 1.8.6; because this portion of EPA's WQS Handbook no longer exists online, a copy of the former Chapter 1 of EPA's WQS Handbook (printed on August 22, 2014) is attached hereto as Exhibit 19).

133. In response to EPA's refusals to act on Maine's WQS for Indian Waters, Maine repeatedly asked EPA to identify what specific Maine waters comprised EPA's undefined concept of Indian Waters, and what WQS, if any, EPA believed were in effect for Maine's Indian Waters. (*See, e.g.*, letters to EPA dated January 14, 2013, and February 27, 2014, attached hereto as Exhibit 20).

134. Prior to EPA's February 2, 2015 letter, EPA never advised Maine: 1) what specific Maine waters comprised EPA's concept of Indian Waters; or 2) what WQS, if any, EPA believed were in effect for such Indian Waters.

135. While this action was pending, EPA issued its February 2, 2015 letter, which remains unclear as to what specific waterbodies comprise EPA's concept of Indian Waters. (Exhibit 1, Attachment A, p. 7). The many other unlawful aspects of EPA's February 2, 2015 letter include, without limitation, the twelve bulleted items set forth in paragraph 9 of this Second Amended Complaint.

EPA's disapproval of Maine's WQS reflects a larger EPA attempt to force States to accept the higher end of EPA's criteria recommendations based on tribal considerations

136. In addition to EPA's disapprovals of Maine's WQS, EPA has also recently expressed its disapproval of other states' human health criteria for their respective Indian Waters, even where

those other states' human health criteria (like Maine's) were within the range of EPA's recommended criteria options.

137. For instance, by letter dated March 23, 2015 (EPA's "Washington Letter"), EPA Region 10 stated its disapproval of a recent rule proposal by the State of Washington, which proposed to increase Washington's FCR from 6.5 grams/day to 175 grams/day and reduce its cancer Risk Level from 10^{-6} to 10^{-5}. (A copy of EPA's Washington Letter and attached EPA comments, as well as a response by the National Association of Clean Water Agencies ("NACWA") are attached hereto as Exhibit 21).

138. Contrary to EPA's 2000 Guidance, EPA's Washington Letter alleges that "a cancer risk level of 10^{-5}does not provide appropriate risk protection for all Washington citizens, including tribal members with treaty-protected fishing rights, when coupled with a fish consumption rate of 175 grams per day or higher." (Exhibit 21, at p. 1).

139. Echoing the new kind of approach outlined in EPA's February 2, 2015 letter to Maine (Exhibit 1), EPA's Washington Letter also asserts that EPA and Washington must "interpret the state's designated uses to include subsistence fishing," treat Washington's tribal population as "the target general population, not as a high-consuming subpopulation of the state," utilize FCR data reflecting tribal subsistence practices "unsuppressed by fish availability or concerns about the safety of the fish available for them to consume," and select a Risk Level that ensures "a minimum level of protection for that tribal target population when consuming fish at unsuppressed levels." (Exhibit 21 (Comments at pp. 2-3, 4-5)).

140. EPA's apparent rationale for its Washington Letter is based on the relationship between Risk Levels and FCRs (in a way that is inconsistent with States' roles under the CWA and that

violates EPA's own 2000 Guidance), and on treaty rights that are different from the terms of Maine's 1980 Acts:

> By using a 10^{-5}cancer risk level, the state has substantially offset the environmental benefits of raising the fish consumption rate for carcinogenic human health criteria. For tribes with treaty-protected fishing rights, this approach to the cancer risk level will not advance health protections consistent with their treaty-reserved right to harvest and eat fish and shellfish.

(Exhibit 21, pp. 1-2); *see also id.* at Comments at p. 2 ("In Washington, many tribes hold a treaty-reserved right to take fish for subsistence, ceremonial, religious, and commercial purposes at all usual and accustomed fishing grounds. . .") and p. 5 ("It should also be noted that the 2000 Human Health Methodology did not consider how CWA decisions should account for applicable treaty-reserved fishing rights, and the treaties themselves may require higher levels of protection.")

141. By letter dated May 13, 2015, the National Association of Clean Water Agencies ("NACWA") responded to EPA's Washington Letter in a way that carries equal force here in Maine:

> [T]he language in the CWA and the implementing regulations was not intended to give EPA authority to disapprove standards because the state's science and policy decisions are not identical to [EPA's] preference, policies and guidance. . . . In the case of Washington's proposed rule, which in fact was consistent with the range of values and approaches included in existing federal guidance, EPA appears to ignore the flexibility afforded to states in its own guidance by insisting that the state's program conform to EPA's preferred approach. These tactics are inconsistent with the CWA's cooperative federalism foundation and history that provides the states the responsibility for developing and approving water quality standards. . . . The structure established by the CWA – where EPA provides criteria recommendations and guidance and the states develop water quality standards based on that information as well as state policy and risk decisions (where a range of acceptable CWA options exist) – must be preserved to ensure that federal preference and the criteria recommendations do not become de facto regulations.

(Exhibit 21 (NACWA letter at pp. 2-3)).

142. EPA sent a similar letter and comments to Idaho dated May 29, 2015 (EPA's "Idaho Letter"), which responds to Idaho's proposed revisions to its human health criteria in a way that is similar to EPA's new and aggressive approach in Maine and Washington. (A copy of EPA's Idaho

Letter with EPA's comments is attached hereto as Exhibit 22; *see also id.* at Comments, p. 4 (outlining EPA's new position that states must select FCRs reflecting unsuppressed fish consumption, which EPA believes may be "necessary" to protect "tribal treaty or other reserved fishing rights")).

143. EPA's recent attempts to force States such as Maine, Washington, and Idaho to adopt the higher end of EPA's criteria recommendations (set forth in EPA's long established guidance) appear to stem from a late 2014 policy directive made at EPA's national level "regarding the role of tribal treaty rights in the context of EPA's activities," which directive was developed outside of the context of Maine's unique Indian Settlement Acts and which encourages EPA to implement and "enhance protection of tribal treaty rights and treaty-covered resources [including "hunting, fishing, and gathering"] when [EPA has] discretion to do so." (Copies of memoranda on this directive from EPA's national leadership dated November 28, 2014, and December 1, 2014, are attached hereto as Exhibit 23).

Count I – 5 U.S.C. §§ 701-706
Appeal of EPA's disapprovals of Maine's WQS set forth in
EPA's February 2, 2015 Letter under the Administrative Procedure Act

144. Plaintiffs reallege the allegations contained in paragraphs 1 through 143 and incorporate them herein.

145. EPA's February 2, 2015 letter sets forth EPA final agency action(s) with respect to Maine's WQS for Indian Waters only, which have harmed Plaintiffs and which are reviewable by this Court under the Administrative Procedure Act, *5 U.S.C. §§ 701-706* ("APA"), and for which Plaintiffs have no other adequate remedy in court other than review under the APA.

146. EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting

rationale set forth in Attachment A to that letter, are, among other things within the meaning of 5 U.S.C. § 706(2), arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law (including, without limitation, the CWA and corresponding regulations, EPA's Section 304(a) and other guidance documents, the 1980 Acts and other Maine Indian Settlement Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)), in excess of EPA's jurisdiction and authority and without observance of required procedure under the same authorities, and unsupported by substantial evidence and unwarranted by the facts, inasmuch as Defendants, among other things: 1) do not define with specificity their concept of Maine's Indian Waters; 2) assert that no Maine WQS are currently or were ever in effect for Maine's Indian Waters; 3) assert that EPA's pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was first required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters; 4) assert that EPA's historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was mistaken; 5) assert that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine environmental regulation; 6) assert that Maine's WQS and the protection of Maine's own existing designated uses of its waterbodies must be "harmonized" by EPA with EPA's flawed interpretation of the underlying and unwritten purpose of MIA, MICSA, and Maine's other Indian Settlement Acts; 7) interpret the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters; 8) assert a new interpretation of Maine's longstanding

designated use of "fishing," as used throughout Maine's established Water Classification Program, as now meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters; 9) usurp Maine's role as a State under the CWA by purporting to establish EPA's own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process; 10) interpret EPA's own new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect EPA's new use by ensuring a higher quality of fish for tribal-only sustenance purposes; 11) focus on a tribal-only fish consuming population, as opposed to Maine's general population, as the "target" population to be protected by EPA's new designated use of tribal "sustenance fishing"; 12) interpret EPA's new designated use of tribal "sustenance fishing" as requiring an unsuppressed tribal FCR based on a newly announced historical tribal fish consumption study that was never the subject of any public input process; and 13) disapprove Maine's human health water quality criteria for Indian Waters only as being un-protective of EPA's new tribal "sustenance fishing" designated use for those unspecified waters.

Count II – 28 U.S.C. §§ 2201, 2202
Requests for declaratory relief under the Declaratory Judgment Act

147. Plaintiffs reallege the allegations contained in paragraphs 1 through 146 and incorporate them herein.

148. An actual controversy within the Court's jurisdiction exists between the parties regarding EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting rationale set forth in Attachment A to that letter, including, without limitation, EPA's interpretations of the CWA and corresponding regulations, the 1980 Acts and Maine's other Indian Settlement Acts,

EPA's Section 304(a) and other guidance documents, and applicable case law, and EPA's assertions identified in paragraphs 9 and 146 of this Second Amended Complaint.

149. Additional actual controversies within the Court's jurisdiction also exist between the parties, including the following: 1) whether under the CWA and the 1980 Acts Maine's pre-2004 WQS were already approved and remain approved for Maine's non-Indian and Indian Waters; 2) whether Maine can lawfully be, or have been without, any WQS for Indian Waters, as EPA's rationale in its Attachment A to its February 2, 2015 letter states; 3) whether EPA waived all rights to disapprove, or is otherwise barred from disapproving, some or all of Maine's WQS that were previously approved without qualification as to their effect in Indian Waters by EPA, or that have been approved for adjacent non-Indian Waters; 4) whether there are any Indian Waters that warrant different environmental regulatory treatment from other Maine waters, and/or special treatment for members of Maine's Indian tribes from the standpoint of water quality regulation; 5) the meaning of the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations provided that the taking of such fish is for the members' individual sustenance only, and whether such portions of MIA amount to a designated use tribal "sustenance fishing" for any Maine waterbodies; 6) the meaning of Maine's longstanding designated use of "fishing" within Maine's established Water Classification Program, and whether that designated use also encompasses a separate tribal "sustenance fishing" designated use with respect to each of Maine's Indian tribes within their respective Indian Waters; 7) whether EPA may create its own designated use of tribal "sustenance fishing" for Maine, and if so, whether EPA can do so without the benefit of any public input or process; 8) whether EPA may select a tribal-only fish consuming population as the target population to be protected under provisions of Maine law, the CWA, and EPA's regulations; and 9) the range of

acceptable Risk Levels and FCRs available to States such as Maine under the CWA and existing EPA Section 304(a) guidance, whether EPA can restrict those options without new guidance subject to a public input process, and whether Maine's Risk Levels and FCRs fall within permissible EPA criteria options for WQS purposes.

150. Declarations by the Court of the rights and legal relations of the parties will redress the existing actual controversies between the parties, and the requested declarations in favor of Plaintiffs will redress the harms to Plaintiffs.

Count III – 33 U.S.C. §§ 1313, 1365(a)(2)
EPA's failure to perform non-discretionary duties under the CWA

151. Plaintiffs reallege the allegations contained in paragraphs 1 through 150 and incorporate them herein.

152. Plaintiffs are entitled to commence a civil action on their own behalf against Defendants pursuant to 33 U.S.C. §§ 1365(a)(2), 1365(g).

153. Plaintiffs have provided the requisite notice pursuant to 33 U.S.C. § 1365(b) by virtue of a certified letter sent to the EPA Administrator and the United States Attorney General dated 1) March 17, 2015, which, per that letter's return receipts, was received by both EPA and the U.S. Attorney General on March 23, 2015. (A copy of the March 17, 2015 notice letter and corresponding return receipts is attached hereto as Exhibit 24).

154. Defendants have a non-discretionary, official and public duty under the CWA, 33 U.S.C. § 1313, and the 1980 Acts to approve, and have no discretion to disapprove, WQS for Maine's Indian Waters where those same standards have been determined to be consistent with the CWA, 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5 & 131.6, and approved by EPA for Maine's non-Indian Waters, and where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

155. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Indian Waters only, as set forth in its February 2, 2015 letter, which WQS had already been determined to be consistent with the CWA and approved by EPA for Maine's non-Indian Waters.

156. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to approve, and have no discretion to disapprove, Maine's WQS that EPA already approved without qualification as to their effect in Maine's Indian Waters (*i.e.*, before 2004), where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

157. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in its February 2, 2015 letter, to the extent those disapprovals extend to Maine's WQS previously approved by EPA before 2004 without qualification as to their effect in Maine's Indian Waters.

158. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to disapprove Maine's WQS within 90 days of their submission to EPA, and Defendants have no discretion to disapprove Maine's WQS for Indian Waters only after expiration of the 90 day deadline where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

159. Defendants failed to fulfill this duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in EPA's February 2, 2015 letter, which occurred well beyond any applicable 90-day deadline for such disapprovals.

160. Prior to the issuance of EPA's February 2, 2015 letter, Defendants waived all right to disapprove and/or specify any changes required for approval of, or are otherwise legally barred

from disapproving, Maine's WQS that had historically been approved by EPA without qualification as to their effect in Indian Waters (*i.e.*, before 2004), and that had previously been fully approved by EPA for non-Indian Waters.

161. Defendants have a non-discretionary, official and public duty under the CWA to approve Maine's WQS that are consistent with EPA Section 304(a) guidance, and Defendants have no discretion to disapprove Maine's WQS provided they are within the acceptable range of EPA's guidance.

162. Defendants failed to fulfill this duty by failing to approve Maine's WQS (*i.e.*, its human health water quality criteria) that were well within the range of acceptable EPA criteria recommendations considering the relative relationship of Maine's FCRs and Risk Levels.

163. The failure by Defendants and EPA to perform their non-discretionary duties under the CWA and the 1980 Acts and approve Maine's WQS at issue in EPA's February 2, 2015 letter has harmed Plaintiffs, and the relief requested by Plaintiffs will redress those harms.

164. Plaintiffs are seeking their litigation costs, including attorneys' fees, pursuant to 33 U.S.C. § 1365(d).

Requests For Relief

Plaintiffs request from the Court the following relief:

a. A declaration and order setting aside as unlawful and void each of EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) set forth in EPA's February 2, 2015 letter, as well as EPA's rationale for those disapprovals;

b. A declaration and order that all Maine WQS that are or were approved by EPA for non-Indian Waters are also required under the CWA and the 1980 Acts to be approved by EPA for Indian Waters;

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c. A declaration and order that all of Maine's WQS submitted to EPA prior to 2004 that purported to apply to Indian Waters and that were previously approved by EPA for non-Indian Waters only were fully approved by EPA for both Indian Waters and non-Indian Waters, and were in effect for Indian Waters as of the date of their approval by EPA for non-Indian Waters;

d. A declaration and order that, in Maine and under the 1980 Acts, EPA's concept of Indian Waters has no relevance or meaning for WQS purposes under the CWA, and EPA may not lawfully base any disapproval of Maine's WQS on any distinctions between Indian Waters and non-Indian Waters, or between Maine's tribal population and its general population;

e. A declaration and order that the portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction (within their reservations provided that the taking of such fish is for the members' individual sustenance only) relate only to IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing," and do not, for CWA and WQS purposes, constitute a separate "sustenance fishing" designated use for any waterbodies in Maine for CWA and WQS purposes, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

f. A declaration and order that Maine's longstanding designated use of "fishing" as used in Maine's established Water Classification Program for all Maine waterbodies does not, for CWA and WQS purposes, encompass or also constitute a separate "sustenance fishing" designated use for any waterbodies in Maine, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

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g. A declaration and order that, when developing WQS under the CWA for any of its intrastate water bodies, Maine retains the flexibility to choose from among its many CWA options any of EPA's acceptable criteria recommendations set forth in EPA's Section 304(a) guidance documents, including EPA's 2000 Guidance, and may rely on its chosen EPA criteria recommendations as a lawful basis for establishing enforceable Maine WQS under the CWA;

h. An order awarding Plaintiffs their attorneys' fees and costs incurred in bringing and maintaining this action pursuant to 33 U.S.C. § 1365(d), 28 U.S.C. § 2412, and 5 U.S.C. § 504; and

i. Such further and additional relief as the Court may deem just and proper.

Dated: October 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2015, I electronically filed Plaintiffs' Second Amended Complaint and exhibits 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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