Knapp, Michael

From: Maher, Lauren
Sent: Wednesday, July 18, 2018 3:42 PM
To: Reid, Jerry; Boak, Scott
Cc: Carson, Davida; Fotouhi, David; Dunn, Alexandra; Neugeboren, Steven; Schroer, Lee; Koslow, Karin; Siegal, Tod; Marshall, Tom; Dierker, Carl; Williams, Ann; Knapp, Michael; Nagle, Deborah; Fleisig, Erica
Subject: RE: Maine v. EPA - Settlement Discussions
Attachments: Micmac Tribal Lands Map.pdf; HBMI Trust Lands Map.pdf

Categories: Record Saved - Shared

Confidential Settlement Communication Subject to Fed. R. Evid 408

Hi Jerry and Scott,

We appreciated the opportunity to hear the State's perspective on Monday, and we agree that given our desires to reach settlement on the current timeline, frequent communications will facilitate the process of trying to reach agreement.

We heard your legal concerns and analysis of the proposal we shared with the State for last Thursday's call as well the State's interest in legal clarity on the issues currently in litigation. While, for the reasons we explained last week, we continue to have significant legal concerns with the State's proposal, we have focused our internal deliberations this week on the concerns that you raised Monday with regard to EPA's suggestion that the State propose the national default Fish Consumption Rate (FCR) for tribal waters beyond the ones you have identified near the Southern Tribes' reservations (e.g., extending the default FCR to all tribal waters, including the Northern and Southern Tribes' trust waters). We summarize below our understanding of your concerns, and a conceptual framework we have developed through internal discussions this week among staff and with our principals, which we believe could be a potential path forward.

We heard your driving concern regarding what the factual basis would be for the State to propose a fish consumption rate (FCR) of 142 g/day for what were referred to as the "vast" tribal trust waters. In response to your request for a list of waters related to the Northern Tribes, we have attached two maps which depict the scope of what we understand their trust land holdings to be. You will see that the only relatively major waterbody included is a stretch (approximately 6 miles) of the Meduxnekeag River in and adjacent to the Houlton Band of Maliseet Indians' trust lands. The remaining waterbodies appear to be ponds/small lakes, for which we identified no permitted dischargers.

You also stated that the Northern Tribes should be treated similarly to other populations, in a neutral fashion, and that sustenance fishing can be practiced by non-tribal Maine citizens in areas outside tribal waters. You expressed particular concern with EPA's proposal regarding scope, noting what the State referred to as the "jurisdictional" implications of proposing to apply a sustenance fishing FCR to tribal trust waters.

To address these concerns, we would like to discuss on Thursday's call the following approach:

1. DEP would publish a notice in advance of a proposed rule (styled to suit the State's process; in federal rulemakings it may fit the style of an Advanced Notice of Proposed Rulemaking) which would solicit comments from the public identifying waters in the State used by subsistence/sustenance groups/populations.

- The purpose of the solicitation would be for determining where to apply site-specific human health criteria (HHC) using the national "default" FCR value of 142.4 g/day, which as you know is EPA's recommended default value to protect subsistence fishers for use by States that do not have adequate information on local or regional consumption patterns. Therefore, we would anticipate the relevant information for use by the State (and by EPA in reviewing the State's adoption of site-specific criteria under section 303(c)) would include qualitative information (as opposed to quantitative data, discussed below) such as groups identifying waters they utilize as part of their sustenance fishing practices.

- While such a solicitation would likely not yield quantitative fish consumption rate data, EPA is willing to discuss with the State a process for collecting such data, with EPA providing technical assistance and exploring possible funding sources. These data, when collected, could be utilized by the State to revise the site-specific HHC based on the national default FCR, as appropriate, but given the longer time horizon, would not be a critical path element of the settlement.

- This approach would address both of the primary concerns expressed by the State on Monday's call – establishing a record foundation for applying the default national rate for appropriate waters, and treating all Maine populations similarly. Also, EPA understands and does not expect that the water quality standards program target protection of every individual practicing sustenance fishing; rather, it is appropriate for the State to evaluate the information in the context of identifying subsistence/sustenance groups/populations such as, but not limited to, tribal populations.

- To the extent DEP has programmatic concerns about soliciting public input on a state-wide basis (e.g., agency resource implications), the State could choose to proceed in a step-wise fashion, for e.g., by first requesting such information with regard to waters covered by the federal human health criteria with the expressed intent of expanding the information to collect information more widely in subsequent action(s). We defer to the State's judgment on how to allocate its limited resources, but such a sequential approach could be less resource-intensive in the near term, provide a record foundation for identifying waters subject to sustenance fishing currently covered by EPA's human health criteria, yet still signal the State's intention of treating all Maine citizens similarly in assessing sustenance fishing over time.

2. Based on consideration of the public comments, DEP would propose site-specific HHC based on the national default FCR for waters which the information submitted indicates are being used by subsistence/sustenance groups/populations.

The remainder of the steps would track, from a process standpoint, EPA's first proposal, including EPA's rulemaking proceeding in tandem with and in reliance upon the State's proposed site-specific HHC and submittal of final criteria for review to EPA. The process would culminate in EPA's withdrawal of its prior use approval designations/interpretations and Administrator determination, and approval of the State's general fishing designating use without an explicit sustenance fishing use interpretation.

This framework would differ from EPA's first proposal in that EPA would review the site-specific HHC in light of the information collected from the public under step 1 and determine whether they protect the state's general designated fishing use, including use of a FCR of 142.4 g/day for waters which the information indicates are used by subsistence/sustenance groups/populations. For those waters where there is no current information, and no information is submitted in response to the State's solicitation, to support the conclusion that the waters are used by subsistence/sustenance groups/populations, Maine would submit and EPA would review, Maine's updated HHC based on the State's statewide 32.4 g/day FCR in light of the general fishing designated use.

Please let us know if you have any thoughts on this approach prior to our call tomorrow afternoon, otherwise we can discuss it then, along with any further thinking you all have done since we spoke earlier in the week.

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- Settlement Meeting with Maine 7/19/18
  - HQ: Koslow, Maher, Fotouhi, Siegal, Erica,
  - R1: Dierker, Williams, Moraff, Knapp
  - DOJ: Carson
  - Maine AG:
  - Maine DEP:
  - Initial remarks by Gerry Reid: