TRIBAL RESERVED FISHING RIGHTS AND WATER QUALITY STANDARDS

Purpose: Briefing on general principles of federal Indian law regarding fishing rights reserved to federally recognized Indian tribes in treaties or statutes and how these rights intersect with EPA actions under the Clean Water Act (CWA) water quality standards (WQS) program.

Timing: This briefing is intended to serve as background for upcoming meetings on EPA's action on Idaho WQS (required to act by June 13 per settlement agreement) and EPA's opening merits brief on Maine WQS (due August 28; decision meetings likely in late Spring).

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Treaty and Similar Tribal Rights

- Under the U.S. Constitution, federal treaties are the supreme law of the land and have the same legal force as federal statutes.

- From 1778 to 1871, the federal government's relations with Indian tribes were defined and conducted largely through the treaty-making process. These treaties are the foundation of the trust relationship that the federal government has with federally recognized tribes.

- Through treaty-making, Indian tribes granted land and other natural resources to the United States, while retaining all rights not expressly granted. Treaties with Indian tribes cover a wide variety of subjects, including rights reserved by tribes relating to natural resources, such as the right to hunt, fish, and gather on Indian reservations and/or off-reservation.

- Between 1778 and 1871, about 370 treaties between tribes and the United States were negotiated and ratified into law; many of these treaties remain in effect today.

- After the treaty-making era in 1871, agreements between tribes and the federal government were generally memorialized through executive orders, statutes, and other agreements. Natural resource rights reserved through these other agreements entail a similar analysis to treaty rights to ensure their protection.

- While treaties do not expand EPA's authority, they are binding on the federal government (and states). Accordingly, EPA must ensure that its actions do not conflict with tribal treaty rights.

- While federal statutes should generally be read in harmony with applicable federal treaties, CWA section 511 specifically provides that the CWA "shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States."

- Tribes, particularly in the Pacific Northwest, have asserted their treaty rights to ensure that they are protected by the federal government and states. Over the last few years, tribes have

won key court victories (building on decades of precedent) regarding the scope of their treaty rights, and have pushed federal agencies and states to honor treaty rights in agency decision-making.

- In 2014, EPA reaffirmed its commitment to honor tribal treaty rights relating to natural resources that are affected by EPA actions. Toward that end, EPA issued guidance last year to help ensure that tribal treaty rights are addressed when EPA consults with tribes about its actions in specific geographic areas that may affect treaty rights or treaty-protected resources.

Treaty and Similar Reserved Tribal Fishing Rights and Water Quality Standards

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