HOULTON BAND OF MALISEET INDIAN'S RESPONSE TO PETITIONS FOR RECONSIDERATION AND WITHDRAWAL OF EPA'S LETTERS DATED FEBRUARY 2, 2015, MARCH 16, 2015, AND JUNE 5, 2015, AND EPA'S FINAL RULE PROMULGATING CERTAIN FEDERAL WATER QUALITY STANDARDS APPLICABLE TO MAINE, 81 FED. REG. 92,466, INCLUDING THOSE SUBMITTED BY THE STATE OF MAINE ON FEBRUARY 27, 2017, AND THE TOWN OF BAILEYVILLE, ME, VERSO CORPORATION, AND WOODLAND PULP LLC ON MARCH 6, 2017

Submitted July 18, 2017, to Administrator, U.S. Environmental Protection Agency (EPA)

The Houlton Band of Maliseet Indians ("Houlton Band" or "HBMI"), a federally recognized Indian tribe, hereby opposes the two rulemaking petitions ("Petitions") submitted under 5 U.S.C. § 553(e) by the State of Maine on February 27, 2017, and the Town of Baileyville, ME, Verso Corporation, and Woodland Pulp LLC ("Dischargers") on March 6, 2017, which request that EPA initiate a rulemaking process for reconsideration and withdrawal of EPA's approvals and disapprovals of water quality standards ("WQS") dated February 2, 2015, March 16, 2015, and June 5, 2015 (collectively, "approval/disapproval letters"), and EPA's final rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466 (Dec. 19, 2016) ("Final Rule"). Petitioners' efforts are contrary to the Clean Water Act, applicable federal Indian law, science, and the public interest. As EPA reviews and considers the Petitions, the Houlton Band requests that EPA review the entirety of the administrative records for the challenged actions and all of the science before the agency, the consideration of which will, and must, result in EPA denying the Petitions in full.

I. Sustenance Fishing is of the Utmost Importance to the Houlton Band of Maliseet Indians and Must Be Protected Under the Clean Water Act

The Houlton Band of Maliseet Indians is a fishing tribe. As river people, the Maliseets have fished, gathered aquatic and wetland plants for food and basket weaving, and used the rivers and streams of their ancestral territory for ceremonial purposes since time immemorial. Wolastoqewiyik, the name the Maliseets call themselves, means "People of the Beautiful, Flowing River." Sustenance fishing has always been at the heart of the tribe's culture. EPA004836-4839; EPA004449-4454; EPA004940-4943.[1] When Congress set aside trust lands along the Meduxnekeag River as a homeland for the tribe, it did so specifically to allow tribal members to continue their traditional way of life. EPA000542-548; EPA001403; EPA004853-4854; EPA004973-4977, 4981; EPA005308; EPA005319-5325. But that way of life is threatened. The river is polluted and subject to fish advisories that warn people not to eat fish they catch there lest they risk cancer and other diseases. EPA004838; EPA004849; EPA005340-5341. The pollution endangers the health of tribal members who continue to engage in traditional levels of sustenance fishing, out of both need and a desire to maintain their cultural practices, and it deters others from participating fully in this time-honored way of life. EPA004838; EPA005304-5305; EPA004973-4977, 4981. While the Clean Water Act is intended

[1] Bates-numbered documents may be found in the administrative record EPA considered in regard to the three challenged approval/disapproval letters, which was originally filed on February 29, 2016, and corrected on March 2, 2017, in *Maine v. Pruitt*, Civil Action No. 1:14-cv-264 JDL (D. Me.) (Dkts. 38, 92).

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to guard against such threats, until EPA promulgated the Final Rule, no WQS protected Indian waters in Maine. *E.g.*, 81 Fed. Reg. at 92,468.

As suggested by the references in the preceeding paragraph to EPA's own administrative record, EPA is well aware of this history and the need for water quality standards to protect tribal sustenance fishing. The Houlton Band, moreover, has worked for decades to ensure that its waters are protected sufficiently to ensure its members can safely engage in the culture and sustenance practices the tribe has maintained since time immemorial. *See, e.g.*, HBMI Natural Resources Department Newsletters from Fall/Winter 2016 and Spring 2017 (discussing water quality monitoring and sediment sampling, watershed summit, and other water quality-related projects). Part of this work has included engaging at every available stage in the administrative processes for the approval/disapproval letters and Final Rule that are the subject of the Petitions. As EPA knows, it can find a great deal more information regarding the primacy of sustenance fishing to Maliseet culture and health throughout the administrative records for the approval/disapproval letters and the Final Rule, as well as in the documents attached herewith. The Houlton Band incorporates all of its prior comments on those actions and attachments to those comments by reference, and requests that the agency consider those comments as well as the administrative records as a whole for those actions as it reviews the Petitions.

II. The Petitions Provide No Basis on Which EPA Could Reverse Its Prior Decisions and Must Be Denied

While an agency may have authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), an agency cannot pretend that it exists in a vacuum when it does so. When a "new policy rests upon factual findings that contradict those which underlay the prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC*, 556 U.S. at 515-16; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (requiring a "reasoned analysis for the change"). Moreover, an agency's discretion is cabined by what is permissible under applicable law. *See FCC*, 556 U.S. at 515. Consequently, EPA could only justify reversal of its recent decisions if reversal would be permissible within the scope of the Clean Water Act, and if Petitioners presented some rational reason for which the agency should make a 180 degree turn on its carefully reasoned, well-supported decisions. The Petitions fail on both counts.

Section 303 of the Clean Water Act establishes the bases on which the agency can evaluate water quality standards. Specifically, it requires that EPA's review and promulgation of water quality standards ensure that WQS "protect the public health or welfare, enhance the quality of water and serve the purposes" of the Clean Water Act. 33 U.S.C. § 1313(c)(2)(A). "[S]tandards shall be established taking into consideration their uses and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." *Id.* These are health-based standards. Nothing in the Clean Water Act allows fiscal or political considerations to influence the review and promulgation of water quality standards, let alone to displace the most basic goals and requirements of the Act. Instead, the statute's plain language is explicit that the agency is authorized to approve a State's submitted

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WQS only if "such standard meets the requirements of this chapter." *Id.* § 1313(c)(3); *id.* § 1313(c)(4); EPA005335 (EPA explanation of § 303). The administrative records for the challenged decisions, and EPA's well-reasoned, thoughtful analyses of the issues related to those decisions, are clear that water quality standards that do not include the sustenance fishing designated use or criteria sufficient to protect that use simply do not meet the requirements of the Clean Water Act, and the petitions must accordingly be denied.

Furthermore, under the Administrative Procedure Act, an agency must always articulate a rational connection between the facts it finds and the conclusions it reaches. *State Farm*, 463 U.S. at 43. Consequently, EPA cannot simply reverse its decisions on political whim or when there is a complete paucity of new information to consider. Instead, a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*, 556 U.S. at 516; *see also id.* at 537 (Kennedy, J. concurring in part and concurring in the judgment) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."). The State and Discharger Petitions pending before the agency provide no basis, scientific or otherwise, on which EPA could reverse itself because they provide no new information for EPA to consider.

The administrative record EPA considered in developing the final "Promulgation of Certain Federal Water Quality Standards Applicable to Maine" is considerable, and the effort EPA put into carefully considering and documenting the basis for its decision was incredibly thorough. For instance, along with the 10-page summary of the response to comments that EPA included in the preamble to the Final Rule, it also produced a detailed 231-page Response to Public Comments. *Id.* at 92,475-85; *see generally* EPA, Response to Public Comments (Dec. 2016) (RTPC). Similarly, the approval/disapproval letters contain detailed explanations of the agency's review of and determinations regarding Maine's proposed standards, which are likewise based on an extensive administrative record that has been lodged with the District of Maine in the *Maine v. Pruitt* litigation.

Both petitions rehash, mostly *word for word*, arguments the State and Dischargers made in comments in the review processes for the State's proposed WQS and the rulemaking for the promulgation of federal WQS, all of which were already addressed and dismissed by EPA in thorough, often excruciating, detail. The State's four-page petition does nothing to upset any of the agency's prior analysis because it does nothing more than summarize arguments the State previously, and unsuccessfully, presented to EPA in the prior public processes. In addition to its four-page petition, the State attached the Attorney General's 20-page comments and the Maine Department of Environmental Protection's 11-page comments on the Rule, both documents that EPA carefully considered, responded to in the RTPC, and rejected in its Final Rule. The petition likewise repeats arguments made in litigation pending before the federal District Court for the District of Maine by attaching the 57-page Second Amended Complaint. However, EPA has already thoroughly reviewed and rejected these arguments in its approval/disapproval letters. Dischargers filed a similarly redundant petition, which merely duplicates comments submitted during the rulemaking, which, again, EPA considered and rejected in the RTPC. Nothing in the Petitions is new, and EPA has no cause to reconsider their contents. Because both Petitions lack any new evidence, studies, data, circumstances, or arguments upon which the agency could base a rational change in course, they must be denied.

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To conclude, EPA has already thoroughly considered and rejected all of the arguments Petitioners make in their Petitions in the context of its deliberations on the very actions Petitioners now ask the agency to reconsider. The administrative records with regard to both the approval/disapproval letters and the Final Rule are robust and the agency's prior determinations well-reasoned and exhaustive. Having not been presented with requests elucidating any new circumstances or scientific evidence that could support a permissible reconsideration of prior decisions, the Petitions do nothing to upset the strong analysis and administrative records that EPA built over the last few years and must be denied.

III. The Clean Water Act and Federal Indian Law Preclude EPA from Granting Petitioners' Request

Over four decades ago, Congress, in the Clean Water Act, committed to rid the nation's waters of toxic pollutants and to restore and protect the "fishable and swimmable" character of those waters. While the deadline for accomplishing this goal has long since passed, EPA, through its approval/disapproval letters and Final Rule put itself and Maine on track to finally fulfill that purpose with respect to Maliseet waters, which until this point did not even have water quality standards in place. EPA's Final Rule finally establishes water quality standards in Indian waters in Maine that are protective enough to protect sustenance consumers of fish from toxins, and which when implemented, will move the agency and the State of Maine toward finally meeting the requirements of the Clean Water Act. Petitioners seek to force the agency backwards and undermine the progress EPA has made to protect human health and the State of Maine's and the nation's waters, which is in contravention of the basic requirements of the Clean Water Act, EPA regulation, and agency policy.

The overarching commitment of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). To that end, Congress set national goals to eliminate all discharges of pollutants by 1985, to attain water quality which provides for the protection and propagation of fish and shellfish by 1983, and to set a national policy to prohibit toxic pollutants in toxic amounts. *Id.* In order to attain these goals and implement the policy, the Act imposes an obligation on states, with EPA acting in an oversight role, to develop water quality standards comprised of narrative or numeric water quality criteria sufficient to protect designated uses such as fishing. *Id.* § 1313(a)-(b). While States have the first shot at promulgating protective, science-based water quality standards, EPA is obligated under the Act to review and to disapprove a state's efforts if they fall short of meeting the requirements of the Act. *Id.* § 1313(a)-(c). Furthermore, EPA has independent authority to ensure that a state's standards are up to date and adequate to meet the Act's requirements. *Id.* § 1313(c)(4) (indicating that when "the Administrator determines that a revised or new standard is necessary to meet the requirements" of the Clean Water Act, the agency "shall promptly prepare and publish proposed [revised] regulations"). Thus, where a state fails to act in accordance with the statute, EPA is obligated to fulfill the state's traditional role of issuing standards that comply with the Act.

In its February 2, 2015 letter, EPA approved the designated use of tribal sustenance fishing in Maine's water quality standards. This was entirely proper and necessary to fulfill the

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requirements of the Clean Water Act, as well as to adhere to the requirements of federal Indian law and the federal trust responsibility to Federally recognized tribes.[2] Maliseet waters are degraded as a result of activities Maine has allowed to take place outside tribal lands, making traditional foods scarce or contaminated. With fish advisories in place across Maine, tribal members who carry on their traditional lifeways risk substantial exposure to high levels of contaminants. Others, who heed the advisories, are forced to move from traditional diets to more processed foods, resulting in a greater incidence of diabetes and other health issues and cultural loss.[3] Tribal sustenance fishing existed at the CWA's enactment and continues today; it must therefore be fully protected under the Clean Water Act as an existing use, regardless of whether Maine has specifically enumerated it in its designated uses. HBMI Comments on Proposed Rule at 5-7. The State argues that it "never created . . . a sustenance fishing [designated] 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." State Petition at 5. It made the same arguments during the federal rulemaking. *Id.* at 17. However, as EPA explained in its February 2, 2015 letter, the agency's authority and duty to evaluate the tribal sustenance fishing designated use does not depend on what WQS the State submits for review and is not limited to a single section of state code. EPA005333 n.18; *see also Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1089 (11th Cir. 2004); *Natural Res. Def. Council v. McCarthy*, No. 16-CV-02184-JST, 2017 WL 491147, at *12-22 (N.D. Cal. Feb. 7, 2017). EPA further described, in exhausting detail, why it was required to interpret the State's "fishing" use as "sustenance fishing" in Indian waters in Maine.

> The first step in establishing and reviewing WQS is to determine the uses of the waters. In tribal waters, EPA must harmonize the CWA requirement that WQS must protect uses with the fundamental purpose for which land was set aside for the Tribes under the Indian settlement acts in Maine. Those settlement acts, which include [the Maine Indian Claims Settlement Act (MICSA)] and other state and federal statutes that resolved Indian land claims in the State, provide for land to be set aside as a permanent land base for the Indian Tribes in Maine. One clear purpose of that set aside is to provide a land base on which these Tribes could continue their unique cultures. A critical element of tribal cultural survival is the ability to exercise sustenance living practices, including sustenance fishing. There are multiple provisions in the Indian settlement acts that specifically codify the Tribes' sustenance practices. Maine general law regulating fish take accommodates sustenance fishing, and in several regards also specifically codifies the Tribes' ability to sustenance fish. The legislative record supporting the Indian settlement acts in Maine makes it clear that the statutes intend to create a land base on which the Tribes in Maine may fish for their sustenance. Therefore, EPA

[2] The Houlton Band of Maliseet Indians is a Federally-recognized Indian Tribe, and the federal government is its trustee. All federal agencies, including EPA, must act in accordance with the federal trust responsibility to Indian tribes. Executive Order 13175; *see also* HBMI Comments on Proposed Rule at 11-13 for further detail). MICSA does not alter the federal government's trust responsibility to the Maine tribes, and ambiguities in federal law must be construed in a tribe's favor. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999); Solicitor's Opinion (May 16, 2000).

[3] Maliseet tribal members' incidence of diabetes is nearly double that of the general population in Maine. University of Nebraska Medical Center, *The Houlton Band of Maliseets Health Needs Assessment Summary Report* 18, 20 (2012).

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> interprets the State's "fishing" designated use, as applied in tribal waters, to mean "sustenance" fishing; and EPA is approving a specific sustenance fishing right reserved in one of the settlement acts as a designated use for certain tribal reservation waters.

EPA005304; EPA005319-5334 (detailed legal analysis); *see also* Solicitor's Opinion (Jan. 30, 2015); EPA005305 (noting reliance on legal opinion from the Department of Interior Solicitor, from whom EPA sought advice "because the Department is the federal government's expert agency on matters of Indian law and is charged with administering the settlement acts in Maine"). Likewise, during the federal WQS rulemaking, EPA provided detailed legal analyses for its determination that "sustenance fishing" is a designated use in Indian waters in Maine. 81 Fed. Reg. at 92,468, 92,472, 92,478-80; RTPC at 36-56. EPA was correct to interpret Maine's fishing designated use to incorporate tribal sustenance fishing, and nothing in the Petitions counters EPA's painstaking reviews.

EPA was also correct to require that the criteria be set in such a way as to protect the sustenance fishing use. In 2000, EPA directed states to update fish consumption rates and human health criteria (HHC) based on the best available local consumer data. EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* at 1-1 (2000). The methodology requires "that priority be given to identifying and adequately protecting the most highly exposed population. Thus, if the State or Tribe determines that a highly exposed population is at greater risk and would not be adequately protected by criteria based on the general population, and by the national 304(a) criteria in particular, EPA recommends that the State or Tribe adopt more stringent criteria using alternative exposure assumptions." The HHC water quality standards that Maine submitted for EPA's approval would not protect sustenance fishing in Maliseet and other tribal waters because the criteria would allow far more toxins in fish than is safe for tribal members to consume at their customary levels. EPA accordingly disapproved them and was required to implement replacement standards in the face of Maine's decision not to correct its standards. Although there were other significant problems in Maine's approach to the WQS, which are described in detail in the administrative records for the challenged actions and in EPA's decisions, two of the major flaws in criteria are discussed here.

First, Maine's proposed standards grossly underestimated the Maliseet fish consumption rate (FCR). Maine refused in its proposed WQS to take into account tribal fish consumption in tribal waters. Instead, it relied on a flawed 1992 Chemrisk study in choosing a FCR of 32.4 g/day for most pollutants and 138 g/day for arsenic. In addition to Maine's arbitrary and unscientific choice to apply different FCRs in setting criteria for different pollutants, the 1992 Chemrisk study is unusable because it did not account for Native American cultural practices; was initiated after fish advisories were already in place (i.e., depressed consumption); the sample size of Native American anglers was too low to make any statistically valid conclusions regarding fish consumption in that population; and was targeted solely at anglers with Maine State licenses, missing tribal members who obtain their licenses from tribal governments. EPA, both in its February 2, 2015 approval/disapproval letter and in the Federal Register notice for the Final Rule, explained in detail the reasons that the ChemRisk Study could not be used to determine the FCR. EPA005339-5341; 81 Fed. Reg. at 92,480-81; RTPC at 62-64, 72. EPA concluded that

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the ChemRisk Study does not represent tribal members' sustenance fishing use because, among other reasons, it "was not intended to be, nor was it, a survey of tribal sustenance fishers in tribal waters" and it did not "reflect unsuppressed fish consumption levels." EPA005340; 81 Fed. Reg. at 92,481.

Instead, in setting criteria that will allow for protection of the sustenance fishing use, EPA relied on the *Wabanaki Traditional Cultural Lifeways Exposure Pathway Scenario* study, which is the best available science on the fish consumption rate of Maliseet tribal members. The Wabanaki study is a peer-reviewed estimate of traditional sustenance fish consumption, which "EPA [found] . . . used a sound methodology (peer reviewed, written by experts in risk assessment and anthropology), and contains the best currently available information for the purpose of deriving an FCR for HHC adequate to protect present day sustenance fishing for such waters." 81 Fed. Reg. at 92,480; RTPC at 59-62; EPA005341-5344. The Wabanaki study indicates a range of fish consumption from 286 g/day through 514 g/day for inland tribes. EPA selected the more conservative Inland Non-Anadromous lifestyle consumption rate of 286 g/day because anadromous fish species' populations in Indian waters in Maine are currently still too low from historic environmental degradation to harvest in significant quantities. The Wabanaki Study is in line with contemporary fish consumption surveys of other fish-dependent tribes across the nation. For instance, in Washington, the Squaxin Island Tribe's 95th percentile FCR is 318 g/day while the Suquamish Tribe's 95th percentile is 797 g/day.[4] Nothing in the Petitions presents a viable basis for disturbing any of EPA's conclusions. Neither petition provides, for example, some new survey or study that Petitioners argue should displace EPA's reliance on the Wabanaki Study. Having been presented with no new evidence or argument, EPA has nothing new to consider and no permissible basis for disregarding any of its past determinations with regard to the FCR.

Second, in addition to the fish consumption rate, another critical component of the human health water quality standards equation is ensuring the use of an adequately protective cancer risk rate (i.e., the risk that a person consuming fish will contract cancer during his or her lifetime because of exposure to toxins that may accumulate in fish). Like the FCR, the cancer risk rate Maine selected did not meet the requirements of the Clean Water Act either. Congress, in MICSA, established trust resources for which the federal government is responsible. The Maliseet trust land, which is a reservation under Federal law, was set aside specifically to allow Maliseet tribal members to continue their traditional lifeways, including sustenance fishing. HBMI Comments on Proposed Rule at 8-11; Solicitor's Letter (Jan. 15, 1993). On lands set aside by Congress specifically for a Tribe's use, tribal members should not be faced with the dilemma of either abandoning their traditional fishing practices or engaging in them with the knowledge that they do so at the increased risk of developing cancer. EPA's determination that tribes must be treated as general target populations, rather than highly exposed subpopulations, on lands set aside for them specifically to prevent acculturation is consistent with the CWA and federal Indian law. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe, as it did for the Maliseets, Congress impliedly reserves

[4] Attached herewith are letters from the Northwest Indian Fish Commission and Earthjustice submitted to EPA in regard to a similar petition filed by dischargers in Washington State attempting to dismantle the federal WQS recently promulgated for that state; the Houlton Band requests that EPA also consider those letters and associated materials in the context of its review of the Maine Petitions.

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water and fishing rights on those lands. These water and fishing rights are entitled to protection under federal law, including the right to water of sufficient quantity and quality to support tribal sustenance fishing. The right to protection relates to traditional levels of use rather than use levels that may have been suppressed due to adherence to fish advisories, fear of ingesting contaminated food, or lack of quantity. HBMI Comments on Proposed Rule at 8-11; Solicitor's Letter (Jan. 30, 2015). As with the designated use and FCR matters, the Petitions contain no new materials or arguments for EPA to consider, and there is no basis for EPA to reconsider its past determinations.

IV. EPA's Final Rule Is Beneficial for Indians and non-Indians Alike and Will Not Have Detrimental Economic Effects on Petitioners

The approval/disapproval letters and Final Rule were the product of significant public processes that culminated in decisions that are beneficial not only to Indians in Maine, but to all Mainers who desire water clean enough that they can safely eat fish from Maine waters. The Houlton Band of Maliseet Indians, other tribes in Maine, the State, towns, industrial entities, and private citizens participated in comment opportunities on Maine's submitted standards and notice and comment rulemaking for the federal promulgation of WQS. As EPA indicated in its Final Rule, public comments overwhelmingly supported EPA's promulgation of protective WQS. 81 Fed. Reg. at 92,475; *see generally* RTPC.

> One striking aspect of the comments EPA received on its proposal is that every individual who commented supported EPA's proposed action, including many non-Indians. Nearly all of the comments were individualized expressions of support, ranging from a profound recognition of the need to honor commitments made to the tribes in the Indian settlement acts to an acknowledgment that everyone in Maine benefits from improved water quality. It is notable that the record for this action shows that individuals in Maine who commented did not express concern that the tribes are being accorded a special status or that this action will in any way disadvantage the rest of Maine's population.

81 Fed. Reg. at 92,476. Commenters thus realized that protective water quality standards not only fulfill the nation's obligations to Federally-recognized tribes, but benefit everyone alike. Moreover, even though the Clean Water Act does not allow economic considerations, like cost-benefit analyses, to play a role in the setting of human health criteria, EPA still completed an economic analysis, which found limited negative economic effect on industry from the Final Rule. In short, everyone benefits from EPA's approval/disapproval letters and Final Rule, and EPA should not upset this new status quo.

V. Existing Litigation in the District of Maine is the Proper Forum to Resolve Petitioners' Concerns

While the Houlton Band believes that the State's and Dischargers' Petitions are entirely without merit, to the extent that they seek to resolve certain legal arguments, the proper forum for resolution of those matters is not at the agency but in the State's currently pending lawsuit before the District of Maine. *See Maine v. Pruitt*, Civil Action No. 1:14-cv-264 JDL (D. Me.).

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Rather than correct its standards, Maine chose to litigate over the approval and disapproval of them. The APA contains no deadline for the review of a petition submitted under 5 U.S.C. § 553(e), so the agency can wait and see what the Court does before acting on the petition, if it is disinclined to flat out deny the petitions (although as described above, the agency should deny them). Furthermore, section 553(e) of the APA does not actually provide a mechanism for achieving Petitioners' desired results with respect to the approval/disapproval letters, which were agency adjudications and not rulemakings; the federal courts are the proper forum for Petitioners' challenge. Finally, anything but a denial of the petitions would be a tremendous waste of agency resources and taxpayer dollars because, having intervened as parties in the case, the Houlton Band of Maliseet Indians stands ready to defend EPA's existing decisions in full. *E.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1225-26 (10th Cir. 2011), *cert. denied* 133 S.Ct. 417 (2012).

Furthermore, in light of the Petitioners' failure to identify any new concerns it has with the federal promulgation of water quality standards that was mandated by Maine's failure to correct its standards, the State's and Dischargers' recourse is to the courts, not a rulemaking petition under the APA. Yet Maine has thus far declined to challenge the Final Rule in the existing litigation or a new lawsuit. The Clean Water Act is explicit that upon making a determination that a State's proposed standards do not satisfy the Clean Water Act, EPA has a mandatory duty to propose and promulgate standards that do satisfy the Act, and to do so in a timely manner. 33 U.S.C. § 1313(c)(3)(4). The mandatory nature of the promulgation duty is consistent with the CWA's overarching framework, which is designed to force pollution control adequate to protect designated uses. States have the first opportunity to promulgate adequate water quality standards, but EPA provides a backstop for inadequate state standards, which must be replaced—whether it be by the state itself or EPA—quickly after they are determined to be inadequate. 33 U.S.C. § 1313. In promulgating the Final Rule, EPA satisfied its non-discretionary duty under the Clean Water Act to promulgate and simultaneously filled the regulatory void in Indian waters, which Maine chose not to fill. If the State is concerned by this promulgation, it still has the opportunity to challenge the federal standards in court or else to submit its own corrected WQS for EPA to review and approve, so long as the standards are science-based and satisfy all other requirements of the CWA.

VI. The Record for EPA's Consideration of the Petitions Must Include the Entire Administrative Record for the Approval/Disapproval Letters, the Entire Administrative Record for EPA's Final Rule, and All Responses to the Petitions and Any Materials Submitted Therewith

As EPA reviews and responds to the Petitions, EPA must consider the voluminous documentation the agency already compiled and reviewed in its administrative records for the approval/disapproval letters and for EPA's Final Rule, as well as any other documents discussed above or included with this and other responses to the Petitions. EPA has filed the administrative record for the approval/disapproval letters with the District of Maine, and this record is within EPA's possession and must be included in the administrative record for EPA's review of the Petitions. *See Maine v. Pruitt*, Civil Action No. 1:14-cv-264 JDL (D. Me.) (Dkts. 38, 92). Likewise, the administrative record for EPA's Proposed Rule, 81 Fed. Reg. 23,239 (Apr. 20, 2016), and EPA's Final Rule is within EPA's possession and can be found at the

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regulations.gov website at Docket # EPA-HQ-OW-2015-0804 (https://www.regulations.gov/docket?D=EPA-HQ-OW-2015-0804). The entirety of this record must be included in the administrative record for EPA's review of the Petitions, and the documents are already within EPA's possession and are not included in their entirety here. The Houlton Band refers EPA, in particular, to the documents cited herein and listed below, and calls upon EPA to ensure that they are included in the administrative record as EPA reviews and responds to the Petitions. Copies of the following documents are enclosed with this letter for inclusion in the administrative record:

- EPA Final Rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466 (Dec. 19, 2016)
- EPA Response to Public Comments (Dec. 2016) (RTPC)
- EPA Approval and Disapproval Letters and Other Decision Documents (2015)
- Solicitor's Letter (Jan. 30, 2015)
- Solicitor's Opinion (May 16, 2000)
- Solicitor's Letter (Jan. 15, 1993)
- *Wabanaki Traditional Cultural Lifeways Exposure Pathway Scenario* (2009)
- University of Nebraska Medical Center, *The Houlton Band of Maliseets Health Needs Assessment Summary Report* 18, 20 (2012)
- HBMI Comments on Maine's Proposed WQS and Attachments (Sept. 13, 2013)
- HBMI Supplemental Comments on Maine's Proposed WQS and Attachments (Dec. 17, 2013)
- HBMI Comments on EPA Proposed Rule to Promulgate Certain Federal Water Quality Standards Applicable to Maine and Attachments (June 20, 2016)
- HBMI Natural Resources Department Newsletter (Fall/Winter 2016)
- HBMI Natural Resources Department Newsletters (Spring 2017)
- EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2009)
- National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice* (2002)
- EPA, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (June 2016)
- EPA, Final Rule Revising Certain Water Quality Standard Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 28, 2016)
- Northwest Indian Fish Commission Letter re Industry Petition in Washington (July 10, 2017)
- Earthjustice Letter re Industry Petition in Washington (May 18, 2017)

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Please do not hesitate to contact the undersigned should you have any questions.

Sincerely,

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Enclosures

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