PIERCE ATWOOD LLP

WILLIAM E. TAYLOR

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

P 207.791.1213
F 207.791.1350
C 207.632.1880
wtaylor@pierceatwood.com
pierceatwood.com

Admitted in: MA, ME, NH

March 6, 2017

VIA OVERNIGHT MAIL AND EMAIL

Mr. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue
Mail Code: 1101A
Washington, DC 20460

Re: Petition for Reconsideration 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 of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016).

Thank you for carefully considering this petition since the recently-issued rule will have significant and unnecessary financial impacts with no corresponding benefit.

Sincerely,

William Taylor

William E. Taylor

Enclosure

PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition for Reconsideration of EPA's Disapproval of Maine's Water Quality Standards and Repeal of the Final Rule Promulgating Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466-92,494	Submitted March 6, 2017 to the Administrator and Acting Assistant Administrator of the Office of Water, U.S. Environmental Protection Agency

The Town of Baileyville, ME, Verso Corporation, and Woodland Pulp LLC (collectively, the "Coalition") submit this petition to the Administrator of the U.S. Environmental Protection Agency ("EPA") under 5 U.S.C. § 553(e) for the following actions: reconsideration and approval of the State of Maine's existing Water Quality Standards ("WQS"), and either repeal or withdrawal of the Promulgation of Certain Federal Water Quality Standards Applicable to Maine published at 81 Fed. Reg. 92,466-92,494 (Dec. 19, 2016) ("EPA Final Rule").

The Coalition supports and joins in the Petition for Reconsideration submitted by Maine Governor Paul LePage on February 27, 2017. The Coalition is submitting its Petition for Reconsideration to address the following points.

I. SUMMARY

On December 19, 2016 EPA wrongfully disapproved certain Maine WQS and instead finalized human health criteria ("HHC") that do little to protect the sustenance fishing designated use in waters in Indian lands and in waters subject to sustenance fishing rights under the Maine Implementing Act ("MIA"). Instead, in promulgating its Final Rule EPA has usurped the primary role of the state to make risk management decisions for human health water quality criteria.

EPA is required under section 303(c)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(c)(3), to approve state WQS if they meet the requirements of the CWA. State standards for toxics must be protective of beneficial uses and derived using EPA guidance or other scientifically defensible methods. 40 C.F.R. §131.11(a)(2)-(b). Maine's existing water quality criteria and standards serve the purposes of the CWA, protect designated uses established by the Maine Legislature, and are based upon appropriate technical and scientific data. They therefore comply with the CWA.

Nevertheless, EPA repeatedly failed to comply with its obligation to approve or disapprove state submittals of WQS within 90 days. 33 U.S.C. § 1313(a), (c); 40 C.F.R. § 131.5(a). EPA's failure to act on Maine's submittals extended for up to 10 years in some cases. At the same time, EPA allowed Maine DEP to issue permits to potentially-affected facilities without comment. Accordingly, in 2014, Maine sued EPA for failure to approve its backlogged WQS. Nevertheless, EPA wrongfully disapproved a number of Maine WQS, mostly applicable to waters in Indian lands, as not adequately protective of human health or aquatic life. Because the CWA requires EPA to promptly promulgate replacement WQS where it has

Because the CWA requires EPA to promptly promulgate replacement WQS where it has disapproved state WQS, it promulgated the rulemaking at issue here. However, because Maine's existing WQS meet CWA requirements, they should not have been disapproved and EPA should repeal or withdraw its federal WQS promulgation.

Furthermore, EPA should repeal or withdraw its federal WQS promulgation because it is inconsistent with the CWA and best available science, as well as with the Maine and federal Indian Claims Settlement Acts. Nor has EPA followed its own public participation requirements in developing its Final Rule. Instead, through its Final Rule, EPA has imposed on the people of Maine arbitrary and capricious HHC that likely will be devastating to the local communities and businesses of Maine. Many costly and long-term waste discharge treatment decisions have been based on the current WQS and permits issued under those standards. Further, EPA has failed to properly delineate the scope of Indian waters in its Final Rule, causing permittees and other licensed dischargers significant economic and regulatory consequences.

EPA should now respect that state's authority to make risk management decisions in deriving human health water quality criteria by approving Maine's existing WQS and repealing its Final Rule.

II. EPA SHOULD RECONSIDER AND APPROVE MAINE WATER QUALITY STANDARDS

A. EPA is Required to Approve State Water Quality Standards that are Consistent with EPA Guidance and Scientifically Defensible Methods

The CWA is "a program of cooperative federalism" in which States are principally responsible for implementing much of the statute. *New York v. U.S.*, 505 U.S. 144, 167, 112 S.Ct. 2408 (1992); 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution."). Accordingly, the CWA assigns to the states the primary authority for adopting water quality standards. 33 U.S.C. § 1313(a), (c). Those standards must protect all designated beneficial uses, be based on sound scientific rationale, and contain sufficient parameters or constituents to protect the designated uses. 40 C.F.R. §131.11(a). When establishing criteria, states are encouraged to base numeric values on guidance adopted by EPA pursuant to CWA § 304(a) ("304(a) Guidance"), 304(a) Guidance modified to reflect site-specific conditions, or other scientifically defensible methods. 40 C.F.R. § 131.11(b). The standards must include the six elements set out in 40 C.F.R. § 131.6, including use designations consistent with the CWA, the methods used and analyses conducted to support the WQS, and water quality criteria sufficient to protect the designated uses.[1]

Once adopted by a state, EPA's role is limited to the review of the standards for consistency with the CWA, and either approval or disapproval of those standards. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.5(a). As set out in 40 C.F.R. § 131.5, EPA's review involves a

---

[1] 40 C.F.R. § 131.20(c) further delineates the information, analyses, methodologies and policies that states must submit to EPA along with the water quality standards.

ED_002388_00003413-00003

5-part determination: (1) whether the state has adopted water uses that are consistent with the requirements of the CWA; (2) whether the state has adopted criteria that protect designated water uses; (3) whether the state has followed its legal procedures for adopting standards; (4) whether the state standards are based on appropriate technical and scientific data and analyses; and (5) whether the standards meet other minimum requirements including the antidegradation policy, certification by the state attorney general, and adequate information to determine the scientific basis for the standards. 40 C.F.R. §§ 131.6 and 135(a).

If EPA determines that the state-submitted standards are inconsistent with the five factors set forth in 40 C.F.R. § 131.5(a), then EPA has 90 days in which to notify the state and specify the changes necessary to meet the CWA's requirements. *Id.* If the state fails to adopt the changes within 90 days of notification by the EPA, then EPA must promulgate a water quality standard for the state. 33 U.S.C. §§ 1313(c)(3), (c)(4). Maine's existing WQS plainly meet the requirements of the CWA and should have been approved by EPA.

B. Maine's Existing WQS Comply with CWA Requirements

Maine's water classification system, WQS, and water quality monitoring programs are recognized as among the best in the country. Maine, through its Department of Environmental Protection ("Maine DEP"), efficiently and diligently implements the CWA and associated state laws and regulations. In all respects, for all designated uses and for all people in Maine, the State's WQS fully meet the requirements of the CWA. While Maine's WQS and criteria have been revised periodically over the last 20 years, the same essential components have been in place through three or more 5-year licensing cycles. During that time, EPA has recommended changes to certain criteria and has reviewed changes to designated uses and to the State's antidegradation policy. Prior to 2001, EPA issued licenses to the 33 dischargers listed in Exhibit 4-1 of the Economic Analysis for Proposal of Certain Federal Water Quality Standards Applicable to Maine ("Economic Analysis") for Final Rule as proposed. EPA utilized the State's WQS. Subsequent to the State receiving authority to administer the CWA, Maine DEP has issued at least two 5-year permits to each of the dischargers listed in Exhibit 4-1. These permits were also based on existing WQS, including the WQS and criteria EPA has now rejected.

To our knowledge, EPA never had a substantive comment or objection to Maine DEP's application of the current standards, designated uses, and criteria in any of these licenses. If EPA was concerned that the State's WQS were not consistent with the requirements of the CWA, it could have disapproved specific standards at any time. If EPA was concerned about the impact of discharges to any river segment identified in its Final Rule, including the Penobscot, Meduxnekeag, and St. Croix rivers, EPA had multiple opportunities to object to permits being issued to dischargers in those river segments, including tributaries to those segments. This is strong evidence that Maine's existing WQS protect designated uses, are based on sound science, and are otherwise consistent with CWA requirements.

Cognizant of the foregoing, EPA indicates in its response to public comments on Maine's submission to EPA for approval of new and revised WQS that although "EPA may not have offered any comments about those permits, [it] does not constitute an acknowledgement by EPA that Maine's WQS had been approved by EPA to apply in waters in Indian lands." Page 44. It is

astounding that EPA would claim that its failure to offer comments on dozens of permits for dischargers subject to the new rule was not an approval of the underlying WQS upon which those permits were based. Maine DEP is similarly concerned about EPA's abrupt change regarding the State's WQS.

Aside from issuing and acquiescing in the issuance of permits to the affected dischargers listed in the rule, EPA did not disapprove the State's Section 303(d) submissions in 2006, 2008, 2010, and 2012, all of which were based on the current WQS and which focus on whether designated uses are being met. EPA may claim that it did not approve the 303(d) lists with respect to waters within Indian lands, but EPA has a legal obligation to promptly approve or disapprove the 303(d) lists; EPA did neither. EPA informed Maine DEP that it was taking no action to approve or disapprove the state lists with respect to waters within Indian territories and lands. Thus, EPA failed to meet its obligations despite a very specific and mandatory requirement to either approve or disapprove. *See* Sections 303(c)(3) and 303(d)(2) of the CWA, which employ the term "shall" and specify a deadline for EPA's decisions.

EPA's historic, long-standing actions (or inactions) with respect to MEPDES permits, 303(d) lists, TMDLs, and other water quality-based requirements are proof that EPA had no fundamental objection to Maine's current WQS, including the listed designated uses, and that EPA acknowledged that the State's WQS are consistent with CWA requirements.

C. There is No Designated Use of Sustenance Fishing in Maine's WQS

On February 2, 2015, EPA suddenly and without any prior notice or warning decided that the WQS that had served as the basis for dozens of permits, listing decisions, and other Maine water quality initiatives over many years were no longer valid. This disapproval was apparently based on Maine DEP's failure to protect a designated use of sustenance fishing, which EPA claims is now part of the State's WQS. Sustenance fishing is not now, and has never been, a designated use under Maine law.

Maine law sets out very specific procedures for developing and approving designated uses and water quality criteria upon which the State's WQS and classification system is based. *See* 38 M.R.S. § 464(2). These procedures have been approved by EPA as part Maine's WQS submissions. Maine's procedures require that the Board of Environmental Protection ("BEP") review information relating to water quality classifications, including designated uses, and hold public hearings in the affected area or reasonably adjacent to the area affected by any change. The BEP has not reviewed information relating to a sustenance fishing designated use nor has the BEP held a public hearing in any area potentially affected by such a new designation. The BEP may recommend changes in classification, but it is the Legislature that has sole authority to make any changes regarding the classification system, designated uses, and criteria to support those uses. 38 M.R.S. § 464(2)(d).

Maine's current designated uses for each class of fresh surface waters are listed in 38 M.R.S. § 465. There is no designated use for sustenance fishing by Maine tribes listed for Maine's fresh surface waters in Section 465, nor is there any such language in 38 M.R.S. §§ 465(a) and 465(b), which relate to lakes, ponds, and estuarine and marine waters. The Maine Legislature has never held a hearing on or adopted a designated use of sustenance fishing. Nor

has the State ever provided EPA a proposed sustenance fishing designated use as part of the water quality "docket" which is periodically compiled and sent to EPA for approval.

Maine DEP, the agency that administers the classification system and enforces State WQS, agrees that there is no designated use of sustenance fishing.

III. EPA SHOULD REPEAL OR WITHDRAW ITS PROMULGATION OF CERTAIN FEDERAL WATER QUALITY STANDARDS APPLICABLE TO MAINE

A. EPA Has Failed to Follow Proper Procedures in Developing the Final Rule

The procedures for establishing a new designated use under Maine law have not been followed, and must be followed, prior to adding or developing rules to protect a proposed new designated use. Even if sustenance fishing were considered a subcategory of an existing designated use, required procedures were not followed.

Prior to adding or removing any use or establishing subcategories of a use, the state must provide notice and opportunity for a "public hearing" under Section 131.20(b) of EPA's regulations and 38 M.R.S. § 464(2-A)(C). In promulgating its own WQS, the EPA is subject "to the same policies, procedures, analysis, and public participation requirements established for states" in the federal regulations. 40 C.F.R. § 131.22(c). EPA has not complied with either the State's procedures or its own public participation regulations set out in 40 C.F.R. Part 25, which require a public hearing and the availability of supporting analyses prior to a hearing. EPA has provided neither the required analyses nor an opportunity for a hearing on the establishment of new designated use. EPA merely asserted that sustenance fishing is a new WQS or designated use and that it is approving the use. EPA then based its proposed rule on the "new" designated use. Where and when was the analysis for these decisions provided? When was the public hearing on this new designated use held? The proposed rule, and the rule in its final promulgation, is silent on these questions.

B. EPA's Final Rule Does Not Provide Fair Notice to Potentially Affected Dischargers

In the Final Rule, EPA indicates that the WQS apply to waters in Indian lands and "waters where there is a sustenance fishing designated use outside of waters in Indian lands." 81 Fed. Reg. 92,468. EPA notes that the Technical Support Document ("TSD") accompanying the proposed rule provides further information regarding waters where the designated use of sustenance fishing applies. In the TSD, EPA interprets the recent *Penobscot Nation v. Mills* decision as extending "the designated use of sustenance fishing to the entire main stem of the Penobscot River, including any portion of that waterbody that may be located outside of Indian lands." TSD, at p. 5. Similarly, EPA suggests that the Passamaquoddy Tribe's right to sustenance fishing may be extended, at a minimum, to large portions of the main stem of the St. Croix River, including the 15 islands referred to in 30 M.R.S. § 6203(5) of the Maine Implementing Act ("MIA").

This extension of the designated use of fishing to waters outside Indian reservations is apparently based on historical fishing practices that somehow establish a right to sustenance fish in those locations. This argument is inconsistent with the Maine Indian Claims Settlement Act,

25 U.S.C. §§ 1721 *et seq.* ("MICSA"), and the MIA, 30 M.R.S. §§ 6201 *et seq.* (collectively the "Settlement Acts"), as discussed further below. In any case, EPA does not further define the scope of the rule on these or other rivers. How can dischargers located on the Penobscot, the St. Croix, or other rivers know whether the Final Rule will impact them without further specific information about historic Indian fishing practices, and EPA's interpretation of those practices? EPA acknowledges that dischargers other than those listed in Exhibit 4-1 of the Economic Analysis may be impacted. Yet, EPA makes no attempt to identify or notify those dischargers or further delineate the scope of its rules.

C. The Final Rule and Supporting Documents Mischaracterize Important Facts About the Passamaquoddy Reservation and Impacts to Reservation Waters

In the Economic Analysis for the proposed WQS, EPA identifies five St. Croix River dischargers to waters in Indian lands, or their tributaries. EPA notes that only one of those dischargers, the Passamaquoddy POTW, discharges directly to waters in Indian lands to which EPA's proposed criteria would apply. *See* page 40 of the Economic Analysis. Later in the Economic Analysis, EPA contradicts itself and claims that the Woodland Pulp facility also "discharges directly to waters in Indian lands." *See* page 97 of the Economic Analysis. EPA identified three other facilities, Calais School, Calais POTW, and Washington County Community College, which discharge to the St. Croix River significantly upstream of the waters in Indian lands at Pleasant Point. However, EPA makes no mention at that point of the Woodland Pulp facility, which is more than 10 miles farther upstream than the other three listed dischargers and therefore can have no measurable impact on waters at Pleasant Point.

EPA includes dischargers other than the Passamaquoddy POTW based partially on Maine common law regarding riparian ownership rights. Under Maine law, riparian owners typically own the bed to the thread of freshwater rivers and streams. EPA concludes, therefore, that such riparian waters are waters in Indian lands. *See* TSD, page 4. Further, EPA interprets the MIA as including within the Passamaquoddy Reservation "15 islands in the St. Croix River in existence on September 19, 1794 and located between head of tide of that river and the falls below the forks of that river." Because these 15 islands are within the Passamaquoddy Tribe's reservation, according to EPA, "EPA presumes that riparian waters associated with the islands in this stretch of the St. Croix River are also within the reservation and thus 'waters in Indian lands.'" TSD, page 4.

With respect to the Passamaquoddy Reservation, EPA has piled bad assumption on top of bad assumption. First, the 15 islands at issue do not fall within the definition of the Passamaquoddy Reservation. It is true that the Passamaquoddy Indian Reservation includes "those 15 islands in the St. Croix River in existence on September 19, 1794 and located between the head of the tide of that river and the falls below the forks of that river," but only if they were not "transferred to a person or entity other than a member of the Passamaquoddy Tribe" after September 19, 1794 and before 1980. 30 M.R.S. § 6203(5). In fact, those islands were transferred out of Passamaquoddy ownership during the relevant time period, so they are not part of the Passamaquoddy Reservation. *See Granger v. Avery*, 64 Me. 292 (1874). At a bare minimum, the 15 islands were transferred out of Passamaquoddy ownership by virtue of flowage over and flooding of those islands before 1980 caused by damming of the river, and by other acts of possession, dominion, or control of those islands. *See* 30 M.R.S. § 6203(5, 13).

Second, even assuming the islands are within the Passamaquoddy Reservation, that does not mean the surrounding waters are within the Reservation. In fact, as with the Penobscot Reservation, the Passamaquoddy Reservation does not include submerged lands and waters adjacent to the islands, but only the actual lands enumerated in the Settlement Acts. 30 M.R.S. § 6203(5). Nor does Maine riparian rights law operate to magically expand the reservation to include such submerged lands or waters adjacent to reservation islands, which would be contrary to the express terms of the Settlement Acts.

Because the State of Maine owns reservation land in trust for the Tribes, it is the State, not the Tribe, that owns any adjacent submerged lands. *See, e.g.,* (1) Maine Attorney General Opinion dated December 18, 1951, in which Assistant Maine Attorney General James Frost stated as follows: "it would seem that fee simple title to that land is today in the Indians. However, the State, from time to time, has taken control of these lands to the extent that their alienation has been restricted. The whole question of the status of tribal lands is therefore somewhat anomalous. Though the land would appear to be vested in the Indians, legislation has so encompassed his ability to transfer such land, that ultimately the conclusion must be that the land on a reservation is state land, but held for the use of the Indians, at least so long as they remain a tribe, on that reservation."; (2) Opinion dated June 7, 1972, in which Assistant Maine Attorney General John Kendrick stated as follows: "The actual control of tribal lands has long been in the State. The reservation, held for the use of the Indians, is State land."; (3) May 17, 1983 letter to FERC from Lawrence Jensen, the Associate Solicitor for DOI's Division of Indian Affairs, in which Jensen states that "title in fee simple to the subject islands and affected lands is held by the State of Maine in trust for the benefit of the Penobscot Nation which possesses the right of perpetual occupancy and use."; (4) Resolves 1983, Chapter 24, in which the Maine Legislature granted to Governor Brennan the authority to confirm the granting of a 1931 power line easement given by a Penobscot Indian to Bangor Hydro-Electric Company over Mattanawcook and Chokecherry Islands -- which are (and were at the time) part of the PIN Reservation; (5) Testimony of Andre G. Janelle, Legislative Counsel to Governor Brennan, on L.D. 712, March 1, 1983, in support of Resolves 1983, Chapter 24, that "the State of Maine has a reversionary interest in the reservation land of the Penobscot Nation. Although the Reservation belongs to the Penobscot Nation, its ownership interest is not absolute. In the event that the Penobscot Nation should cease to exist as a tribe its reservation land would revert to the State of Maine," thus, the State was required to grant the easement to Bangor Hydro; (6) Easement deed signed on February 13, 1984, by Governor Brennan.

Third, while EPA is generally correct regarding ownership of the bed to the thread of freshwater streams, that is not the case with the St. Croix River. The bed of the St. Croix River on the United States side of the international border is owned by the State. *See* 12 M.R.S. § 1801(9), which defines state ownership of submerged lands as including the riverbed of international boundary rivers. Thus, the St. Croix River, where it forms an international boundary, is an exception to the common law rule that riparian property owners own to the thread of a non-tidal stream or river.

EPA states that it is working with the Passamaquoddy Tribe and the U.S. Department of the Interior to confirm the status of these 15 islands. It would have saved significant resources if EPA had also worked with the State of Maine to confirm not only the ownership of the bed in the international portions of the St. Croix River, but ownership of the 15 islands, prior to developing

an economic analysis for impacts associated with the proposed rule, and the proposed rule itself. For this reason alone, the proposed rule should be deferred until information becomes available that would give the potentially affected dischargers on the St. Croix River adequate notice of potential liabilities and allow an adequate economic analyses to be undertaken.

D. EPA's Fish Consumption Rate is Not Based on Sound Science or Supported by the Data

Maine DEP Rule *Chapter 584 Surface Water Quality Criteria for Toxic Pollutants* establishes 32.4 g/day as the fish ingestion rate for determining human health water quality criteria. This fish consumption rate is based on the assumption that one-half pound (227 g) of recreationally caught fish obtained from Maine waters may be consumed weekly throughout the year. This fish consumption rate was derived from data provided by EPA, and recreationally caught fish consumption surveys conducted in Maine and in other states (MCDC 2001).

EPA alleges that Maine DEP's consumption rate does not adequately protect Maine's Native American Tribal consumers because it represents suppressed fishing efforts and consumption; *i.e.*, modern fish ingestion rates are influenced by limited availability due to advisories and bans and by consumer concern for the safety of available fish. Furthermore, EPA opines that deriving WQS using traditional sustenance consumption rates is needed to protect the Tribes as a target population. Finally, EPA concludes that there are no contemporary local survey data that document fish consumption rates for sustenance fishing in waters in Indian lands in Maine. Thus, EPA based WQS for "waters in Indian lands" on a fish consumption rate of 286 g/day that is reported in a EPA-funded and Tribal-sponsored analysis of traditional Native American lifeways, designed specifically for producing fish consumption rates for EPA's proposal.

Contrary to the foregoing, (1) site-specific, modern consumption surveys are most relevant to WQS development, (2) there are relevant, scientifically-sound, and peer-reviewed local fish consumption data available for both the general Maine fish consuming population, as well as for Tribal consumers (and these data have been applied regularly by EPA to inform fish consumption rate estimates), and (3) the self-funded and self-directed Tribal Lifeways fish consumption value is an inappropriate and irresponsible factor on which to base WQS. Present day tribal fish consumption rates are well represented, if not over-estimated, by Maine DEP's fish consumption rate, and that value should continue to be used to inform water quality regulations for all inland waters in Maine for all populations.

EPA has established a methodology for states and tribes to develop ambient water quality criteria (EPA 2000). This methodology recommends the following hierarchy for selecting fish consumption rates to be used in the following order of preference.

1. Use a "site-specific fish consumption rate that represents at least the central tendency of the population surveyed (either sport or subsistence, or both),"

2. If surveys conducted in the geographic area are not available, "consider results from existing fish intake surveys that reflect similar geography and population groups (e.g., from a neighboring State or Tribe or a similar watershed type),"

3. Use intake rate assumptions from national food consumption surveys such as the national food consumption surveys conducted by the U.S. Department of Agriculture, or

4. Use EPA's defaults of 17.5 g/day for the general adult population and sport fishers, and 142.4 g/day for subsistence fishers.

EPA (2000) uses the default rate of 17.5 g/day in its national 304(a) criteria derivations, a rate chosen to be protective of the majority of the general population. EPA changed the default fish consumption rate to 22 g/day, but also cited, emphasized, and retained the above hierarchy for selective fish consumptions (EPA 2015). In addition, EPA (2000) states that it "has provided default values for States and authorized Tribes that do not have adequate information on local or regional consumption patterns, based on numerous studies that EPA has reviewed on sport anglers and subsistence fishers." While EPA's methodology allows substantial flexibility in the development of state-specific or waterbody-specific WQS, it is clear that protection of every potentially exposed individual is not its goal. Instead, the methodology strives to protect average consumption among all potentially exposed populations, including higher consuming subpopulations.

EPA's preferred methodology for selecting fish consumption rates is the use of state-specific data where available. Such data are available in Maine for the general angler population and also for various, potentially sensitive ethnic subpopulations in the State, including Native Americans.

A one-year state-wide survey of licensed Maine recreational anglers was conducted in 1991. Those survey data indicated that 95 percent of the Maine anglers surveyed who consumed sport-caught fish obtained through both open-water and ice-fishing in Maine consumed a total of 26 g/day or less. At the time the survey was conducted, there were fish consumption advisories present on only 200 miles of the more than 37,000 miles, or about one-half of one percent, of rivers, streams, and brooks in the state, and there were no advisories present on any of Maine's roughly 2,500 lakes and ponds. As a result, Maine anglers had the ability to fish from a nearly unlimited number of non-advisory Maine water bodies during that time period. Thus, the results of this survey can be considered to represent consumption associated with unsuppressed fishing efforts.

Fish consumption rates for a number of identified subpopulations were also estimated based on those survey data. The group with the highest consumption rate comprised those individuals who identified themselves as Native Americans. A total of 148 Native Americans were included in the surveyed population (11 percent of the population who participated) and 96 of those individuals reported consuming freshwater fish that had been sport-caught. While the median consumption rate (50th percentile) of 2.3 g/day for this subpopulation was similar to other groups evaluated, the arithmetic mean of 10 g/day was higher than the arithmetic mean of 6.4 g/day for the total population, and the 95th percentile of 51 g/day for Native Americans was nearly double the 95th percentile for the total angler population (ChemRisk and HBRS 1992). These data indicated that there was a portion of the Maine Native American population that, on average, was consuming fish at higher rates than the general Maine angler population. However, only six (6 percent) of the 96 Native Americans who consumed fish consumed at rates higher

than Maine's default fish consumption rate, 32.4 g/day. In addition, the maximum rate reported by this subpopulation (162 g/day) was lower than the maximum consumption rate of 182 g/day reported for the entire Maine population surveyed. Thus, while the average Native American angler consumed more than the average recreational angler, the consumption rates for the very highest consumers were similar to those for the population at large.

The basis for the Native American tribal fish consumption rate applied by EPA in the derivation of the WQS for waters in Indian lands (and for any water to which the sustenance fishing designation use based on MIA applies [81 FR 23243, Part III.2]) is the reported results of a EPA-funded dietary reconstruction study conducted by Harper and Ranco (2009). These authors estimated historical consumption rates between 286 and 514 g/day for Maine's Native American tribes based on assumptions about caloric intake and literature-based information about the historical dietary practices of Native Americans in the 16th, 17th, 18th, and 19th centuries. The stated intent of that report was to reflect the historical patterns of individuals fully using their natural resources, and the report asserted that individuals could not return to these patterns because of present-day environmental contamination conditions but that they would return to this behavior "once protective standards are in place."

This report implies that impaired water quality is the reason that individuals do not currently consume fish at the historically higher rates, and that a substantial number of them would return to those historic consumption rates if water quality was improved. However, neither assertion is true, for the following reasons:

- All individuals who lived in Maine in the 16th, 17th, 18th, and 19th centuries lived in a subsistence manner. Thus, this behavior was not limited to the tribes. Hunting, fishing, farming, and trading were the only way individuals could feed themselves, as there were no widely available commercial foods. Due to the current commercial availability of fresh, frozen, and prepared foods in stores and restaurants, and public assistance for low income persons, this lifestyle is no longer necessary for survival in Maine.

- It is very unlikely that many, if any, individuals would return to this lifestyle in the future. At the time the Maine angler survey was conducted, advisories were limited to specific main stem reaches of four warm-water rivers in the State, but there were no advisories on any other water bodies. Thus, Maine anglers had a vast number and variety of non-advisory fishing resources available at that time. Despite this, only 65 percent of the licensed Native Americans who participated in the survey actually consumed sport-caught fish. This percentage was lower than the 77 percent of the total angler population surveyed that consumed sport-caught fish. Thus, even when nearly unlimited resources were available, none of the Native Americans included in the survey consumed at the levels asserted by the Harper and Ranco (2009) study.

- While it is possible that some tribal members may desire to return to a traditional, subsistence lifestyle, this would certainly not be "typical" behavior among tribal members, which is the focus of EPA's (2000) methodology document. It is highly unlikely that younger tribal members, who have never engaged in such

practices, would adopt them as a way of life. In fact, studies of traditional, high-fish consuming populations that have immigrated to the U.S. indicate that, after a few years of acculturation in the U.S., their sport-caught fish consumption is substantially reduced and replaced by other proteins and commercial sources of fish. This change in behavior is even more marked for the second generations of those populations, who tend to discard the previous cultural practices and acclimate to a more typical American diet (Shatenstein, et al. 1999; Sechena, et al. 1999).

- Changes in diet based on economic development and the increased availability of commercial food sources have been clearly demonstrated even for native populations that have historically relied on natural resources for their food (Nobmann, et al. 1992). Wolfe and Walker (1987) clearly demonstrated that the consumption behaviors of Alaskan Inuits, Eskimos, and Aleuts changed markedly when formerly isolated villages were connected by roads so that commercial food was more readily available.

All of the available data indicate that it is highly unlikely that a substantial number of Native Americans in Maine would return to historical subsistence behaviors that occurred prior to the 20th century even if Maine water bodies were returned to a pristine condition. This is largely due to the commercial availability of wide variety of market-based foods. In fact, when nearly all of Maine's water bodies were viewed as pristine, due to the lack of advisories at the time the Maine angler survey was conducted, this type of behavior was not exhibited.

As specified in its own guidance, EPA should rely on local fish consumption survey data for the target population. Because it is based on and supported by fish consumption survey data, the current fish ingestion rate of 32.4 g/day should be retained as the basis for WQS for all waters and uses in Maine. This rate is protective of more than 95 percent of the total angler population in Maine and is protective of 94 percent of the Native American angler population in the State. It is based on state-specific data, as outlined in the first tier of EPA's (2000) hierarchy, and it exceeds the rate of 17.5 g/day that EPA uses to develop its national water quality criteria.

E. EPA's Final Rule Will Not Have a Measureable Benefit for Maine's Indian Tribes

EPA's promulgation of chemical-specific WQS in Indian waters based on a fish consumption rate of 286 g/day at a 1E-06 target risk level will not result in a measureable reduction in lifetime cancer rates. To illustrate this, we compare background or current cancer risks to the incremental change in the cancer risk based on EPA's use of a 286 g/day fish consumption rate. The background lifetime risk of developing cancer rate in the U.S. is 0.4205, or roughly 1 in 2 for men and 0.3758 or 1 in 3 for women.[2]

---

[2] http://www.cancer.org/cancer/cancerbasics/lifetime-probability-of-developing-or-dying-from-cancer, visited on 06/13/2016.

Historically, Maine has relied on a 32.4 g/day fish consumption rate and a 1E-06 target risk threshold for setting WQS, so the above background risks represent the current or background exposures and risks. EPA's promulgation for waters in Indian lands uses a fish consumption rate of 286 g/day, which would theoretically change the lifetime cancer risk for men from 0.420500 to 0.420491, and for women from 0.375800 to 0.375791. These differences in lifetime cancer risk are not measurable, nor are they meaningful from a public health perspective. In essence, the 32.4 g/day fish consumption rate used for setting WQS in the rest of the State of Maine provides as much meaningful protection as does the EPA's promulgation, so EPA's changes to the fish consumption rate for waters in Indian lands is not warranted for the purpose of protecting human health.

F. The Final Rule is Inconsistent with the Settlement Acts

The Final Rule is inconsistent with the Settlement Acts in several respects, some of which have already been discussed. In addition, EPA makes the following statements.

- *Page 23241: "a key purpose of the settlement acts was to confirm and expand the Tribes' land base, in the form of both reservations and trust lands, so that the Tribes may preserve their culture and sustenance practices, including sustenance fishing."*

This statement wrongly asserts that a key purpose of the Settlement Acts was to allow the Maine Tribes to preserve their sustenance fishing practices in waters located outside of tribal reservation lands, including in trust lands. In fact, the Settlement Acts provide that the tribal members' sustenance fishing right is limited to the tribal reservations, which do not include trust lands. 30 M.R.S. §§ 6205 (distinguishing between tribal reservation land and tribal trust land), 6207(4) ("the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, <u>within the boundaries of their respective Indian reservations</u>, for their individual sustenance . . . " (emphasis added)). Thus, it would be illegal for tribal members to engage in sustenance fishing when they are located in inland waters outside their reservations. When located in such waters, tribal members are subject to the fishing restrictions – including bag limits – that apply to all other Maine citizens. 30 M.R.S. § 6204.

The court in *PIN v. Mills*, No. 1:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015), concluded that the Section 6207 sustenance fishing right applies to the main stem of the Penobscot River, although it also concluded that the river itself is outside the Penobscot Reservation. That order has been appealed to the First Circuit Court of Appeals, so it is premature for EPA to base this rulemaking on the decision in that case.

Further, the EPA statement above wrongly assumes that the Northern Tribes also have a sustenance fishing right that may apply to waters within their trust lands, or even beyond those trust lands. In fact, the Northern Tribes do not have any sustenance fishing right; the Settlement Acts grant that right only to the Southern Tribes, and only within their reservations.

- *TSD, pages 4-5: "the approved designated use of sustenance fishing set forth in MIA sections 6207(4) and (9) applies to all inland waters where the Southern Tribes have a right to sustenance fish, irrespective of whether such waters are*

determined to be within or outside of the scope of their reservations for purposes other than sustenance fishing."

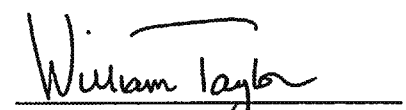
As discussed above, the Settlement Acts provide that the tribal members' sustenance fishing right is limited to the tribal reservations, so it would be illegal for tribal members to engage in sustenance fishing when they are located in inland waters outside their reservations.

IV. CONCLUSION

For the reasons described above, Petitioners request that EPA reconsider the State of Maine's Water Quality Standards and repeal or withdraw the Promulgation of Certain Federal Water Quality Standards Applicable to Maine published at 81 Fed. Reg. 92,466-92,494 (Dec. 19, 2016).

Dated: March 6, 2017

WILLIAM E. TAYLOR
PIERCE ATWOOD LLP



WILLIAM E. TAYLOR
254 Commercial Street
Portland, ME 04101
(207) 791-1213