United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

JAN 30 2015

Avi S. Garbow
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes

Dear Mr. Garbow:

The State of Maine has submitted proposals to the Environmental Protection Agency (EPA) to implement Water Quality Standards (WQS) within waters set aside for federally recognized tribes under applicable state and Federal law for uses including sustenance fishing (hereinafter described as Maine Indian Waters).[1] To assist in your review of Maine's proposals, you have asked for the Department of the Interior's views regarding tribal fishing rights in Maine and particularly the relationship between tribal fishing rights and water quality. We have reviewed applicable law and, for the reasons explained below, conclude that all four of the Maine tribes—the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs—have federally-protected tribal fishing rights. These fishing rights should be taken into account in evaluating the adequacy of WQS in Maine.

1. Overview of Tribal Fishing Rights in Maine Indian Waters

As you are well aware, the four federally recognized Indian tribes in the State of Maine are subject to a unique statutory framework established by the state-law Act to Implement the Maine Indian Claims Settlement ("Maine Implementing Act"),[2] the state-law Micmac Settlement Act,[3] the federal Maine Indian Claims Settlement Act ("MICSA"),[4] and the

[1] We note that the exact boundaries of at least some Indian lands and territories in Maine remain in dispute. For example, the United States has intervened in a lawsuit filed by the Penobscot Nation against Maine claiming that the Penobscot Reservation includes waters in the Main Stem of the Penobscot River. *See* Order on Pending Motions in *Penobscot Nation v. Mills*, 1:12-cv-00254-GZS (D. Maine Feb. 4, 2014) (granting US motion to intervene). It is beyond the scope of this letter to precisely identify all Maine Indian Waters. The location of Maine Indian Waters for each Tribe would have to be defined based on all applicable law, including statutory language, applicable property law doctrine, and lands reserved by treaty and retained by the tribes pursuant to statute. We do not elaborate here on the question of whether the Maine tribes have additional fishing rights outside of Indian lands and territories.

[2] 30 M.R.S. §§ 6201 *et seq.*

[3] 30 M.R.S. §§ 7201 *et seq.*

[4] 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act[5] (collectively the "Settlement Acts").[6]

There is no dispute that the four Maine tribes have historically engaged in fishing in Maine waters and that fishing is an important cultural and economic activity for Maine tribal members.[7] Because of differences in their history and applicable statutory language, the fishing rights of the two Southern Tribes—the Passamaquoddy Tribe and the Penobscot Indian Nation— derive from different legal sources than the fishing rights of the Northern Tribes—the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. But all Maine tribes possess fishing rights that EPA should consider when analyzing proposed water quality standards in Maine.

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters[8] are expressly reserved[9] fishing rights: the Maine Implementing Act

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[5] P.L. 102-171, 105 Stat. 1143 (1991).

[6] In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1725(i). Federal recognition was extended to the Aroostook Band of Micmacs eleven years later with the enactment of P.L. 102-171 (Sec. 6(a)), so now these four Maine tribes are recognized as eligible for the rights and benefits of Indian tribal status. *See generally* 25 U.S.C. § 479a-1(a) (providing for listing of federally recognized tribes that are all entitled to "services provided by the United States to Indians because of their status as Indians").

[7] Notably, several standalone provisions in Maine law recognize and arguably encourage the continuing centrality of fishing to the traditions and health of Maine tribes. First, the State of Maine recognizes and facilitates fishing as a central part of tribal culture by issuing permits to tribal members to fish in Maine waters at no cost. 12 M.R.S. § 10853(E). Second, the State has enacted legislation providing for special treatment of tribal members engaged in fishing for marine organisms, exempting them from many state permitting requirements and providing a broad exemption for many tribal sustenance and ceremonial uses. 12 M.R.S. § 6302-A. Concerns of the tribes with the process by which this language was adopted and objections to the definition of sustenance are explained in a recent report by the Maine Tribal-State Commission. Me. Indian Tribal-State Comm'n, *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* (June 17, 2014), *available at* http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf ("Commission Saltwater Fisheries Report").

[8] 30 M.R.S. § 6203(5) (defining Passamaquoddy Indian Reservation as "those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794" except for lands transferred by the Tribe after these treaties but before enactment of the Maine Implementing Act, and with certain additional specifications); § 6203(E) (defining Penobscot Indian Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" except for islands transferred by the Tribe after these treaties but before the enactment of the Maine Implementing Act and with the addition of other specifically enumerated parcels). Legislative history confirms that the Reservations include riparian and littoral rights under State law or treaties:

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law.

State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[9] A reserved right is a right that has been retained since aboriginal times. Section 6207(4)'s sustenance fishing right applies within those Reservations retained by the Southern Tribes first under treaties and now under the Settlement Acts, see *supra* note 8, since aboriginal times. Congress used an apt phrase that

acknowledges the right of Penobscot Nation and Passamaquoddy members to "take fish . . . for their individual sustenance" within their reservations free of state regulation.[10]

These statutorily-acknowledged fishing rights are rooted in treaty guarantees[11] that were upheld through the Settlement Acts. The Passamaquoddy Tribe's 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees "to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation."[12] The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to "pass and repass" the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.[13]

The Maine Implementing Act further provides for tribal sustenance fishing in certain ponds on lands located outside the Southern Tribes' reservations, but held in trust by the United States as part of the Indian territories established under the Settlement Acts. The Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands which "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation."[14] The Maine Implementing Act also includes special provisions for

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captures the reserved right concept in the legislative history for the Federal Maine Indian Claims Settlement Act, characterizing fishing rights as an example of natural resources considered "expressly retained sovereign activities." H.R. Rep. No. 96-1353 at p 15 (1980).

[10] This reading is established by language in 30 M.R.S. § 6207(4):

> 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 subsection 6 [providing for the State to limit tribal fishing if necessary to protect the stock of fish].

State regulation is allowed only in the case of conservation necessity, as laid out in the Maine Implementing Act at 30 M.R.S. § 6207(6).

[11] These treaties were State treaties, negotiated not with the United States but with the Commonwealth of Massachusetts; Maine later adopted the responsibility to implement those treaties in its state constitution. See Maine Constitution, Art. X, Sec. 5:

> The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise.

Available at http://www.maine.gov/legis/lawlib/const1820.pdf. (Note that per Art. X, Sec. 7, the text quoted here is omitted from printed copies of the Maine Constitution, but still remains in force and effect.). The Settlement Acts preempt any contrary language in the treaties, but the legislative history discussed in *supra* note 8 explains that expressly reserved riparian rights under the treaties were retained under the Settlement Acts.

[12] The text of the treaty is available at http://www.wabanaki.com/1794_treaty.htm.

[13] *See, e.g., Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 86-89 (1918) (holding that where Congress set aside lands for the Metlakahtla Indians, a fishing tribe, it impliedly reserved fishing rights in the adjacent waters).

[14] 30 M.R.S. § 6207(1).

regulation of certain waters by the Maine Indian Tribal-State Commission.[15] Thus, through the Maine Implementing Act, the State has recognized the Southern Tribes' sustenance fishing rights within their territories, and the importance of fish to tribal members' diet.

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."[16] Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . . especially the reference to the right of taking fish."[17] The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly[18] to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,[19] with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.[20] When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

The sources of the fishing rights of Maine's Northern Tribes are different in that they are not discussed explicitly in the Settlement Acts. However, express language in a statute or

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[15] The Commission is an intergovernmental body made up of members appointed by the Tribes and the State. 30 M.R.S. § 6212. 30 M.R.S. § 6207(3) authorizes the Commission to promulgate fishing rules and regulations within specified waters on or adjoining the Penobscot Nation's and Passamaquoddy Tribe's territories, taking into account the "needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes."

[16] *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). The Indian canons of construction have been held to apply to interpretation of the Settlement Acts. *See infra* note 48 and accompanying text.

[17] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 678 (1979).

[18] Tribes have argued that in addition to fishing for individual consumption, the definition of sustenance traditionally incorporated two other components: barter and exchange. Commission Saltwater Fisheries Report, *supra* note 7, at p. 22-23.

[19] A study prepared for EPA in collaboration with the Maine Tribes discusses what level of fish consumption is representative of sustenance fishing in Maine Indian waters. Harper, Barbara and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, prepared for EPA in collaboration with the Maine Tribes, July 9, 2009, available at http://www.epa.gov/region1/govt/tribes/pdfs/DITCA.pdf.

[20] This statutory provision establishing a right of the State to regulate in limited situations of conservation necessity is consistent with the federal common law rule. *See United States v. Oregon*, 769 F.2d 1410, 1436 (9th Cir. 1990) (describing findings that court must make in order to uphold regulation of treaty rights to take fish, including that "States must consider the protection of the treaty right to take fish . . . as an objective co-equal with the conservation of the fish runs for other uses"); *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) ("Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.").

treaty is not necessary to establish the existence of a tribal fishing right.[21] Tribal fishing rights are implied through an analysis of the purpose of these land settlements—to create a permanent land base—and the trust property interests created pursuant to the Acts. As described below, these fishing rights are also rooted in state common law on the right of riparian owners to fish on their properties in addition to the Settlement Acts and federal common law on the importance and durability of tribal fishing rights.

The fundamental requirement for a fishing right is access to fishable waters, and legislative history for the Maine Implementing Act specifically addresses the issue of the tribes' access to waters in connection with their trust lands:

> Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law.[22]

This language allows for riparian rights to attach to the tribal trust lands held by the United States for the Northern Tribes, which are acquired by purchase and then put into trust.[23] In Maine, a right to fish is a right "included by general principles of law" when riparian lands are acquired,[24] and this language thus confirms that Maine's legislature recognized the right of the Maine tribes to engage in fishing on their reservation and trust

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[21] The hunting and fishing rights that were held to survive termination of the Tribe's status as a federally recognized tribe in the seminal case *Menominee Tribe of Indians v. United States* were created by treaty language providing that tribal land would be "held as Indian lands are held." 391 U.S. 404, 405-06 (1968). *See also United States v. Dion*, 476 U.S. 734, 738 (1986) (explaining that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress," and that these rights need not be expressly mentioned in the treaty). State regulatory jurisdiction is not incompatible with a tribal fishing right; the existence of state laws dealing with tribal fishing in Maine, *see supra* note 7, reinforces that the State acknowledges the importance of tribal fishing rights. Carole E. Goldberg et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1177-78 (6th ed. 2010) ("It is important to see that jurisdictional protections supplement rather than displace tribal property rights to hunt and fish.").

[22] State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[23] *See* 25 U.S.C. § 1724(d)(4) (providing for "land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band"); 30 M.R.S. § 6205-A (providing for acquisition of "Houlton Band Trust Land"; P.L. 102-171, 105 Stat. 1143, § 5 (providing for acquisition of "Aroostook Band Trust Lands"); 30 M.R.S. § 7202(2) (defining Aroostook Band Trust Land).

[24] The right of riparian landowners to fish is predicated on both State and federal common law. Based on the default Maine property rule, owners of riparian land also own out to the thread, or middle, of most streams. *Wilson & Son v. Harrisburg*, 107 Me. 207, 211 (1910) ("With respect to the rights of the riparian proprietor in floatable and non-tidal streams, it is the settled law of this State that he owns the bed of the river to the middle of the stream and all but the public right of passage."). Riparian property owners have the right to fish on their lands. *See* Answers to Questions Propounded to the Justices of the Supreme Judicial Court by the House of Representatives, 118 Me. 503, 507 (1919) (noting that "[t]he riparian proprietor has the right to take fish from the water over his own land").

lands alike when these lands are riparian to fishable waters. On the Northern Tribes' trust lands, this right is subject to reasonable State regulation.[25]

Even more importantly, however, the Northern Tribes[26] have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,[27] and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.[28] Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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[25] The Settlement Acts provide that State law applies to the trust lands of the Northern Tribes. We describe this as a right of "reasonable regulation" because the Settlement Acts did not contemplate and should not be read to allow State law that is discriminatory against tribes or not consistent with the Settlement Acts, including the federal purpose of holding this land base in trust. In section 1725(a) of MICSA, Congress approved 30 M.R.S. § 6204 of the Maine Implementing Act regarding the application of state law to Indian lands, specifying that Maine civil and criminal law would generally apply to these lands. While conferring civil and criminal jurisdiction on the State of Maine over the Northern Tribes' trust lands, nothing in section 1725 abrogates federal authority to protect these tribal trust lands. 25 U.S.C. § 1725(a) reads:

> Except as provided in section 1727(e) [dealing with Indian Child Welfare Act definitions] and section 1724(d)(4) [regarding acquisition of land and natural resources for the Houlton Band of Maliseet Indians] of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians 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.

[26] This discussion is aimed at the Northern Tribes, but we note that some of the Southern Tribes' Territories include lands held in trust that would have fishing rights based on this same trust land focused analysis. Some, but not all, of these lands have fishing rights confirmed through other statutory language, *see supra* notes 14-15 and accompanying text.

[27] For the Houlton Band of Maliseet Indians, 30 M.R.S. § 6205-A(3) describes restraints against alienation of these trust lands. The same language applying to the trust land of the Aroostook Band of Micmacs,is found at 30 M.R.S. § 7204(3). With respect to the Micmacs, legislative history is even plainer that Congress intended the trust lands to provide a land base for subsistence purposes: "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century . . . .Today, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." S. Rep. No. 102-136 at 5, 9 (1991) (quoting testimony of Dr. Harold E.L. Prins).

[28] Even for the Northern Tribes, the Maine Implementing Act recognizes that the tribes may retain certain aspects of governmental authority over tribal members. For example, 30 M.R.S. §6209-C(1)(a) provides:

> The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over . . . [c]riminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians, except when committed against a person who is not a member of the Houlton Band of Maliseet Indians or against the property of a person who is not a member of the Houlton Band of Maliseet Indians.

practices, which fosters tribal self-determination.[29] The legislative history for MICSA supports the view that one of Congress's purposes in providing Maine tribes with a land base was to preserve their culture.[30] The connection between fishing rights and land ownership is particularly emphasized in the Settlement Acts: the Maine Implementing Act defines the "land or other natural resources" to be purchased with federal funds and placed into trust as "any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and *fishing rights*."[31] The exercise of these fishing rights by Tribes is fully consistent with the Settlement Acts.[32]

In sum, the Federal Government as the owner of the trust lands for the benefit of the Tribes has a substantial interest in providing all Maine tribes, including the Northern Tribes, with a functional land base that ensures the continuation of their sustenance practices and cultural activities.[33]

2. Tribal Fishing Rights Include the Subsidiary Right to Sufficient Water Quality to Render the Rights Meaningful.

In Maine, EPA must determine how tribal fishing rights intersect with EPA's authority under the Clean Water Act to approve or disapprove State WQS. We are not aware of any case law addressing an identical situation to the one raised by Maine's proposed WQS. However, Federal courts have acknowledged the importance of permanent, enforceable fishing rights for tribes and have interpreted these rights expansively.

Tribal fishing rights encompass subsidiary rights that are not explicitly included in treaty or statutory language but are nonetheless necessary to render them meaningful. For example, in the 1905 case *United States v. Winans*, the Supreme Court held that a tribe must be allowed to cross private property to access traditional fishing grounds.[34]

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[29] *See* Final Rule, Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67929 (November 13, 2013) (noting in Background section that taking land into trust serves the "goals of protecting and restoring tribal homelands and promoting tribal self-determination" and "reaches the core of the Federal trust responsibility").

[30] Sen. Rep. No. 96-957, at 17 ("Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine."). Several of the Maine tribes submitted comments to the EPA about Maine's WQS describing the centrality of fishing to their cultures.

[31] 30 M.R.S. § 6203(3) (Emphasis added). MICSA includes this definition almost verbatim at 25 U.S.C. § 1722(h). 25 U.S.C. § 1724(d) authorizes the Secretary to "expend . . . the land acquisition fund for the purpose of acquiring land or *natural resources* for the . . . . Houlton Band of Maliseet Indians." Emphasis added. Section 5(a) of the Aroostook Band of Micmacs Settlement Act, P.L. 102-171, provides similarly that the Secretary is authorized "to expend . . . the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band" and defines natural resources to include fishing rights at section 3(4).

[32] Recognizing that Maine tribes have a tribal fishing right would not impinge upon Maine's right to regulate such a fishing right. The existence of a tribal fishing right does not affect or preempt Maine's regulatory jurisdiction as described in 25 U.S.C. § 1725(h).

[33] See *supra* note 30 and accompanying text.

[34] 198 U.S. 371, 384 (1905).

Similarly in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit held that a tribe's fishing right could be protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch.[35] In *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, the Sixth Circuit found that the treaty right to fish commercially in the Great Lakes includes a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially.[36] While the issues presented by diminished water quality in Maine are different from the issues presented by inadequate access to fishing places or the need to protect fish populations, the result for tribes if water quality in Maine Indian Waters is not protected is the same: Indian tribes will not be able to fish for their sustenance healthfully.

The rules in the cases identified above are all variations on the fundamental holding of *Washington v. Washington State Commercial Passenger Fishing Vessel Association* that tribes with reserved fishing rights are entitled to something more tangible then "merely the chance . . . occasionally to dip their nets into the territorial waters."[37] The holding of *Washington*, while specific to the treaty language at issue in that case, is consistent with similar holdings from other courts examining the question of whether a tribal fishing right implicitly contains within it the right to additional protections to render the fishing right meaningful. For example, in holding that a Tribe's hunting and fishing rights persisted, the Minnesota Supreme Court explained that "[c]ertainly, it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home."[38]

In the context of water quantity, courts have recognized that tribal fishing rights include the subsidiary right to water flow sufficient to maintain fish health and reproduction in order to effectuate the fishing right. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle."[39] The logic that supports the tribe's right to water quantity adequate to support a lifestyle based on fishing in *Adair* supports a conclusion that EPA should take tribal fishing rights into account when reviewing Maine's water quality standards. If water quality diminishes to the point where the fish are no longer safe to eat or able to reproduce, tribal fishing rights will suffer a diminution just as surely as they suffer from inadequate quantity of water to support fish.[40]

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[35] 763 F.2d 1032, 1034-35 (9th Cir. 1985).
[36] 141 F.3d 635, 639-40 (6th Cir. 1989).
[37] 443 U.S. 658, 679 (1979).
[38] *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).
[39] 723 F.2d 1394, 1409-10 (9th Cir. 1983). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).
[40] The leading federal Indian law treatise explains:

Ongoing litigation in Washington State involving questions about the extent to which tribal fishing rights encompass associated rights to protection for fish habitat also informs our analysis.[41] The tribes and the United States have argued that tribal fishing rights impose a duty on the state of Washington to refrain from building or maintaining road culverts that directly block fish passage both to and from breeding areas and therefore significantly and directly kill fish, diminish fish populations, and diminish habitat.[42] In 2013, the court adopted this analysis, concluding that the tribes' treaty based fishing right had been "impermissibly infringed" through the construction and operation of culverts that "has reduced the quantity of quality of salmon habitat, prevented access to spawning grounds, reduced salmon production . . . and diminished the number of salmon available for harvest."[43] The court issued a permanent injunction forcing the State to renovate its culvert system.[44] The decision is currently on appeal, but the district court's reasoning is consistent with the view that tribal fishing rights can be protected under the Clean Water Act.

When diminished water quality has hindered tribal uses of water outside the fishing context, courts have held for tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. In an Arizona case, *United States v. Gila Valley Irrigation District*, farmers with a more junior right whose properties were located upstream from a reservation were required to take steps to decrease the salinity of the tribe's water so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[45] Other courts have noted that in some situations protecting water

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> Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . . [H]abitat protection is an integral component of the reserved [fishing] right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

[41] The United States District Court for the Western District of Washington court held that several Washington State tribes' treaty fishing rights "implicitly incorporated the right to have the fishery habitat protected from manmade despoliation." *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (Phase II). The court explained that "the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless." *Id.* at 205. That decision was vacated on procedural grounds. *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (requiring plaintiffs to allege specific environmental harms before any declaratory judgment could issue, noting that "[i]t serves neither the needs of the parties . . . nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension").

[42] In *United States v. Washington*, 2007 U.S. Dist. LEXIS 61850, 37-38 (W.D. Wash. Aug. 22, 2007), the district court held in favor of the federal and tribal plaintiffs.

[43] *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. 2013).

[44] *Id.* at 78-79.

[45] 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), aff'd, 117 F. 3d 425 (9th Cir. 1997).

quality is fundamental to the protection of tribal rights to self-determination.[46] Given the importance of fishing to Maine tribes, protection of water quality sufficient to enable the tribes to continue to fish and to consume the fish they are able to catch is comparable to protecting water quality to allow the tribe in the *Gila Valley* case to continue to grow crops.

In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption. If third parties are free to directly and significantly pollute the waters and contaminate available fish, thereby making them inedible or edible only in small quantities, the right to fish is rendered meaningless. To satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption at sustenance levels.

3. The Trust Relationship Counsels Protection of Tribal Fishing Rights in Maine

EPA has already recognized that Maine tribes' fishing rights should be considered in regulating water quality in a 2003 decision regarding Maine's authority to issue permits under the Clean Water Act.[47] As EPA noted in that decision, the First Circuit has held that the Indian law canons of construction obliging courts to construe statutes which diminish the "the sovereign rights of Indian tribes . . . strictly" apply to the Maine tribes and that the requirement that ambiguity be interpreted in favor of tribes is "rooted in the unique trust relationship between the United States and Indians."[48]

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act[49] it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."[50] EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.[51]

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[46] *See Bagenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d. 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").

[47] 68 Fed. Reg. 65052, 65068 (Nov. 18, 2003).

[48] *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks omitted).

[49] The EPA specifically cited the provision codified at 33 U.S.C. § 1342(d).

[50] 68 Fed. Reg. at 65,068.

[51] The First Circuit, reviewing this EPA decision in *Maine v. Johnson*, found that EPA's analysis of the relationship between fishing rights and water quality was not ripe for consideration. 498 F.3d 37, 48 (1st Cir. 2007) ("The current relationship of the United States to [Maine] tribes, and the EPA's continued authority under the Clean Water Act to review Maine's exercise of ceded powers, present quite different

Secretary Jewell has recently reaffirmed the federal trust responsibility to tribes. Consistent with the principles of Secretarial Order 3335 on Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes, federal agencies should "[e]nsure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected."[52] In addition, consultation is a critically important part of the United States' government to government relationship with tribes, and the EPA should continue to fully consult with tribes regarding decisions that have implications for trust resources, including fishing rights.[53]

4. Conclusion

The Maine tribes rely on clean water, and in particular, on water of a quality sufficient to allow the tribes to engage meaningfully in fishing in Maine Indian Waters. Maine tribes rely on fish as a dietary staple and vital component of their cultures, and a diminution in their ability to take fish at sustenance levels results in a loss of food as well as a threat to their ability to carry on their traditions.

The Maine tribes have fishing rights connected to the lands set aside for them under federal and state statutes. Further, these fishing rights would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for their sustenance. The right of all four tribes to take fish is well-founded under State as well as Federal law as discussed in this letter.

Thank you for your attention to these matters of great importance to the Maine tribes. I appreciate the opportunity to submit these views for your consideration.

Sincerely,

Hilary C. Tompkins
Solicitor

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questions [from the ones decided in the case]. . . . [W]e take no view today as to the ultimate resolution of these potential issues.").

[52] Secretarial Order 3335 (August 20, 2014), Sec. 5, Principle 2, *available at* http://www.usbr.gov/native/policy/SO-3335_trustresponsibility_August2014.pdf.

[53] *See generally*, Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000).

RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE'S JANUARY 14, 2013, SUBMISSION TO EPA FOR APPROVAL OF CERTAIN OF THE STATE'S NEW AND REVISED WATER QUALITY STANDARDS (WQS) THAT WOULD APPLY IN WATERS THROUGHOUT MAINE, INCLUDING WITHIN INDIAN TERRITORIES OR LANDS

January 30, 2015

INTRODUCTION

This document contains responses to the significant comments EPA received concerning Maine's January 14, 2013, submittal to EPA Region 1, in which Maine proposed certain revisions to its surface water quality standards (WQS or standards) pursuant to section 303(c) of the federal Clean Water Act (CWA). EPA Region 1 solicited comments from the public specifically relating to the aspect of Maine's request that EPA approve the State's WQS revisions to apply in waters within Indian territories or lands (hereinafter referred to as "Indian lands") located in Maine. It is important to note that, in the Agency's judgment, the public comments EPA received in relation to Maine's January 14, 2013, submission raised both significant legal and technical questions, which extend equally to the EPA's decisions addressed in its letter approving and disapproving certain of Maine's standards in waters within Indian lands. EPA's responses to the comments below will be presented in the context of Maine's January 14, 2013, submittal, but EPA applied the principles articulated in this document to our decision on all the WQS the State has asked the Agency to approve for waters in Indian lands.

Maine's 2013 submittal specifically included a request that EPA approve the WQS revisions as applying to all waters throughout the State of Maine, including to waters within Indian lands located within the State. Neither the CWA (and its implementing regulations), nor the federal Administrative Procedure Act (APA), specify any notice and comment requirements that EPA must satisfy before approving or disapproving a state's new or revised WQS submittal. EPA's longstanding position has been that it is sufficient for EPA to review the adequacy of a submitting state's public process for revisions to its WQS and to rely on that process if it adequately notified and involved the public. See 40 C.F.R. §§ 131.5(a)(3), 131.6(e), and 131.20(b) and 40 CFR part 25 for public participation requirements relevant to state adoption of WQS. The State of Maine's Department of Environmental Protection (ME DEP) provided public notice and an opportunity to comment (including a public hearing), at the state level, on the WQS revisions included in the State's January 14, 2013, submittal to EPA.

However, while ME DEP provided public notice of the substance of the WQS revisions as they would apply generally in the State, the State's notice may not have sufficiently informed the public that ME DEP intended to seek EPA's approval of these revisions to apply in waters within Indian lands. To ensure adequate public participation and development of a complete administrative record for EPA's subsequent decisions, EPA decided to seek further comment due to the possibility that the State's notice may not have been sufficiently clear to some members of the public about the State's intent to apply its WQS revisions to waters in

Indian lands. Accordingly, in August of 2013, EPA solicited additional comment on the approvability of these WQS for waters in Indian lands. In particular, EPA sought comments regarding the State's legal authority to establish WQS in waters in Indian lands under the Maine Implementing Act (MIA, 30 M.R.S.A § 6401, et seq.) as ratified by the Maine Indian Claims Settlement Act (MICSA, 25 U.S.C. § 1721, et seq.) and on whether these WQS revisions would adequately protect water quality in Indian lands.

This responses to comments (RTC) document contains EPA's responses to the significant comments EPA received. We reiterate that EPA lawfully used its discretion to seek additional public input to better inform its approval/disapproval decision and to ensure that any potential flaws in the State's public process are remedied. There is no legal prohibition in the CWA, the Administrative Procedure Act, or any other applicable legal requirement that precludes EPA from seeking such comment to better inform its decision when the administrative record before it is potentially incomplete. Adequate public participation in the context of a federal agency's decision-making process, where regulatory decisions are being made that potentially impact the public or where there is significant public interest, is a fundamental aspect of administrative law in our system of government. Furthermore, we emphasize that EPA's having sought public comment in this one instance, in addition to the State's public participation process, does not in any way set a legal or policy precedent that could in any way be used by any person in the future to require EPA to solicit public comment on any State's WQS submission for EPA review and approval or disapproval. As explained throughout EPA's RTC document and Decision Support Document related to EPA's decision on Maine's WQS submissions, the Agency has been presented with a unique set of circumstances due to the highly atypical legal framework that MIA and MICSA establish for Indian lands in Maine; circumstances which do not exist in other areas of the United States.

The WQS revisions in Maine's 2013 submittal include five new or revised WQS criteria, including three human health criteria (HHC) for the allowable levels or concentrations in surface waters for three toxic pollutants: arsenic, acrolein, and phenol. For arsenic, ME DEP changed the cancer risk level, fish consumption rate, and percentage of inorganic arsenic (relative to organic arsenic) used in calculating the criteria for *inorganic* arsenic, which is the form of arsenic that is harmful to human health. For acrolein and phenol, ME DEP updated its ambient water quality criteria consistent with updates EPA has made to its recommended criteria for those two pollutants based on newly published reference doses.

This RTC document is a source of information about EPA's decision on Maine's submissions, and should be read in conjunction with EPA's letter communicating its decision on these and other WQS to Maine DEP and with the accompanying Decision Support Document; the latter focusing specifically on, among other things, the question whether Maine has adequate legal authority to establish WQS in waters located in Indian lands and on whether Maine's standards meet the requirements of the CWA. This RTC document incorporates the terminology and reasoning presented in those other two documents, while expanding on it in certain respects to address the more specific individual comments EPA received. This responsiveness summary digests and organizes the significant comments received. Opposing comments concerning each issue were grouped together where EPA received comments on both sides of an issue. We received

comments from the State of Maine's Office of the Attorney General, the Commissioner of the ME DEP, and from three of the four federally recognized Indian Tribes in Maine – the Penobscot Nation, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs; no other parties provided comments to EPA.

The particular language used in the summary of each issue presented below may derive primarily from one set of comments. But this does not mean that EPA has not considered each of the comments received on the issue in question. EPA did not limit its analysis of the comments submitted to the digest presented below, and we have reviewed each comment in its entirety. This outline and its digest of the comments are simply designed to structure our responses and make them more accessible to the interested public, while addressing the substantive content of all of the significant comments received.

Comments and Responses to Comments on EPA's 2003 NPDES Program Approval

Some of the key issues relevant to Maine's WQS submission were also the subject of public comments EPA received in the context of EPA's 2003 action on Maine's National Pollution Discharge Elimination System (NPDES) program application. In fact, the Penobscot Nation and the Houlton Band of Maliseet Indians specifically incorporated by reference into their comments on Maine's WQS submission those Tribes' earlier comments on Maine's NPDES program application. Consequently, EPA's responses today to some of those same issues, or at least to certain aspects of those same issues, parallel EPA's earlier responses to comments received on Maine's NPDES program application. For completeness and efficiency, rather than repeat in this RTC document all of EPA's responses to the Tribes' comments on Maine's NPDES program, EPA hereby incorporates by reference its responses to public comments received on Maine's NPDES program application, but only to the extent those earlier responses are consistent with, and are not superseded by, the First Circuit's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), and the responses expressly articulated in this document and in EPA's accompanying Decision Support Document.

Federal Indian Common law cited by Maine Indian Tribes and Protecting the Tribes' Sustenance Fishing

As discussed in detail below in EPA's specific responses to specific public comments, many of the Maine Tribes' (primarily the Penobscot Nation's) legal arguments opposing Maine's jurisdiction to establish WQS in waters within Indian lands included citations to federal case law. EPA addresses that case law in more detail later in this RTC document. Many of the Tribes' comments rely heavily on the case law. It is therefore worth noting here in summary, for purposes of orienting the reader to what follows, that EPA found many of those cited cases compelling from the standpoint of supporting the proposition that the CWA requires protection of the quality of the water that supports the Maine Tribes' sustenance fishing practices, culture and lifestyle. The cases cited also represent a strong collection of federal Indian common law on subjects such as the federal government's trust responsibility to Indian tribes, the sovereign status of Indian tribes in

the United States, and the canons of statutory construction used by the federal courts to interpret treaties and statutes addressing the rights of Indian tribes.

With one very important and dispositive exception that arises due to the unique nature and jurisdictional provisions of the settlement acts[1], EPA does not disagree that the cases cited by the Maine Tribes articulate valid and accurate general principles of federal Indian common law. In EPA's view, however, none of these cases answers or is dispositive of the question whether Maine has legal jurisdiction to establish WQS in waters within Indian lands in Maine, but that is precisely the argument that the Maine Tribes frequently assert is supported by those cases. As EPA explains in this RTC document and in its Decision Support Document, the settlement acts clearly undermine the Maine Tribes' use of those cases to oppose Maine's assertion of jurisdiction. Moreover, EPA reads the vast majority of the Maine Tribes' comments as taking the position that protection of their sustenance fishing practices and a legal conclusion that Maine has jurisdiction to establish WQS in waters within Indian lands in Maine are mutually exclusive. The inaccuracy of that position is demonstrated by EPA's Decision Support Document. That is, EPA has determined that Maine has jurisdiction to establish WQS in waters within Indian lands in Maine and that EPA has no discretion to find otherwise given the settlement acts. At the same time, however, EPA has also disapproved certain of Maine's WQS as not being adequately protective of the applicable CWA designated uses, which encompass the Maine Tribes' sustenance fishing practices. Consequently, the jurisdictional scheme embodied in the settlement acts renders those cases inapposite to EPA's decision. In addition, to the extent that the Maine Tribes cite

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[1] Settlement Acts in Maine

MIA and MICSA

In 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA), which resolved litigation in which the Southern Tribes asserted land claims to a large portion of the State of Maine. 25 U.S.C. §§ 1721, et seq. MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA), which was designed to embody the agreement reached between the State and the Southern Tribes. 30 M.R.S. §§ 6201, et seq. In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA. 30 M.R.S. § 6205-A, 25 U.S.C. § 1724(*d*)(1). Since it is Congress that has plenary authority as to federally recognized Indian Tribes, MIA's provisions concerning jurisdiction and the status of the Tribes are effective as a result of, and consistent with, the Congressional ratification in MICSA.

MSA and ABMSA

In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs. 30 M.R.S. §§ 7201, et seq. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. 25 U.S.C. § 1721, Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143. One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Malisects in MICSA. See ABMSA § 2(a)(4) and (5). In 2007, the Federal Court of Appeals for the First Circuit confirmed that the Micmacs and Malisects are subject to the same jurisdictional provisions in MICSA. Aroostook Band of Micmacs v. Ryan, 484 F.3d 41 (1st Cir. 2007).

Where appropriate, this document will refer to the combination of MICSA, MIA, ABMSA, and MSA as the "settlement acts."

to the First Circuit's opinions interpreting MIA and MICSA, EPA's RTC document explains why those cases also do not support the Tribes' assertion that Maine does not have jurisdiction.

Two examples illustrate this general point. While EPA agrees that *U.S. v. Adair*, 723 F. 2d 1394 (9th Cir. 1984); *Winters v. United States*, 207 U.S. 564 (1908); and *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658 (1979), may be cited in support of arguments that address tribal sustenance fishing practices and the associated quantity and/or quality of the waters that support those fishing practices, nothing in those cases does or can supersede or affect the jurisdictional arrangement embodied in the settlement acts. Similarly, while *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *State of Washington, Dep't of Ecology v. U.S.E.P.A.* 725 F. 2d 1465 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Oklahoma Tax Comm'n v Sac & Fox Nation*, 508 U.S. 114 (1993); and *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g*, 476 U.S. 877 (1986), may each stand for or support in some manner the proposition that states generally lack jurisdiction in Indian reservations absent express authorization by Congress, those cases cannot properly be cited to support an argument that Maine has no jurisdiction to apply state law in Indian lands in Maine, because Congress expressly granted Maine such authority in the settlement acts.

EPA's Specific Responses

I. Maine's legal authority or jurisdiction to establish WQS in Indian waters.

A central issue raised by Maine's WQS submission is whether Maine has the necessary legal authority, or jurisdiction, to establish WQS applicable to surface waters (both reservation and trust land waters) situated in Indian lands located within the exterior boundaries of the State of Maine. EPA received many comments about this legal issue from three of the Maine Indian Tribes and from the State of Maine.

EPA's Decision Support Document contains, among other things, a legal analysis of the specific statutory provisions of the settlement acts and their respective legislative histories. That analysis supports EPA's legal determination that Maine has the necessary legal authority to establish WQS in surface waters located in Indian lands in Maine. While the legal analysis constitutes EPA's reading of the language and legislative history of the statutes themselves, it does not always address directly the way in which the Maine Tribes' articulated their jurisdictional arguments opposing Maine's legal authority to establish WQS in waters in Indian lands in Maine.

The reason for that is that the Tribes' public comments on the jurisdictional question rely, to a great extent, on two concepts derived from principles of

federal Indian common law, i.e., the federal government's trust relationship to Indian tribes generally and the concept of inherent tribal sovereignty. It is for that reason that EPA's responses below to the Maine Tribes' public comments on the jurisdictional question principally are organized around the way in which the Tribes specifically crafted their jurisdictional arguments, i.e., primarily in terms of the federal trust responsibility and the concept of inherent tribal sovereignty. After addressing those comments from the Tribes, EPA's responses also address the State of Maine's comments on the federal trust responsibility and tribal sovereignty.

A. Does the federal trust responsibility affect or determine whether Maine has jurisdiction to establish WQS in waters within Indian lands?

Many of the Tribes' comments relating to whether Maine has jurisdiction focused on the federal trust responsibility to the Maine Indian Tribes. The Tribes asserted that the EPA's trust responsibility obligates EPA to conclude that Maine does not have jurisdiction. Examples of those comments are identified below first, followed by examples of the State of Maine's comments about the trust. EPA's responses to the comments are provided after the listed representative examples received from the parties who commented.

Representative examples of comments from Maine's Indian Tribes

1. EPA's federal trust responsibility and duties under the CWA preclude EPA from finding that Maine has jurisdiction to promulgate WQS applicable to waters in Indian lands.

2. EPA's Constitutionally-based trust responsibility and federal Indian common law require EPA to reject Maine's WQS application as to waters within Indian lands.

3. EPA's trust responsibility requires it to protect the Tribes' natural resources and sovereign authority against state encroachment.

4. Approval of Maine's WQS in waters within Indian lands would be an unlawful abdication of EPA's trust responsibility because it would empower Maine to control tribal resources when Maine does not even recognize the existence of the Penobscot Nation's sustenance fishery.

5. The authority to establish WQS under the CWA applicable to the Southern Tribes' sustenance fishery established under MIA and MICSA must reside with EPA in the first instance, as the Tribes' trustee, or, eventually with the Penobscot Nation.

6. Congress acquired the Houlton Band of Maliseet Indians' trust lands for the purpose of preserving the Tribe's riverine culture, including traditional fishing, hunting and gathering activities. EPA therefore has a trust responsibility to protect the quality of the waters in the Tribes' lands.

Representative examples of comments from the State of Maine

1. The concept of a federal "trust responsibility" to Indian tribes does not apply under the CWA because there are no substantive or procedural requirements written into the CWA that anyone may review to assess whether a particular action that EPA takes complies with a "trust responsibility." EPA cannot establish procedural or substantive requirements, pursuant to a trust responsibility, that are not already embodied in the CWA. The federal trust responsibility toward Indian tribes in Maine is fully and exclusively expressed through the substance of the statutes and regulations that an agency is charged with administering.

2. Even if the concept of a federal "trust responsibility" otherwise would apply toward the Maine Indian Tribes under the CWA, Title 25 U.S.C. section 1725(h) of MICSA makes clear that federal Indian law that would otherwise affect or preempt the jurisdiction of Maine relating to "environmental matters" has no effect in Maine.

3. Reservation lands in Maine are not held in trust by the federal government.

EPA's responses to comments concerning the general nature of the federal trust responsibility to the Maine Tribes in this case and the extent to which that trust responsibility is relevant or dispositive to the question whether Maine has adequate legal authority or jurisdiction to establish WQS for surface waters within Indian lands located in Maine

As EPA previously noted in its responses to public comments received on Maine's NPDES program application in 2003, the commenters' arguments (on both sides) regarding the federal government's trust responsibility to the Maine Indian Tribes do not accurately articulate the scope of the trust responsibility as relevant to EPA's decisions in this matter; and, more specifically, do not accurately articulate the scope of the trust responsibility to the Maine Indian Tribes as EPA exercises its authorities under the CWA.

First, it is important to note that the existence, operation and extent of the federal trust responsibility to the Maine Indian Tribes under the United States Constitution and

applicable federal statutory and common law cannot be determined in isolation from the allocation of legal jurisdiction among the tribal, State, and federal governments under the the settlement acts. For example, the jurisdictional framework set forth in the MIA was ratified by Congress in MICSA, and it is well-established law that Congress has plenary authority to legislate in the area of Indian affairs. EPA does not have the legal authority to alter the jurisdictional arrangement ratified by Congress in the settlement acts, either pursuant to the trust responsibility to the Maine Indian Tribes in relation to the CWA or pursuant to any other law.

At the same time, however, EPA still must consider the trust responsibility toward the Maine Indian Tribes when implementing the CWA, but must do so within the bounds of the jurisdictional scheme that Congress ratified in the settlement acts and the requirements of the CWA. It is for this reason that the federal trust cases cited by the Penobscot Nation in its comments are inapposite, i.e., none of these cases discusses the federal trust obligation against the backdrop of statutes such as the settlement acts, and they cannot properly be cited for the proposition that the trust obligation should or does override Congress' jurisdictional arrangement in those settlement acts such that Maine cannot establish WQS in waters in Indian lands in Maine. The cases cited by the Tribe include, e.g., *HRI, Inc. v. E.P.A.*, 198 F.3d 1224 (10th Cir. 2000); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942).

As EPA earlier explained in its responses to public comments on EPA's proposed approval of Maine's NPDES program, the trust responsibility towards the Maine Indian Tribes continues to operate in Maine in relation to the CWA, even under the settlement acts, but that the trust's reach and effect are more limited than might typically be the case in other states. In other words, the settlement acts significantly revise in Maine the jurisdictional arrangement that more typically exists elsewhere in the United States among Indian tribes, a state, and the federal government. EPA notes that the Penobscot Nation's comments cite to a number of federal court opinions that address the trust. See for example, *Worcester v. Georgia*, 31 U.S. 515 (1832); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985); and *State of Washington, Dep't of Ecology v. U.S. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985); *HRI, Inc. v. E.P.A.* 198 F.3d 1224 (10th Cir. 2000); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942). These cases and others of their kind, which may have addressed the federal trust, are not relevant to the analysis of whether Maine has jurisdiction to establish WQS in waters within Indian lands in Maine because the courts in those cases were not confronted with statutes like the settlement acts which, as EPA said above, alters the typical framework within which the trust operates.

<u>The trust and federal Indian common law</u>

As a threshold matter, when delving into the meaning of the settlement acts, EPA is employing, and always has employed, where appropriate, the interpretive canons of federal Indian common law that derive from the general trust responsibility. For

example, we agree that any ambiguity in the meaning of statutory provisions that attempt to limit tribal sovereignty must be narrowly construed and that such ambiguities must be resolved in favor of the tribes. EPA also agrees that the federal government's general trust responsibility charges the Agency with a responsibility to protect the tribes' inherent sovereignty from unwarranted state encroachment. Adhering to these basic common law elements of the trust doctrine does not run afoul of the settlement acts. They do not result in any alteration of the jurisdictional arrangement ratified in the settlement acts and simply require the Agency to consider the Maine Indian Tribes' interests and welfare consistent with Maine's authority, when EPA implements the CWA. In so doing, we are not thereby affecting or preempting Maine's jurisdiction, but merely applying the law which provides that jurisdiction to the State, and analyzing how that grant of authority from Congress affects EPA's CWA decisions in relation to the Maine Indian Tribes. We note that the First Circuit, without much comment, has invoked the general trust in support of the idea that ambiguities in MICSA should be interpreted in favor of the Tribes where possible. *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999).

Consistent with the discussion above, the settlement acts do not create a complete barrier to the application of the federal common law concerning the federal government's trust responsibility in Maine. For one example, MICSA itself provides for certain lands and natural resources to be held in trust for the Penobscot Nation and the Passamaquoddy Tribe (hereinafter referred to for convenience as the "Southern Tribes") and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1724. (Also for convenience, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs will hereinafter be referred to as the "Northern Tribes," where appropriate). So the mechanism of having the federal government serve as a trustee for tribal resources operates expressly under MICSA. The trust relationship is also evident elsewhere in the statute, albeit in a more inchoate form. MICSA clearly establishes that the Houlton Band of Maliseet Indians and the two Southern Tribes are federally recognized and it specifically charges them to document how their governments are structured. 25 U.S.C. §§ 1721(a) (3), (4), and (5), 1722(a), (h) and (k), and 1726. The Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 2(a)(1) and Sec. 3(1) and Sec. 7.[2] These various provisions are perfectly consistent with EPA's work with the Tribes on a government-to-government basis consistent with a trust relationship with the federal government. In addition, MICSA and MIA combine to explicitly reserve to the Southern Tribes the right to take fish for their individual sustenance within their reservations and to manage their lands and natural resources more generally. 30 M.R.S.A. § 6207(4); 25 U.S.C. § 1724(h); see also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. The Southern Tribes' statutorily reserved sustenance fishing right establishes an interest that the Southern Tribes have in the protection of specific natural resources, the fish that may

[2] In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to status of the Aroostook Band of Micmacs. 30 M.R.S. §§ 7201 et seq. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. 25 U.S.C. § 1721, Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143.

sustain them and the water quality on which the quality of that fishing right depends. In addition, as articulated in EPA's Decision Support Document, EPA has determined that Congress's intent in the settlement acts was to establish a land base for the four federally recognized Maine Tribes permitting them to sustain their unique culture and lifestyle practices. The legislative record regarding the trust land provisions in MIA, MICSA, MSA and ABMSA demonstrate Congress's intent to provide the Tribes with the opportunity to exercise their sustenance life ways, including sustenance fishing in waters of tribal trust lands. For additional discussion relevant to the Maine Tribes' sustenance fishing practices, see EPA's Decision Support Document and the Department of the Interior's (DOI) January 30, 2015 letter to EPA. In sum, it is relatively easy to conclude that all the elements of a trust relationship exist under the settlement acts for the four federally recognized Maine Tribes, consistent with the trust doctrine as it has been developed in the federal common law. The Tribes are federally recognized; the Tribes have an interest in specific natural resources which the CWA charges EPA to protect; and the federal government, including EPA, has a responsibility to consider the Tribes' interests, consistent with applicable law.

As stated earlier, however, the existence of this trust relationship does not and cannot legally alter the jurisdictional arrangement Congress ratified in the settlement acts. The trust by itself does not and cannot compel, or constitute an independent basis for, EPA to disapprove Maine's surface WQS as applied in waters within Indian lands in Maine on the grounds that the State does not have jurisdiction to do so where, in fact, the settlement acts and their jurisdictional provisions actually *do* provide Maine with the requisite legal authority. Accordingly, EPA disagrees with the Penobscot Nation's comments that cite to and characterize several of the First Circuit's legal opinions as providing a basis for applying the full suite of federal Indian common law principles and the trust *prior to* analyzing MIA and MICSA. . See Page 11 of the Penobscot Nation's comments, citing *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999) and *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st. Cir. 1994).

Tribal comments that the trust obligates EPA to find that Maine does not have jurisdiction because the trust requires EPA to protect the Tribes from state encroachment

Outside Maine, EPA has typically excluded Indian country from EPA-approved state environmental programs based on the absence of state jurisdiction in Indian country. See, e.g., *HRI, Inc. v. EPA*, 198 F.3d 1224, 1247 (2000). By contrast, in Maine, the jurisdictional provisions of the settlement acts provide the State jurisdiction to administer WQS in waters in Indian lands. Moreover, MICSA's savings clauses (see more detailed discussion in EPA's Decision Support Document), in effect, prevent any federal law applicable to Indians from rewriting those jurisdictional provisions (*i.e.*, from preempting or affecting the application of Maine law) without explicit Congressional action made specifically applicable in Maine. Therefore, as discussed above in this RTC document, EPA has carefully considered how the trust operates consistent with MIA, MICSA and the CWA in the context of Maine's surface WQS submission. EPA is not relying on the trust to determine whether Maine has jurisdiction to establish water quality standards for waters in Indian lands. As discussed elsewhere in this RTC document, the jurisdictional

scheme established in the settlement acts bears on how the Agency implements our decision consistent with the trust responsibility.

However, notwithstanding that Maine does have jurisdiction to establish surface WQS that apply in waters within Indian lands in Maine, EPA's implementation role under the CWA and the trust responsibility to the Tribes nonetheless require EPA to consider the effects that Maine's WQS would have on the Maine Indian Tribes' interests and welfare as we exercise our existing CWA authority. This is not different in kind from the way in which the CWA generally obligates EPA to consider and comply with the requirements of the CWA in assessing impacts of state and EPA decisions on the interests and welfare (in this instance human health, specifically) of persons in light of the goals of the CWA. In other words, EPA must evaluate the adequacy of Maine's WQS as they apply to waters within Indian lands using a standard or methodology that is consistent with the requirements of the CWA. The trust responsibility to the Maine Indian Tribes together with the Agency's authorized means of implementing the CWA require EPA to consider impacts on the Tribes in relation to protections of tribal resources that are addressed by the settlement acts and the CWA. See e.g., the discussion in EPA's Decision Support Document regarding the "designated use" of sustenance fishing and its protection under the CWA.

In addition, as we will discuss further below, the CWA assigns EPA a very important role in overseeing state surface WQS programs. Therefore, EPA's decision finding that Maine has the authority to establish WQS for waters within Indian lands will not prevent EPA from continuing to work with the Tribes and will not prevent EPA from communicating with all interested parties to improve coordination in protecting water quality in the surface waters in question. In fact, EPA's decision letter to ME DEP is a concrete example and manifestation of how CWA requirements provide for EPA's protection of the Maine Indian Tribes' interests and welfare in a way that is consistent with the jurisdictional framework established by Congress in Maine through the settlement acts and with the trust responsibility to the Tribes.

Maine's comments about the trust

As EPA earlier articulated in its responses to comments on Maine's NPDES program application in 2003, EPA disagrees with Maine's assertion that the federal government has no trust relationship or responsibility with respect to the Southern Tribes' reservations. While it is true that Congress curtails the applicability of the Non-Intercourse Act to the Penobscot Nation and the Passamaquoddy Tribe in MICSA Section 1724(g)(1), Congress also created similar responsibilities in Sections 1724(g)(2) and (3) that apply post-MICSA. Section 1724(g)(3) requires the approval of the Secretary of the Interior for six specific types of land transfers within the Southern Tribes' "territories,"

which have been defined, in MIA,[1] to include the reservations.[2] See 25 U.S.C. §1724(g)(3). Section 1724(g)(2) states that "any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory ... shall be void ab initio and without any validity in law or equity." 25 U.S.C. §1724(g)(2). This language is very similar to that of the Non-Intercourse Act which states that no transfer of land or title to land from any Indian nation or Tribe "shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. §177. More importantly, Congress intended for these MICSA sections to replace the Non-Intercourse Act as a source of federal trust responsibility. Both houses of Congress, in responding to concerns about federal protection of the Southern Tribes, acknowledged that "[o]ne of the most important federal protections is the restriction against alienation of Indian lands without federal consent. [The sections that eventually became Sections 1724(g)(2) and (3)] specifically provide] for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. §177." H.R. DOC. No. 96-1653, at 15 (1980); S.R. DOC. No. 96-957 at 15(1980). As Congress confirms, Sections 1724(g)(2) and (3) essentially replace the Non-Intercourse Act as a source of federal trust responsibility. Reading MICSA as Congress intended would mean that the reservations are subject to a federal trust responsibility by nature of their inclusion as delineated parts of Penobscot Indian Territory and Passamaquoddy Indian Territory. See 25 U.S.C. §§1724(g)(2) and (3); 30 M.R.S.A. §6205.

Additionally, there are other sources of the federal trust relationship with respect to the reservations, as well as to the Southern and Northern Tribes' trust lands. It is obvious that the reservation lands are central to federally protected rights reserved for the Penobscot Nation and the Passamaquoddy Tribe. MICSA federally recognizes the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. 25 U.S.C. §1721. The Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains a similar provision at Sec. 2 (a)(1). In addition, MIA reserves, for the Southern Tribes, hunting and fishing rights within their reservations. 30 M.R.S.A. §6207(4). Both the House and Senate Committee reports relating to MICSA confirm that Congress intended for the Southern Tribes to have "the permanent right to control hunting and fishing ... within their reservations" according to the terms set out in MIA. H.R. DOC. No. 96-1653, at 17 (1980); S.R. DOC. No. 96-957 at 16 (1980). MICSA also reserves, for the Penobscot Nation and the Passamaquoddy Tribe, the right to manage their natural resources. 25 U.S.C. §1724(h). See also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. Therefore, it is reasonable to conclude that Congress reserved the trust lands in order to preserve the Maine Tribes' cultural activities, in

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[1]The Maine statute that is ratified by MICSA. See 30 M.R.S.A. §6205.

[2]The First Circuit has recognized that the necessity of the signature of the Secretary of the Interior implicates a federal trust responsibility. See Key Bank 112 F.3d. 538 at 553.

particular sustenance fishing, and intended that there be some federal responsibility to protect these activities consistent with the trust responsibility and the requirements of the CWA. For additional discussion relevant to the Maine Tribes' sustenance fishing practices, see EPA's Decision Support Document and DOI's January 30, 2015 letter to EPA.

Ultimately, the CWA provides the relevant authority for EPA to approve or disapprove Maine's surface WQS. 33 U.S.C. §1251 et. seq. As mentioned before, MIA, in 30 M.R.S.A. Section 6207(4), reserves for the Penobscot Nation and the Passamaquoddy Tribe, a sustenance fishing right within their reservations. MICSA, in 25 U.S.C. Section 1724(h), reserves for these Tribes, the right to manage their natural resources. See also 25 U.S.C. § 1724(g)(3) for provisions relating to management of natural resources for the Southern Tribes and for the Houlton Band of Maliseet Indians. In addition, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, contains similar provisions at Sec. 5(b)(3) for the Aroostook Band of Micmacs. Federal common law principles, and Congressional intent, support the position that the Tribes have the ability to practice sustenance fishing in their reservation and trust land waters. Section 303(c) of the CWA specifically gives EPA the authority to ensure that states adopt WQS that are protective of human health and the environment. 33 U.S.C. § 1313(c). EPA is the federal body charged with protecting the very resource that is reserved for Maine's federally recognized tribes, and the CWA gives EPA the authority to oversee state WQS. EPA should account for tribal resources, such as their fishing rights, in exercising that oversight authority, as required by the CWA and consistent with CWA authority and the trust relationship.

Moreover, it is clear that the State of Maine itself contemplated that sustenance fishing practices for the Maine Tribes would be part of the settlement embodied in MIA and subsequently ratified by Congress through MICSA. MIA section 6207(1) provides that "[i]n addition to the authority provided in this subsection, the Passamaquoddy Tribe and the Penobscot Nation, subject to the limitations of subsection 6, may exercise within their respective Indian territories all the rights incident to ownership of land under the laws of the State." The legislative history to MIA clearly indicates that both reservation lands and lands acquired pursuant to MIA after its enactment (trust lands) would enjoy riparian or littoral rights under state law and/or principles of common law.

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law. Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are covered by the selling party or included by general principles of law. State of Maine, Maine Legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "AN ACT to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory." Paragraph 14. 1980.

In support of the State's assertion that no trust relationship exists with respect to the reservations, Maine cites in its comments to a letter from DOI in which that Agency, according to Maine, stated that "fee title to the islands in the Penobscot River was held by Maine in trust for the benefit of the Penobscot Nation" and also cited to *Bangor Hydro-Electric Co.*, 83 FERC ¶ 61,037, 1998 WL292768 (F.E.R.C.). Bangor is a Federal Energy Regulatory Commission (FERC) case regarding the licensing of a hydro-electric project under the Federal Power Act (FPA). 16 U.S.C. §§797, 808. The Penobscot Nation and DOI intervened regarding parts of the Penobscot Nation's lands that were inundated when the project was originally built. Both Bangor and the case upon which it relies, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99,115 (1960), recognized that the narrow definition of "reservations," which relies on a strictly property oriented understanding of the term, is confined to the FPA. Bangor at 10. Tuscarora plainly says that "the national 'paternal interest' in the welfare and protection of the Indians is not the 'interests in lands owned by the United States' required, as an element of 'reservations' by § 3(2) of the Federal Power Act." Tuscarora, at 115. FERC's assertion in Bangor that "no trust relationship exists" with respect to aboriginal lands, should therefore be understood in this limited capacity, that "no trust relationship exists" for the purposes of the FPA, which requires an interest in lands owned by the United States. Bangor is therefore irrelevant in determining whether there is a federal trust responsibility with respect to the reservatidns outside the context of the FPA, and therefore does not establish or constitute precedent for the trust responsibility in the context of EPA's implementation of under the CWA.

Tuscarora, however, highlights the difference between 1) a narrow trust responsibility relating to lands "held in trust" and 2) a more general interest in the welfare and protection of the Indians, which points to a general federal trust responsibility, a distinction which is important to this discussion. In federal Indian law, the federal government's general trust responsibility derives from the United States Constitution as further developed by the Supreme Court and other federal courts of the United States, and has become a key aspect of federal Indian common law. The general trust responsibility includes the notion that the federal government has a responsibility, as a general matter, to consider and protect Indian tribes' interests when implementing federal statutes or evaluating decisions that may affect tribes. The federal government's attention to the Indian law canons of statutory construction that have evolved in the common law is an element of this general trust responsibility. The general trust responsibility does not, however, create or establish substantive obligations on the part of the federal government.

The specific trust on the other hand derives from substantive rights established in statutes or regulations that are implemented by the federal government on behalf of Indian tribes. The specific trust is sometimes referred to as an obligation that entails fiduciary duties on the part of the federal government to protect specified tribal rights. As noted in Cohen's Handbook of Federal Indian Law, "[t]he concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and the opinions of the Supreme Court." Cohen explains that the Supreme Court played a major role in defining the relationship between the federal government and Indian tribes. The Court's cases established principles, among others,

such as tribes' right to own land and to set land use policies for those subject to tribal authority, as a federal duty to protect tribal rights including tribal property rights, and as a rationale for canons of construction of various legal documents in light of the federal government's obligation to protect tribal sovereignty and property. See generally section 5.04[3][a] of Cohen's Handbook. In this case, EPA has attended to the general trust responsibility to the Maine Tribes by consulting with them about and understanding their interests in the decisions we are making regarding Maine's WQS in tribal waters, and by implementing the requirements of the CWA that apply to the WQS program. The substance of EPA's review of those WQS is governed by the generally applicable requirements of the CWA that guide EPA's implementation, not by any authority that creates a specific fiduciary obligation to any particular tribe in Maine.

We note that Maine also argues that CWA Section 518, a provision that allows Indian tribes to apply for treatment in the same manner as a state ("treatment as a state" or "TAS") status for purposes of certain CWA programs, is not available to the Tribes in Maine. Accordingly, says Maine, that fact is another reason why EPA has no trust responsibility to the Maine Tribes. EPA responds that its decision on Maine's WQS submissions relates to *Maine's* submission regarding WQS for waters in Indian lands, which is governed by EPA's CWA authorities and responsibilities, and which is unaffected by the separate issue of potential tribal roles under Section 518.[3] Even assuming, only for purposes of responding to Maine's specific comment, that none of the Maine Tribes could qualify for TAS status under CWA Section 518, EPA strongly disagrees that such fact, even if true, would mean that no trust responsibility exists to the Maine Tribes. This RTC document and EPA's Decision Support Document each address and demonstrate EPA's exercise of its CWA authority consistent with the trust responsibility to the Maine Tribes notwithstanding EPA's determination that Maine has adequate legal authority to establish WQS for waters within Indian lands. Maine's comment about CWA section 518 is not relevant to the question of whether a federal trust responsibility exists in Maine under the settlement acts and the CWA.

From the perspective of EPA's earlier description of the general and specific trust responsibilities, and for all of the other reasons discussed above, a federal trust relationship clearly does exist with respect to the Penobscot Nation and Passamaquoddy Tribes' reservations as well as with respect to the Southern and Northern Tribes' trust lands. In summary, although MICSA Section 1724(g)(1) negates the application of the Non-Intercourse Act (a statute often identified as a source of the federal government's specific, as opposed to general, trust responsibility) to these Indians, Congress intentionally included modern non-intercourse provisions in MICSA Section 1724(g)(2) and (3), thereby continuing a federal trust responsibility to the Tribes, and more specifically to their reservations. In addition to these non-intercourse provisions and the common law sources of the federal government's general trust responsibility, the CWA

[3] EPA notes that on October 8, 2014, the Penobscot Nation submitted to EPA an application "to administer water quality standards program and for federal approval of the standards" covering the Maine Stem of the Penobscot River from Indian Island north to the confluence of the east and west branches of the river. Included in the Nation's submission was a TAS application. EPA has not commenced a formal review of the Nation's application, wanting first to address Maine's submissions.

gives EPA the authority to review the State's WQS for consistency with the statute and thereby to utilize its existing authority to protect the reservations and trust lands and the practices and rights associated with them. The relevant settlement acts established trust lands for the Northern and the Southern Maine Tribes, and specifically defined those holdings to include "land or natural resources," which in turn specifically includes "fishing and fishing rights." The settlement acts contain provisions about the potential disposition and management of those resources. The relevant statutory provisions have been cited earlier in this RTC document. So in utilizing our existing CWA authority to protect the Maine Tribes' interests and welfare in relation to the reservations and trust lands, EPA is acting consistently with the settlement acts in Maine and the trust responsibility.

The State also cites in its comments to the First Circuit's opinion in *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007) in support of its contention that EPA has no trust responsibility to the Maine Indians Tribes in making decisions under the CWA. Maine claims that the CWA contains no set of written standards that anyone may review to assess whether a particular implementation decision EPA may render complies with its trust obligation under the CWA. Thus, Maine asserts, an EPA decision that breathes substantive or procedural requirements into the CWA pursuant to its trust relationship, but independent of the CWA, would be arbitrary and capricious, citing to *Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C. Circuit 2001).

EPA agrees with Maine's assertion that any specific requirements that flow from a specific trust relationship must derive their content from and are the product of applicable law, whether treaties, statutes, or regulations. See *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1482 (D.C. Cir. 1995); *State of California v. Watt*, 668 F.3d 1290, 1324 (D.C. Cir. 1981). However, EPA disagrees with Maine to the extent the State argues that EPA may not, in exercising our existing authority and discretion under the CWA, be informed by our consideration of tribal interests consistent with the general trust relationship. The CWA includes requirements for how EPA must review the adequacy of WQS, and EPA must apply those requirements to Maine's WQS in Indian waters. In considering the impacts of Maine's WQS on the water quality-related interests and welfare of the Indian Tribes in Maine, and most notably on the tribal sustenance fishing practices associated with Indian land waters, EPA is exercising its CWA authority consistent with the trust relationship, the requirements of the CWA, and the settlement acts. EPA's decision that Maine's human health criteria are not sufficiently protective of the CWA "designated uses" that apply to waters in Indian lands is directly tied to a fundamental requirement of the CWA, *i.e.* that WQS must protect designated uses. See EPA's Decision Support Document for a more detailed discussion. In this regard, EPA's decision to disapprove certain of Maine's WQS is entirely consistent with the holding in *Nulankeyutmonen Nkihtaqmikon v. Impson* in the sense that EPA's decision is derived from CWA requirements, provisions in the settlement acts, and Congress's intent to preserve the Tribes' sustenance fishing practices, culture, and lifestyle.

B. Many comments from the Maine Tribes relating to the question of Maine's jurisdiction focused on the concept of the Tribes' inherent sovereignty, and/or the concept of "internal tribal matters" as an explicit expression in MIA/MICSA of the Southern Tribes' retained inherent sovereign status. Maine submitted comments along the lines that MIA/MICSA provide the State with jurisdiction, at least implying that these concepts raised by the Tribes do not function to alter that outcome.

Examples of the Tribes' comments

1. Establishing an appropriate fish consumption rate (FCR) and cancer risk level (CRL) for use in establishing WQS under the CWA are each an "expressly retained sovereign activity."

2. 'Setting CRLs and FCRs amounts to regulation of the Tribes' sustenance fishing right, which the State is not authorized to do under MIA and MICSA.

3. Establishing WQS under the CWA is an inherent sovereign right and is an internal tribal matter.

4. If the Indian Tribes, as opposed to the State, were establishing WQS in Indian waters, the Tribes would not be regulating any non-tribal members.

5. An Indian Tribe's inherent authority or tribal sovereignty cannot be divested unless Congress expressly acts to do so.

6. Water quality in Indian waters is something that may directly threaten the "health or welfare of the tribe." Water rights and governmental jurisdiction are "critical elements necessary for tribal sovereignty."

7. Congress did not "unequivocally abrogate the Tribe's inherent authority to protect the sustenance fishery."

8. The legislative history to MICSA indicates that MICSA's sustenance fishing right is an example of an "expressly retained sovereign activity."

9. Inherent sovereignty applies in this context and allows Indian tribes to protect subsistence practices embodying cultural, spiritual, and physical elements.

10. Inherent sovereignty precludes Maine from regulating in this way. Sustenance fishing is an aboriginal right.

11. The notion that establishing WQS in Indian waters is an internal tribal matter is supported by federal and State governments' adoption of principles in the United Nations declaration on the Rights of Indigenous Peoples.

12. Determining a CRL that tribal members will be subjected to is an internal tribal matter. Maine is asking EPA to approve Maine's policy judgment about the level of risk the Tribes should face, which is inappropriate and inconsistent with the Tribes' inherent sovereignty.

13. Protection of tribal health and welfare is an internal tribal matter over which the State may not exercise jurisdiction, and includes environmental regulation.

Examples of the State's comments

1. The CWA and MIA/MICSA provide Maine with the authority to establish WQS in waters within Indian lands in Maine.

2. MICSA's savings clauses would preclude the Maine Indian Tribes from implementing a WQS program in Maine.

EPA's responses to comments concerning principles of inherent tribal sovereignty (and MIA's and MICSA's internal tribal matters provision) and its effect on Maine's legal authority to establish WQS for waters within Indian lands

Basic tenets or principles of federal Indian common law as they relate to tribal sovereignty

EPA agrees with the comments that set forth the basic tenets of federal Indian common law supporting the idea that Indian tribes have retained their inherent powers as sovereign entities (unless expressly abrogated by Congressional action), that such sovereign status has existed since long before contact with European nations, and that Indian tribes' sovereignty it is not something that was delegated or granted to the tribes by Congress. EPA has consistently sought to uphold the inherent sovereignty of Indian tribes wherever applicable. See, e.g., EPA's 1984 Indian Policy.

Many of the federal court opinions cited by the Penobscot Nation in its comments reflect or discuss certain aspects of these common law principles of federal Indian law. See, e.g., *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *State of Washington, Dep't of Ecology v. U.S.E.P.A.* 725 F. 2d 1465 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Oklahoma Tax Comm'n v Sac & Fox Nation*, 508 U.S. 114 (1993); *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g*, 476 U.S. 877 (1986); *Kiowa Tribe of Oklahoma v. Mfg techs. Inc.* 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217 (1959); *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005); *Montana v. United States*, 450 U.S. 544 (1981); *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996).

These general principles of Indian common law cited by the Penobscot Nation, however, are not dispositive of and do not directly answer the fundamental jurisdictional question before EPA in this matter: what effect do the settlement acts have on the jurisdictional relationship among the Southern and Northern Tribes, the State of Maine, and the federal government when implementing the CWA WQS program applicable to Indian waters within Indian lands in Maine? The cases cited by the Penobscot Nation were not decided against the backdrop of statutes like MIA and MICSA which, as EPA has explained throughout this RTC document, alter in certain important respects the Maine Indian Tribes' inherent sovereign status as compared to the more typical situation that exists in parts of the United States that do not have statutes like MIA and MICSA.[4]

EPA recognizes the fundamental principles of federal Indian law relating to inherent tribal sovereignty, and is aware that Congress has plenary power over Indian affairs as established in the Indian commerce clause of the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As a result, only Congress may change the jurisdictional relationships in Indian country by expanding or contracting state, tribal and federal jurisdiction. If Congress takes any action to limit a tribe's sovereignty, it must do so expressly and any ambiguities must be resolved in the tribe's favor. Congress may provide for state law to apply in Indian country, but it must do so expressly. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

In this matter, EPA is applying the Congressional grant of legal authority to Maine in the Southern and Northern Tribes' Indian lands which is adequate to support the State's assertion of legal authority to implement a CWA WQS program applicable to waters in Indian lands located in Maine. See EPA's Decision Support Document for a more detailed discussion and analysis. Both MIA and MICSA, as further elucidated in MIA's and MICSA's legislative histories, embody a jurisdictional framework that serves as a compromise in settlement of the land claims that gave rise to these statutes. The Senate Report accompanying MICSA specifically addressed concerns about the impact of these

[4] The Penobscot Nation also cites to *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005) as a First Circuit opinion that addresses tribal sovereignty "absent their divestment by the federal government." See Page 14 of the Penobscot Nation's comments. This case, however, like the others cited by the Tribe, does not stand for the proposition that MICSA did not give Maine the legal authority to establish WQS in waters within Indian lands.

two statutes on the Penobscot and Passamaquoddy Tribes' sovereign rights and jurisdiction. "While the settlement represents a compromise in which State authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with [certain legal precedent] the settlement provides that henceforth the Tribes will be free from State interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the Tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes." Page 14, Special Issues. The Senate Report goes on to describe other ways in which the Tribes' sovereignty is protected, including, but not limited to, the hunting and sustenance fishing right provisions in the statutes and the provisions granting to the Southern Tribes state constitutional status of municipalities. However, the nature of this compromise in retaining certain aspects or elements of the Tribes' sovereignty does not override or conflict with the fact that Congress in MICSA ratified a jurisdictional relationship among the Tribes and the State that gave Maine the authority to apply state law to those matters not falling within either:1) the internal tribal matters provision in the statute; 2) the Southern Tribes' reservation hunting and fishing rights or 3) certain other matters specifically reserved by the statutes to the Tribes.[5] EPA's conclusion that Maine has the legal authority to establish WQS in waters within Indian lands is consistent with MIA and MICSA because, as discussed below in more detail, doing so is not an internal tribal matter and does not alter or regulate the Southern Tribes' right to take fish within their reservations for their individual sustenance. In fact, EPA's Decision Support Document explains that the Southern and Northern Tribes' fishing rights are being protected under the CWA notwithstanding Maine's authority to establish WQS in waters within Indian lands.

Consistent with the analysis above of the Maine Tribes' sovereign status, as expressed in MICSA, which ratifies MIA, the federal Indian common law cases cited by the Penobscot Nation are generally inapposite here. The vast majority of the cases did not address the scope of the sovereign status of an Indian tribe under statutes similar to MIA and MICSA. See e.g., *Kiowa Tribe of Oklahoma v. Mfg techs, Inc.* 523 U.S. 751 (1998); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217 (1959); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Montana v. United States*, 450 U.S. 544 (1981); *Wisconsin v. E.P.A.*, 266 F. 3d 741 (7th Cir. 2001); *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996). In addition, although the Penobscot Nation also cites to several First Circuit cases discussing some aspects of inherent tribal sovereignty generally, none of those cases held that Maine law did not generally apply to the Maine Indian Tribes under MIA section 6204 and MICSA sections 1725(a) and 1725(b)(1) on the basis of the Tribes' inherent sovereign status. See, e.g., *Akins v. Penobscot Nation*, 130 F. 3d 482 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F. 3d 706 (1st Cir. 1999); *Bottomly v. Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 19179); and *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005).

[5] The other matters referenced here are not pertinent to EPAs decision.

The effect of the settlement acts on federal Indian common law as they relate to tribal sovereignty

The settlement acts clearly represent a substantial revision to the relationship between state and Indian jurisdiction that would apply in Maine absent the settlement acts. Virtually every court that has reviewed the statutes has emphasized that it is impossible in Maine to simply apply federal Indian common law without first starting with the settlement acts. See, e.g. *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999), cert. denied 527 U.S. 1022 (1999); *Penobscot Nation v. Georgia-Pacific*, 254 F.3d 317, 320 (1st Cir. 2001), cert. denied 534 U.S. 1127 (2002); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983), app. dismissed 464 U.S. 923 (1983); *Great Northern Paper Inc. v. Penobscot Nation*, 770 A.2d 574, 580 (Me. 2001), cert. denied -- U.S. --, 122 S.Ct. 543 (2001); *Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007). For example, the settlement acts create a status for the Northern and Southern Tribes (although there are statutory differences for each of the two groups) that is unique in the nation, and extends state authority over the Tribes to an unusual extent. Therefore, to say simply that federal Indian common law applies to the Maine Tribes (without any qualification) understates the critical role the settlement acts play in revising the customary formula for gauging Indian sovereignty.

On the other hand, it overstates the effect of the settlement acts to say that federal Indian law is irrelevant to interpreting how the settlement acts apply in Maine. As a threshold matter, for example, MICSA is a federal statute that modifies tribal jurisdiction, and therefore is subject to the interpretive doctrines in federal common law giving the tribes the benefit of the doubt where the statute is ambiguous. *Fellencer*, 164 F.3d at 709. Additionally, MICSA ratified the jurisdictional formulation in MIA for the Southern Tribes, and MIA specifically preserves "internal tribal matters" from state regulation. When analyzing the scope of "internal tribal matters," the First Circuit has twice referred to general principles of federal Indian law, both common law (*Akins*, 130 F.3d at 489-90) and statutory provisions (*Fellencer*, 164 F.3d at 711), to help understand the extent of that term. MICSA and its legislative history make it clear that "internal tribal matters" is not a reservation of the Southern Tribes' full inherent sovereignty that predated passage of MICSA. But the term nevertheless protects key elements of the Southern Tribes' inherent sovereignty from state regulation. Therefore, when confronted with MICSA, courts have looked to the body of federal Indian law to better understand how a tribe's inherent sovereignty works in the customary case. In EPA's decision on Maine's WQS submission, EPA has similarly filtered the body of general federal Indian common law through the lens of MICSA, recognizing its unique requirements, while understanding at the same time that the statute operates against the backdrop of federal Indian common law.

EPA would disagree with any assertion that the Southern or Northern Tribes are no longer sovereigns, notwithstanding that the Southern and Northern Tribes are treated differently by the settlement acts in certain respects. Congress specifically recognized the tribal governments of the Southern and Northern Tribes. 25 U.S.C. §§ 1721(a) (3),

(4), and (5), 1722(a), (h) and (k); Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, at Sec. 2 (a)(1) and Sec. 3(1). Congress charged the Tribes with developing written instruments to govern their affairs when acting in a governmental capacity. 25 U.S.C. § 1726 and Aroostook Band of Micmacs Settlement Act, Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 143, at Sec. 7. It is explicitly clear in MIA and MICSA that the Southern Tribes exercise sovereignty in the sense of having governmental authority over their internal affairs and may take fish for their individual sustenance within their reservations. Using the term sovereignty when referring to the activities of these tribal governments is completely consistent with, indeed is compelled by, the terms of MICSA and The Aroostook Band of Micmacs Settlement Act. But the focus of this matter is the extent of the State's authority in relation to that which may be reserved to the Southern and Northern Tribes, and simply embracing or banishing the term "sovereignty" (without any qualifications or more nuanced explanations) contributes little to answering that question.

Penobscot Nation's sovereignty argument in relation to MIA section 6204

The Penobscot Nation asserts that the Tribe's full aboriginal inherent sovereignty was intended by Congress to be retained in MICSA. The Penobscot Nation argues this is true notwithstanding the language in MIA section 6204 generally subjecting all Indian Tribes in Maine 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. The Penobscot Nation argues that section 6204 "merely confirms that the Nation will adopt Maine law as its own, but it does not expressly impose any form of State regulatory authority upon the Tribe or its natural resources." The Tribe cited to *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P. 2d 1085 (C.A. 1974), a case included in one section of MICSA's legislative history.

Although the Tribe's comment doesn't refer to MIA section 6202, "Legislative findings and declaration of policy," EPA notes that this language may also be relevant to the Tribe's argument:

> The foregoing agreement between the Indian claimants and the State also represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State.

As part of this overall argument in support of the Tribe's assertion of full aboriginal inherent sovereignty, the Tribe also references certain passages from MICSA's legislative history and federal case law. For a number of reasons, EPA disagrees that this particular argument, either on its own, or in conjunction with the Tribe's other arguments about

inherent tribal sovereignty, results in a legal conclusion that Maine is precluded by MIA and MICSA from establishing WQS in waters within Indian lands in Maine.

First, as set forth in EPA's Decision Support Document, and as explained in various other portions of this RTC document, the statutory provisions of MIA and MICSA and those statutes' legislative histories, very clearly establish that state law applies to the Penobscot Nation and the Passamaquoddy Tribe (and the other Maine Tribes) in the context of environmental regulation. Moreover, as the First Circuit said in *Maine v. Johnson*:

> In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected in the particular case, *unless* the internal affairs exemption applies; and the scope of that exemption is determined by the character of the subject matter. Discharging pollutants into navigable waters is not of the same character as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property. [*Maine v. Johnson*, 498 F. 3d 37, 46.]
>
> In addition to Maine's explicit authority over tribal lands and natural resources, the Settlement Acts expressly divested the Maine Tribes of sovereign immunity, *25 U.S.C. § 1725(d)*, and with limited exceptions, made the Maine Tribes subject to the general criminal and civil law of Maine even with respect to activities carried out on tribal lands. *25 U.S.C. § 1725(a), (c); 30 M.R.S.A. § 6204*. [*Maine v. Johnson*, 498 F. 3d 37, 42-43.]
>
> [T]he question here is whether *Maine* has adequate authority to implement permitting as to the tribes' lands, and *section 6204* on its face is about as explicit in conferring such authority as is possible. [*Maine v. Johnson*, 498 F. 3d 37, 43.]

Each of these passages from *Maine v. Johnson* directly conflicts with the Tribe's argument that MIA and MICSA did not intend to provide Maine with the legal authority to regulate the Penobscot Nation under state law because the Settlement Acts intended to preserve the Maine Tribes' full aboriginal inherent sovereignty. Indeed, every time the U.S. Court of Appeals for the First Circuit has adjudicated the extent of Maine's jurisdiction in Indian territories, it is clear the court held that MICSA applies the laws of the State to the Southern Tribes.

Five different First Circuit cases adjudicating the application of state law in the Southern Tribes' territories have never hinted at the idea that state law applies to the Tribes as anything other than state law. *Passamaquoddy Tribe v. Maine*, 75 F.3d at 789, n. 1 (1st Cir. 1996) ("Among other things, the Gaming Act, if it applied, would preempt various provisions of Maine's criminal law, including 17–A Me. Rev. Stat. Ann. §§ 953–954."); *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997) ("This case turns on whether the issuance of stumpage permits is an 'internal tribal matter.' If this is an internal tribal matter, then under both Settlement Act and the Implementing Act, Maine law does not apply and no claims arise under the Maine Constitution or under the Maine

Administrative Procedure Act. Thus no claim arises under state law warranting the exercise of diversity jurisdiction." 130 F.3d at 485); *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), cert. denied, 527 U.S. 1022, 119 S. Ct. 2367, 144 L. Ed. 2d 771 (1999) (Maine state law did not apply only because the decision whether to employ a tribal member or a non-tribal member as a community nurse fell within the "internal tribal matter" exception to the applicability of state law under MIA and MICSA); *Penobscot Nation v. Georgia Pacific Corporation*, 254 F. 3d 317 (1st Cir. 2001) (Company demanded documents from Maine Tribes based on Maine's Freedom of Access Act. "Under Maine law, the Tribes are regulated in certain respects as municipalities, and municipalities are covered by the Access Act." 254 F.3d at 318.); *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007) ("The Southern tribes say that state authority over land and water resources can coexist with tribal authority, pointing to certain provisions of the Settlement Acts that explicitly make state authority 'exclusive.' So, the tribes say, the existence of Maine's authority does not automatically negate concurrent tribal authority over the same subject matter. But the question here is whether Maine has adequate authority to implement permitting as to the tribes' lands, and section 6204 on its face is about as explicit in conferring such authority as is possible. What the tribes might do if Maine did not legislate is beside the point. The Southern tribes' concurrency argument would have bite only if their own 'concurrent' regulatory authority, if it existed, took priority over enacted Maine law. But this would turn on its head the explicit language of the Settlement Acts giving Maine authority over land and water resources in the tribes' territories. If there is 'concurrent' jurisdiction at all, it is subordinate to Maine's overriding authority to act within the scope of section 6204, which clearly includes Maine's power to regulate discharge permitting consistent with the Clean Water Act.") And none of these cases held that the reference to *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P. 2d 1085 (C.A. 1974), in MICSA's legislative history, supports the proposition that Maine state law does not apply as state law to the Southern Tribes under MIA section 6204.

MIA's internal tribal matters provision

In this subsection of EPA's RTC document, EPA provides a legal analysis of the "internal tribal matters" provision in MIA, as ratified by MICSA, as well as a discussion of how the First Circuit has construed the provision in its decisions to date. As explained below, EPA concludes that establishing WQS in waters within Indian lands is not an internal tribal matter. That conclusion is well-supported by First Circuit precedent, which strongly suggested that the balancing factors from *Akins* and *Fellencer*, that should be used in circumstances that constitute close questions of the applicability of the internal tribal matters provision, would be *inappropriate* if applied to the question of Maine's authority to establish WQS in waters within Indian lands. *Maine v. Johnson*, at 46. Nevertheless, because of the prominence of the concept of internal tribal matters in the Penobscot Nation's comments, EPA analyzes the concept below in detail. EPA even analyzes the balancing factors from *Akins* and *Fellencer* as applied to the WQS question to demonstrate that, even if it were appropriate to apply the factors, the analysis shows that Maine has authority to establish WQS in waters in Indian lands and that such

authority is not inconsistent with and does not run afoul of the internal tribal matters provision in MIA.

EPA recognizes the importance of the "internal tribal matters" provisions in MIA section 6206(1), as ratified by MICSA section 1725(b)(1), which by its terms only applies to the two Southern Tribes. We agree that, to the extent a subject is an internal tribal matter, the State is precluded from regulating that subject and that it falls beyond the reach of the grant of state authority in MIA section 6204, as ratified by Congress. Therefore, the scope of the internal tribal matters concept essentially defines the boundary of the State's jurisdiction and the State's ability to regulate activities in the Southern Tribes' territories.[8]

The internal tribal matters provision in MIA and MICSA is a reservation of authority to the Southern Tribes based on their inherent sovereignty that predates MICSA. Congress did not intend, however, to reserve through MICSA the *full scope* of the Southern Tribes' inherent sovereignty which the federal courts had recently recognized prior to MICSA. *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-66 (1st Cir. 1979); *Joint Trib. Coun. of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). That interpretation would cause the exception of internal tribal matters to swallow the rule Congress created, which is that state law generally applies to the Maine Tribes and their lands. But as we discuss further below, the common law generally interpreting Indian Tribes' inherent sovereignty is relevant to assessing the scope of internal tribal matters, at least as a threshold test. If a subject matter would be beyond the reach of any Indian Tribe's inherent sovereignty, it could not qualify as an internal tribal matter under MICSA. If a subject matter is generally within the inherent authority of a Tribe to govern (and one decides it is appropriate to undertake an internal tribal matters analysis), EPA concludes that the next step in the analysis consists of using the factors that the First Circuit has derived in analyzing the provisions of MIA and MICSA. In short, EPA has concluded that "internal tribal matters" under MICSA is a subset of the inherent authority Indian Tribes generally retain as reflected in the general principles of federal Indian common law.

In addition, we note that it would be difficult to reconcile the unique wording of MICSA section 1725(f) with the interpretation that internal tribal matters reserves the Southern Tribes' unimpaired inherent sovereignty. This section provides:

> The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, *to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto*.

25 U.S.C. § 1725(f) (emphasis added). These provisions of MICSA show that the jurisdictional arrangement Congress ratified in MICSA results in an atypical scope for the Southern Tribes' inherent authority. That is because an Indian Tribe's inherent

[8] MIA and MICSA also identify areas of jurisdiction specifically reserved to the Southern Tribes, but those provisions are not relevant to this WQS analysis under the CWA. See e.g. sections 6209-A and 6209-B.

sovereignty typically is not dependent on or subject to definition by state law in the United States, and it requires no affirmative grant of authority from Congress for a Tribe to assert its inherent sovereignty in relation to state law. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n. 14 (1982) ("[N]either the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes."], see also id. at 168 ("Tribal sovereignty is neither derived from nor protected by the Constitution. Indian tribes have, however, retained many of the powers of self-government that they possessed at the time of their incorporation into the United States." (Stevens, J. dissenting; footnote omitted)). But Congress has plenary authority to alter the scope of an Indian tribe's inherent sovereign authority.

Congress understood that MIA had essentially flipped the presumption against state law applying in Indian country, and the wording of section 1725(f) therefore makes sense. Faced with ratifying a state statute that included an aggressive extension of state authority over the Southern Tribes and their territories, using sweeping language creating a presumption that state law applies, Congress was being careful to point out that the Southern Tribes still exercised independent jurisdictional authority for certain purposes under the terms of the MIA. The wording of section 1725(f) is fully consistent when we conclude that internal tribal matters reserved some subset of the Southern Tribes' inherent sovereignty, and that Congress was expressly confirming that residual authority. MICSA, however, also ratifies a substantial grant of authority to the State, which includes adequate authority to establish WQS in waters in Indian lands. Normally, outside Maine, establishing WQS in Indian lands would fall outside state jurisdiction. Here, MIA and MICSA provide that authority to the State.

Consistent with the discussion above regarding the scope and limitations of the internal tribal matters provision, the portion of MICSA's legislative history which specifically speaks to the States' authority to regulate the *environment* in the Southern Tribes' territories is direct and compelling. Most notably, when discussing the specific section of MICSA that ratifies MIA's jurisdictional arrangement for the Southern Tribes, the Senate Report concludes:

> . . . State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27(emphasis added).

The only other place in the Congressional Committee Reports that speaks directly to regulation by the State of environmental matters in Indian lands is the discussion of the first savings clause in MICSA, section 1725(h). This provision makes federal Indian law up to 1980 generally applicable in Maine, but only if that law does not affect or preempt state jurisdiction:

> Except as other wise [sic] provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for [them] shall be applicable in the State of Maine, except that 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)(emphasis added). This provision does not control what jurisdiction Maine received under MICSA; it simply protects the jurisdiction granted to the State elsewhere in MICSA from inadvertent intrusion by general federal Indian law. As a structural matter, however, it is notable that Congress specifically identified "environmental matters" as an area of state law to be protected, strongly supporting our conclusion that environmental regulation was included in the grant of authority to the State. The Senate Report confirms this conclusion:

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, 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 regulations or land use.

S. Rep. at 31; see also H.R. Rep. at 29. This passage makes it very clear that Congress understood it was making state environmental law applicable to Indian lands.

As noted earlier, the First Circuit's precedent interpreting MIA and MICSA is consistent with Congress' intent to make Maine environmental law apply to Indian lands. And establishing WQS is, in character, much more akin to discharging pollutants into navigable waters than it is to such matters as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property.

First Circuit precedent interpreting MIA's and MICSA's internal tribal matters provision, including an analysis of the *Akins* and *Fellencer* factors

In its decision in *Maine* v. *Johnson*, the First Circuit squarely addressed the "internal tribal matters" provision in MIA, ratified by MICSA. In *Maine* v. *Johnson*, the Court noted that its decisions in *Akins* and *Fellencer* were the only two in which the Court had

directly construed the phrase "internal tribal matters" as applied to the Maine Tribes. The Court clearly distinguished both of those prior cases from the CWA NPDES program case before it, noting, among other things, that in each of *Akins* and *Fellencer*, the State disclaimed any interest in regulation or superintendence over the activities in question. The Court noted further that the Settlement Act's jurisdictional provisions clearly affirmed Maine's asserted power in the context of regulating discharges of pollutants into navigable waters, even for facilities located on tribal lands discharging into tribal waters. The Court stated that "[i]f the internal affairs exemption negated so specific a ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction." *Maine* v. *Johnson*, at 45. The Court subsequently noted that "[i]n our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected in the particular case, *unless* the internal affairs exemption applies," finding that discharging pollutants into navigable waters is not of the same character as the enumerated examples of internal tribal matters contained in the MIA. *Id.* At 46. The Court clearly rejected EPA's use of the "balancing test" that the Agency stated was consistent with the Court's analysis in *Akins* and *Fellencer*, noting that "discharging pollutants into navigable waters is not a borderline case in which balancing . . . or ambiguity canons . . . can alter the result." *Id.* At 46.

As noted above, in *Maine* v. *Johnson* the First Circuit suggested that EPA's application of the balancing factors and method of analysis derived from *Akins* and *Fellencer* was misplaced in an area of regulatory authority so clearly reserved to the State under MIA and MICSA. It therefore behooves EPA first to ask the question whether the facts and surrounding circumstances pertinent to Maine's WQS submissions are more akin to the circumstances present in *Maine v Johnson* or to those present in *Akins* and *Fellencer*. That is, is Maine's request to apply its WQS to waters within Indian lands clearly within its regulatory authority under MIA and MICSA in the way that the Court in *Maine v. Johnson* viewed regulating discharges of pollutants into navigable waters (where Maine expressed a strong interest in doing so)? Or does the WQS context before EPA now involve circumstances and relative tribal and state interests more akin to a dispute over whether non-tribal members have timber rights in Indian territory (where the State had disclaimed an interest in regulating the issue), or to a situation in which a tribe wanted the ability and right to determine who, as between a tribal member and non-tribal member, could work as a community nurse (and where the State disclaimed any interest in applying its anti-discrimination laws to that decision)?

Upon examination, the factual circumstances and relative tribal and state interests presented by Maine's establishment of WQS in tribal waters are clearly are more analogous and pertinent to those at issue in *Maine* v. *Johnson* than they are to those in *Akins* and *Fellencer*. Maine's WQS program falls within a broad area of environmental regulation; Maine has expressed a strong desire to exercise regulatory authority in this area; and there potentially would be non-trivial impacts on non-tribal members outside of tribal lands were EPA to find that MIA and MICSA preclude Maine from applying its WQS in waters in Indian land. Following the First Circuit's reasoning then, it would not even be appropriate for EPA to apply the balancing factors from *Akins* and *Fellencer* to determine whether Maine has jurisdiction to establish WQS for waters in Indian lands.

The Court found that the circumstances present in *Akins* and *Fellencer* were much closer legal questions as to whether the internal tribal matters provisions of MIA and MICSA applied, as compared to whether those provisions applied to the question whether Maine had authority to implement an NPDES program in Indian lands. Two critical factors that informed the Court's holding were the potential effects of a tribal NPDES program on non-members outside of Indian territories and the State's strongly expressed desire to implement such program itself throughout the State, including in waters within Indian lands. The Court's holding is consistent with the idea that the jurisdictional provisions of MICSA establish a presumption that Maine was provided with regulatory authority over a particular activity absent a finding that the internal tribal matter exception applied (and absent a showing that other explicitly reserved areas of tribal jurisdiction, clearly not relevant to the WQS context, applied).

Thus, the Penobscot Nation's use in its public comments of the *Akins* and *Fellencer* balancing factors as a basis of its jurisdictional analysis would be rejected by the First Circuit. Of central importance to the First Circuit's analysis of the internal tribal matters provision in MICSA is that its scope is *not* defined by the idea that the concept is intended to cover any and all matters that a sovereign government would typically have authority to regulate, but, rather, under MIA and MICSA the *character* of the activity at issue must be so internal to *tribal* government that it does not impact the State's authority in a way that affects non-tribal members or that is contrary to the State's interest in exercising its authority consistent with the atypical allocation of state jurisdiction under MIA and MICSA. At bottom, it is hard to discern how, given the potential effects of a tribal CWA WQS program on non-member upstream dischargers and on the application of State law, in an area of regulation where the State has expressed a strong desire that its standards apply throughout the State, that the First Circuit would decide that Maine did not have adequate jurisdiction to set WQS for waters in Indian lands. See EPA's Decision Support Document for additional discussion.

A direct comparison of the various factors, dynamics, and impacts described above in relation to a WQS program, with the factors considered by the First Circuit in its decision that Maine has jurisdiction under MIA and MICSA to issue NPDES permits to tribally-owned facilities located on tribal land and which discharge only to tribal waters, compels a legal conclusion that Maine has jurisdiction to establish WQS in waters within Indian lands. As discussed elsewhere in this document and in EPA's Decision Support Document, however, the State's authority and discretion to set such standards is not unbounded and must still comply with CWA requirements, including those that would protect the designated use of sustenance fishing in waters in Indian lands.

Nonetheless, EPA would like to respond fully and comprehensively to the Penobscot Nation's comments. Consequently, EPA provides below specific responses to the Penobscot Nation's internal tribal matters argument, even though the logic of the First Circuit's analysis in *Maine v. Johnson* suggests that these factors are not appropriately applied to the facts presented by Maine's WQS submission.

Before delving into the specifics of the Penobscot Nation's comments on this issue, we note that federal Indian common law plays a limited role in our interpretation of the internal tribal matters exception. The First Circuit has stated that:

> We stress that we do not read the reference by Congress to Santa Clara Pueblo in the legislative history of the Settlement Act as invoking all of prior Indian law . . . . But we also do not agree that reference to such law is never helpful in defining what is an internal tribal matter. Congress was explicitly aware of such law, and explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act. In other areas, courts have long presumed that Congress acts against the background of prior law.

Akins, at 489. Insofar as federal Indian common law provides insight into the sorts of activities that Congress and the courts considered to be matters of inherent tribal sovereignty, and thus what rights Congress may have reserved under the settlement acts, it is a useful aid for determining whether water quality regulation is an internal tribal matter. The First Circuit directs us to examine that common law. The court does say that federal Indian common law defines the scope of internal tribal matters. The internal tribal matter exception under MICSA is essentially a reservation of some elements of inherent tribal sovereignty. *Akins*, at 489. Therefore, in order to qualify as an internal tribal matter, an activity must, as a threshold matter, qualify as a matter of inherent tribal sovereignty. However, concluding that a matter would be treated as part of a tribe's inherent tribal sovereignty under federal Indian common law does not end the inquiry. The First Circuit then provides us a series of factors to determine whether the issue or activity is an internal tribal matter under MICSA.

EPA's responses to the Penobscot Nation's *Akins* and *Fellencer* factors analysis

Factors:

a. Does the activity regulate only tribal members?

Tribal comment: There would only be an indirect effect on non-tribal members. Non-tribal members are not being regulated directly.

EPA's response:

To the extent that the *Akins* and *Fellencer* balancing factors are analyzed, the degree to which an activity may affect non-tribal members has been a primary consideration for the First Circuit. A finding that Maine does not have authority to establish WQS for waters in Indian lands, and the corresponding finding that the Maine Indian Tribes do have that authority for those waters, could have a non-trivial effect on non-member facilities in Maine subject to effluent limitations in NPDES permits that must ensure compliance with WQS. *See*, e.g., *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997). In *City of Albuquerque v. Browner*, the City of Albuquerque challenged EPA's approval of the Isleta Pueblo's water quality standards on

a number of grounds, including that certain of the Tribe's standards were allegedly unattainable because they were too stringent, and would have an adverse effect on an upstream discharger located outside of Indian Country. The Tenth Circuit upheld the district court's opinion affirming EPA's approval of the Tribe's WQS. Under the First Circuit's analysis in *Akins* and *Fellencer*, the *potential* for impacts on non-members of a tribal CWA WQS program weighs heavily against finding that Maine does not have authority under MIA and MICSA to establish WQS in waters in Indian lands under the concept of internal tribal matters.

b. Does the activity relate to lands that define the Tribes' territories, particularly to the commercial use of tribal lands?

Tribal comment: The matter at hand concerns the harvesting or deriving of value from tribal resources.

The second factor in the *Akins* and *Fellencer* analysis concerns a tribe's ability to decide how to use its own resources to protect the interests of its members. The First Circuit found that the Tribe's decisions regarding commercial use of "the very land that defines the territory of the Nation" fell within the realm of internal tribal matters. Id. at 487, 488. This factor is not necessarily limited to commercial use of land, however. Rather, it has to do with resources within the tribe's territory that have a direct effect on tribal well-being. In *Fellencer*, the court analogized control of natural resources on tribal land to control of human resources on tribal land. *Fellencer*, 164 F.3d at 710. The particular "human resource" at issue was a community nurse who was not a tribal member, but who practiced on the Penobscot reservation serving tribal members, and whose practice had a direct effect on the health of tribal members. In this case, the court recognized that "Indian tribes may 'retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the ... health or welfare of the tribe.' " Id., quoting *Montana v. United States*, 450 U.S. at 566.

Fellencer confirms that in order to protect tribal health and welfare, tribes may control activities of non-members *within* Indian territory. However, tribes do not generally have authority to control such activities outside of Indian territory. *Montana v. United States*, 450 U.S. at 565-66. Here, many of the waters in question, *e.g.*, the Penobscot River, and the fish in those waters, are resources used by Maine, its citizens, and the Maine Tribes. The First Circuit's holdings in *Akins* and *Fellencer* do not provide EPA with any grounds to deny the state jurisdiction over setting WQS in any waters within Indian lands, and even more certainly not for waters and resources that are used by tribal and non-tribal members. Again, however, it is important to note that notwithstanding Maine's jurisdictional authority, EPA has the authority under the CWA to protect the Maine Tribes' sustenance fishing practices provided for under the settlement acts by ensuring that WQS applicable to waters in Indian lands protect the quality of water necessary to support those sustenance fishing practices.

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c. Does the activity affect the Tribes' ability to regulate their natural resources?

Tribal comment: The matter concerns the regulation or conservation of tribal resources.

EPA's response

The First Circuit has held that an activity predominantly affecting a tribe's ability to control the use of its own resources is likely to be an internal tribal matter. *Akins* in particular examined an example of natural resource regulation, stumpage permits, which it determined was an internal tribal matter. However, the *Akins* holding is a narrow one. Under *Akins*, the test is not whether the assertion of state law interferes with the tribe's regulation of its natural resources, but whether the assertion of *tribal authority* over such resources interferes with *state* regulation. The court emphasized that "[b]y its own terms, the Implementing Act, § 6204, makes State laws regulating land use or management, conservation and environmental protection applicable to tribal lands. The absence of an assertion that any such [State] laws are involved here is telling." *Akins*, 130 F.3d at 488. The deciding element in the court's analysis of this factor seems to be that the stumpage permit system, "involving tribal lands, appears to have no significant impact on Maine's environmental or other interests." Id.

Also important in the First Circuit's consideration was the geographic component of inherent tribal sovereignty. Id. at 489. The court determined that timber permitting qualified as an internal tribal matter in part because "the policy concerns the harvesting of a natural resource from [land that defines Indian territory]." Id. at 487. The timber subject to the disputed permitting system was located entirely on the Penobscot Nation's territory. Because the resource was confined to Indian territory, the associated permitting system did not impair the State's ability to regulate its own natural resources.

The issue we face today is vastly more complicated than in *Akins* because many of the rivers and streams that are tribal waters flow through and touch both tribal and non-tribal lands. In addition, the WQS regulations at issue involve potential impacts to discharging facilities that operate inside and outside Indian territories. Following the First Circuit's analysis of MICSA, EPA begins with the assumption that the State's laws are generally applicable in all waters. See 25 U.S.C. § 1725(b)(1). Certain activities may be excluded from state regulation as internal tribal matters, but the general presumption is that state laws apply to all water bodies in Maine.

Based on this factor, the State has clear jurisdiction to establish WQS that may have the potential to affect the effluent limitations contained in NPDES permits issued to facilities that are largely located and operate outside of tribal territories and, under the reasoning in

Maine v. Johnson, even to sources that are on tribal lands and owned by tribal members and which have no measurable impact on non-members.[7]

d. Does the activity implicate or impair an interest of the State of Maine?

Tribal comment: The State's only interest in establishing WQS is in subverting sustenance fishing.

EPA response

Another important factor in the First Circuit's prior consideration of internal tribal matters was whether the State had asserted any interest in regulating the matter at issue. The *Akins* court noted at the outset that "[t]his is not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws" and that the tribe's regulation of its own timber resources was "not of central concern to ... Maine." *Akins*, at 487, 488. In *Fellencer*, the court clarified that a general state interest in regulating a matter such as employment discrimination was not sufficient to remove the matter from the scope of internal tribal matters. But because the State expressly disavowed an interest in regulating *tribal* governmental employment decisions, the court found that tribal regulation of its own employees did not impair any *state* interest. *Fellencer*, at 710-11.

In its WQS submission, Maine has vigorously asserted its interest in regulating water quality throughout the State, including within waters located in Indian lands. That is a very different dynamic between the State and the Indian Tribes than the one that existed in the *Fellencer* and *Akins* disputes. Id., *Akins*, 130 F.3d at 488 ("This is ... a question of allocation of jurisdiction among different fora and allocation of substantive law to a dispute between tribal members where neither the Congress nor the Maine Legislature has expressed a particular interest."). In *Maine v. Johnson*, 498 F.3d 37, 45, the First Circuit stated:

> In both those cases, unlike this case, Maine disclaimed any interest in regulation or superintendence. *Akins*, 130 F.3d at 488; *Fellencer*, 164 F.3d at 710-11. By contrast, in the present case, Maine affirmatively asserts authority as to both tribal and non-tribal land to regulate discharges into navigable waters. The Settlement Act provisions just quoted affirm that power. If the internal affairs exemption negated so specific a ground of state authority, it is hard to see what would be left of the compromise restoration of Maine's jurisdiction.

[7] As discussed below, EPA is requiring the State to consider impacts on tribal resources and amend its WQS accordingly. However, the State is not required to cede regulatory authority simply because its activities have an impact on tribal resources.

e. Is defining the activity as an "internal tribal matter" consistent with prior legal understandings?

Tribal comment: Under federal Indian common law principles, the matter at hand involves the inherent authority of an Indian tribe, which must be free from undermining by a state.

EPA's response:

As explained earlier, Maine's jurisdiction to establish WQS in Indian lands is consistent with the First Circuit's analysis of MIA and MICSA and its holdings in *Maine v. Johnson*, *Akins* and *Fellencer* and, to the extent applicable given MIA and MICSA's unique jurisdictional arrangement, other federal Indian common law.

In order to understand the internal tribal matters exception, we must recognize that MICSA, while legislated against the backdrop of federal Indian common law, altered the operation of that common law in Maine. Under federal Indian common law, Indian tribes may have a paramount interest in regulating their own water quality that supersedes that of the state in which the tribes' territory is located. However, as discussed earlier and below, federal Indian common law may aid us in interpreting MICSA but cannot change the statute's general provision for state jurisdiction over natural resources. We must look carefully at what Congress and the courts have said regarding the extent of the internal tribal matters exception to state jurisdiction.

Following the First Circuit's example, we look first to the legislative history of MICSA, and then to federal Indian common law for prior legal understandings of internal tribal matters. As mentioned earlier, we rely largely on the Senate Report, which the House Report "accepts as its own" in part. H.R. Rep. at 20; *Garcia v. United States*, 469 U.S. 70, 76 (1984) (committee reports are an authoritative source for determining legislative consent), cited by *Akins*, at 489. The few references that the Senate Report makes to natural resource regulation are telling. In its discussion of the application of state environmental law under section 1725(b)(1), the provision of MICSA ratifying the MIA and its jurisdictional provisions, the Senate Report states:

> State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27.

In addition, when explaining the operation of the savings clauses discussed earlier, the Senate Report provides a specific example of a federal environmental law that would be

excluded from operating in Maine Indian Country to avoid interfering with state environmental law. Although the example in this passage focuses on the provision in the Clean Air Act that allows Indian tribes to redesignate their lands to a new air quality classification under the prevention of significant deterioration (PSD) air permitting program, the passage ends by emphasizing that this exclusion would also operate more generally as to "police power laws on such matters as . . . environmental regulation."

> It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, 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 regulations or land use.

S. Rep. at 31; see also H.R. Rep. at 29. In addition, this passage makes clear that Congress was not limiting the application of federal Indian law in Maine solely to avoid any interference with state environmental regulation as it applies to lands outside Indian territories. The report specifically discusses Congress's intent to protect the application of state air quality laws which will be applicable to land held "for the benefit of the Maine Tribes." Again, this discussion would be pointless if Congress did not specifically intend to make state environmental regulation applicable in the Southern Tribes' territory.

This passage in MICSA's legislative history is telling in the context of analyzing the State's authority to set WQS under the CWA. The Clean Air Act provision cited by the Senate report refers to the authority tribes have outside Maine to redesignate the air quality classification for their territory so that PSD permits for upwind facilities must include emission limits that protect the air quality consistent with the tribe's chosen classification of its territory. This example is strikingly similar to the function of the WQS program in the context of the CWA. Both programs involve the authority of non-federal sovereigns to determine the level of environmental quality that must be maintained within their territories, and that determination has the effect of controlling the content of permits issued to facilities that might impact those territories. Indeed, the "Area Redesignation" provisions in section 164 of the Clean Air Act are about as direct a cognate to the WQS program in the CWA as one could find in federal environmental law. It is reasonable then, for EPA to conclude, that Congress intended its grant of jurisdiction to the State to include a program like the CWA WQS.

Our inquiry does not end here. *Akins* opens the possibility that even in the area of natural resource regulation, activities may fit within the internal tribal matters exception and be free of state regulation. Here we turn to the federal Indian common law to help us define the contours of inherent tribal sovereignty, which in turn form the basis for internal tribal matters. The analysis of federal Indian common law in *Akins* draws a clear distinction

between inherent tribal authority over the activities of members and non-members. Tribes generally have authority over their own members. In some circumstances, federal Indian common law has found that tribal authority extends to non-member conduct on tribal territory, but not to non-member conduct outside of tribal territory. See *Akins*, at 490. MICSA constricted the common law understanding of inherent tribal sovereignty by establishing the general presumption that state law applies even within tribal territories. 33 U.S.C. § 1725(b)(1). Therefore, the fact that an activity takes place on or off reservation no longer answers the question. Instead, the relative involvement of tribal members and non-members becomes decisive.

Of course, *Akins* and *Fellencer* themselves form part of our prior legal understanding of internal tribal matters. However, these cases provide little more than an analytical framework for considering the issue. Neither case offers a definitive interpretation of the scope of internal tribal matters. To the contrary, the First Circuit emphasized that "[w]e tread cautiously and write narrowly, for the problems and conflicting interests presented by this case will not be the same as the problems and interests presented in the next case." *Akins*, 130 F.3d at 487. *Akins*, while recognizing one example of natural resource regulation as an internal tribal matter, was narrowly drawn to address only stumpage permits where state legal requirements were not at issue. Overall, *Fellencer* went somewhat further in addressing impacts on non-members, holding that a tribe could regulate the activities of a non-member who was acting on tribal territory, serving tribal members, and whose activities had a direct impact on tribal health and welfare. It is tempting to read these cases together to say that natural resource management decisions having a direct impact on tribal health and welfare are an internal tribal matter. But these holdings, as discussed earlier, are not so broad. *Akins* emphasized that tribal authority extended to activities of tribal members, and in some case non-members, *within* tribal territory. *Akins*, 130 F.3d at 489. *Fellencer* relied heavily on its understanding of employment discrimination law as a major source of support for its decision that tribal employment decisions are internal tribal matters. The law surrounding the employment issue indicated quite clearly that tribal governmental employment decisions were retained as an element of inherent tribal sovereignty under MICSA.

Although the situation outside Maine may be quite different, under MICSA EPA has concluded that establishing WQS in Indian water in Indian lands in Maine is not an internal tribal matter. Tribal comments have suggested that under *Fellencer*, tribes may regulate non-member activities that have a direct effect on tribal health and welfare. This reading, however, stretches the First Circuit's decision far past its boundaries. In finding that the Tribe could exercise authority over a non-member to protect tribal health and welfare, the *Fellencer* court emphasized the minimal effects on non-members versus the significant effect on tribal members, as well as the clear statutory basis for the Tribe's control over its governmental employment decision. Here, tribal WQS under the CWA potentially could impact non-tribal members. EPA cannot extend the results of these cases to such vastly different circumstances, particularly when the reasoning of the cases counsels us to do the opposite.

Tribal government as an element of internal tribal matters, including establishing cancer risk levels and fish consumption rates as a matter of tribal policy judgments.

The Tribes argue that establishing cancer risk levels and fish consumption rates are matters of tribal government policy that are part of a distinctly governmental function, that of establishing WQS under the CWA. The Tribes assert that this should lead EPA to conclude that as a legal matter Maine does not have jurisdictional authority to set such standards.

EPA's response

EPA agrees that Maine's fishing designated uses and the Northern and Southern Tribes' trust land and reservation land sustenance fishing practices require adequate protection under the CWA. However, that fact, as important as it is to the Tribes' physical, spiritual and cultural existence, does not alter the jurisdictional framework embodied in the settlement acts. Those vital interests and cultural practices of the Tribes, as critical elements of their survival and well-being may still be protected to the extent authorized under the CWA, and EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands demonstrates that very important point. As the First Circuit has stated, not every matter that might fall within the notion of a governmental function necessarily constitutes an internal tribal matter under MIA and MICSA. "That a tribe attempts to govern a matter does not render it an internal tribal matter." *Akins* at 486.

We agree with the comments from the Tribes' advocates that water quality regulation is of central importance to these Tribes and is a critical issue in maintaining their culture and way of life. We also understand the Tribes' desire to exercise as direct a control over that water quality as possible. Outside the context of the settlement acts, we agree with the Tribes that water quality management is a core governmental function, and therefore that it should generally be reserved to tribal governments. EPA cannot agree, however, that MIA's reference to "tribal government" as one of the examples of internal tribal matters sweeps into that concept all the attributes generally associated with Indian self-governance outside Maine.

C. Tribes commented that EPA will be unable to protect tribal resources if EPA determines Maine has authority to establish WQS in waters within Indian lands.

EPA's response

Certain comments from the Tribes generally raised concerns about the protection of tribal resources if EPA determines Maine has authority to establish WQS in waters within Indian lands. EPA recognizes that if Maine is the standard-setting authority, the State will have the first opportunity to make the judgment calls involved in implementing the WQS program. However, the State's WQS must still meet CWA requirements, which include establishing water quality criteria that assure uses are protected. As demonstrated

by EPA's decision to disapprove certain of Maine's WQS on the basis that they do not adequately protect tribal sustenance fishing practices, EPA's oversight of the State's program through authority established in the CWA plays an important role in protecting water quality in Indian lands notwithstanding the jurisdictional arrangement established by the settlement acts.

Notwithstanding the Tribes' concerns, the practical realities of how a state's WQS program operates do not suffice as a basis for ignoring the jurisdictional arrangement in the settlement acts. As discussed extensively above, Congress has revised that customary jurisdictional formula in Maine. So, pursuant to the settlement acts and the CWA, EPA must acknowledge that the State has the authority to establish WQS applicable to Indian lands, just as the First Circuit has already determined that Maine has the authority to issue federal NPDES permits in Indian lands.

EPA does not agree that finding Maine has authority to implement the WQS program in Indian lands constitutes some sort of delegation to the State of the trust responsibility. As already explained in this RTC document, EPA has discussed the proper interpretation of the trust responsibility to the Maine Tribes generally, and in this matter specifically. EPA has also explained its continuing role in CWA program oversight, in which the trust plays a role. The Agency's continuing role in program oversight does provide adequate tools under the CWA for protecting the Maine Tribes' interests. But before discussing those oversight mechanisms, it is important to understand the context within which EPA's oversight authority operates and how that relates to MICSA's provisions. There are various provisions in the CWA that assign EPA the task of reviewing a state's decisions in implementing the CWA. The Act expresses this authority in various ways, but essentially EPA is either charged with intervening or provided the opportunity to intervene when state decisions do not comply with the requirements of the CWA.[8]

Maine's comments suggest that MICSA's provisions, especially the savings clauses, prevent EPA from exercising its CWA oversight authorities on behalf of the Tribes consistent with the trust responsibility. In EPA's view, Maine inaccurately characterizes EPA's oversight in this matter as "apply[ing] heightened scrutiny to Maine's WQS before approving them as to Indian Territory." See page 10 of Maine's September 13, 2013 WQS comments. EPA is not applying heightened scrutiny to Maine's WQS, but rather is exercising its responsibility as required under the CWA, and consistent with the settlement acts, to protect the Maine Tribes' sustenance fishing practices. See EPA's Decision Support Document. In so doing, EPA is at the same time acting consistently with the trust responsibility to the Tribes. The implication embedded within Maine's comment is that such a decision by EPA would accord the Tribes a special status and that intervening in a state regulatory decision under the CWA would affect or preempt the

[8] See e.g., 33 U.S.C. § 1342(d)(2)(when objecting to a proposed State NPDES permit, EPA shall provide a State with "a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator") and 40 CFR 123.44(c), or 33 U.S.C. § 1313(c)(4)(B)(EPA shall promulgate a water quality standard "if a revised or new water quality standard submitted by such State . . . is determined by the Administrator not to be consistent with the applicable requirements of this chapter").

State's jurisdiction to make that decision, which would run afoul of MIA and MICSA. Ultimately, the CWA establishes EPA's relevant authority, which EPA is exercising consistent with the federal trust responsibility. 33 U.S.C. §1251 et. seq. As mentioned before, MIA, in 30 M.R.S.A. Section 6207(4), reserves for the Penobscot Nation and the Passamaquoddy Tribe a right to take fish for their individual sustenance within their reservations. MICSA, in 25 U.S.C. Section 1724(h), reserves for these Indians the right to manage their natural resources. The CWA specifically gives EPA the authority to administer the statute to protect surface waters. 33 U.S.C. § 1251 et. seq. More specifically, the CWA gives EPA certain authority to oversee state water quality standards to ensure that they adequately protect human health and the environment. 33 U.S.C. § 1313. And EPA is exercising that authority to protect the resource uses that are here of interest to the Tribes -- the sustenance fishing uses of those waters -- consistent with the trust relationship and the requirements of the CWA.

EPA does not agree with Maine's interpretation of the effect of MICSA's savings clauses on the trust, because the Agency's disapproval of Maine's HHC as they would apply to waters within Indian lands is grounded in the requirements of both the CWA and the settlement acts. No state in the nation has "jurisdiction" to establish WQS contrary to the requirements of the CWA, at least in the sense that states cannot do so without running the risk that EPA will disapprove them. Therefore, the savings clauses in MICSA do not shield Maine from EPA's oversight under the CWA when EPA bases its objections on CWA requirements, for such objections do not affect any authority or jurisdiction that Maine has.

D. EPA must protect a broad range of cultural, spiritual, and physical aspects of the Tribes' lifestyles and associated resources. Sustenance fishing touches on all of these aspects of the Tribes' existence and culture.

EPA's response

EPA fully recognizes, respects and appreciates the broad range of cultural, spiritual, and physical aspects of the Tribes' lifestyles and associated resources, and the ways in which a sustenance fishing lifestyle touches on all of these aspects of the Tribes' existence and culture. EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands reflects the extent to which, under the CWA, EPA has the authority to ensure that Maine's WQS adequately protect the Tribes' sustenance fishing practices in relation to the Tribes' fish consumption and therefore their health. EPA notes, however, that notwithstanding EPA's recognition of and respect for the multi-faceted nature of the Tribes' sustenance fishing lifestyle and the various ways in which the Tribes' existence and culture depends on that practice, the focus of EPA's decision to disapprove certain of Maine's WQS in Indian lands necessarily is specific to the physical health-related fish consumption practices of the Tribes. That focus is necessary pursuant to the authority

provided by Congress to EPA under the CWA and the WQS program when human health criteria are established.[9]

However, EPA recognizes that in so protecting the Maine Tribes' sustenance fishing practices, through a focus on human health impacts, other cultural and spiritual aspects of grave importance to the Tribes may also be protected. This does not mean that EPA is overreaching or extending its authority under the CWA; it simply means that there are collateral benefits that arise due to the fact that protecting the Tribes' health through protection of their sustenance fishing practices has implications for other important aspects of their lifestyle and culture.

E. Tribal comment: Maine's regulatory actions and expressed legal positions demonstrate that the Maine Tribes' subsistence practices will not be protected by Maine.

EPA's response

As explained earlier in this RTC document, the accuracy or inaccuracy of factual statements such as this one is not a factor that can affect the jurisdictional arrangement established by the settlement acts. EPA's earlier explanation in this document about its ability and obligation to ensure that the Maine Tribes' sustenance fishing practices are protected under Maine's WQS program shows how the Tribes' concerns about Maine's future intentions are being addressed by EPA in accordance with CWA requirements. See EPA's Decision Support Document for a more detailed discussion.

II. Tribal comment: Even if EPA approves Maine's WQS to apply in waters in Indian Territory, EPA should ensure that the Tribes have a "decisive role in decision-making that affects its waters."

EPA's response

Prior to EPA's decision today to approve and to disapprove certain of Maine's WQS, EPA complied with its obligations to consult with the Maine Indian Tribes about Maine's WQS submissions. EPA carefully considered the Tribes' views, interests, and policy and legal arguments, along with all other pertinent information, including public comments and other sources of information in the administrative record, in reaching its decision to approve and to disapprove certain of Maine's WQS for waters in Indian lands. EPA will continue to act within the confines of the CWA consistent with the trust responsibility in reviewing any future new or revised WQS by Maine that would affect tribal waters and

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[9] Tribes have argued that in addition to fishing for their individual consumption, the definition of sustenance traditionally incorporated other components, including but not limited to barter and exchange. Commission Saltwater Fisheries Report, at p. 22-33. EPA is not deciding in its approval and disapproval of certain of Maine's new and revised WQS whether any of these other components, beyond the Tribes' individual consumption of fish, are properly part of the definition of the term "sustenance" as those other components are not, in any event, relevant to development of human health criteria under the CWA.

uses. EPA will ensure that the Maine Tribes remain involved in any such matters through the government-to-government consultation process EPA is committed to follow.

III. Tribal comment: Even if EPA approves Maine's WQS to apply in waters in Indian Territory EPA should put written procedures in place to moderate between the State and Tribes.

EPA's response

See response to comment immediately above. In addition, EPA agrees that such written procedures would be very helpful, and EPA is prepared to facilitate discussions among the Maine Tribes and Maine. However, EPA notes that there is no legal basis for EPA to *demand* that such written procedures exist as a precondition to the State exercising its jurisdiction to establish WQS in waters in Indian lands.

IV. Tribal comment: EPA must ensure that "designated uses" are protected.

EPA's response

EPA's disapproval of certain of Maine's WQS demonstrates that EPA is fulfilling its CWA obligation to ensure that designated uses under the CWA are protected by water quality criteria. See EPA's Decision Support Document for a detailed discussion and explanation.

V. Tribal comment: A fundamental Congressional purpose in creating the Southern Tribes' reservations was to protect the sustenance fishery.

EPA's response

EPA agrees that a fundamental purpose behind creation of the Southern Tribes' reservations was to protect the sustenance fishery. As discussed earlier in this document, and in greater detail in EPA's Decision Support Document, this Congressional purpose supports EPA's decision to insist on criteria that protect the sustenance fishing rights associated with waters in the Southern Tribes' reservations in Maine. At the same time, however, this Congressional purpose does not function to alter the jurisdictional arrangement among the State, the federal government, and the Maine Tribes, established by Congress in MICSA.

VI. Tribal comment: MICSA sets forth a sustenance fishing right reserved to Southern Tribes (not abrogated by any provisions of MICSA).

EPA's response

EPA agrees that MICSA sets forth a sustenance fishing right reserved to Southern Tribes that has not been abrogated by any provisions of MICSA or any other federal law. As discussed earlier in this document, and in greater detail in EPA's Decision Support Document, this fact supports EPA's decision to insist on criteria that protect the sustenance fishing use associated with the Southern Tribes' reservations. At the same time, however, the sustenance fishing right reserved to the Southern Tribes does not function to alter the jurisdictional arrangement among the State, federal government, and the Maine Tribes, established by Congress in MICSA.

VII. Tribal comment: Maine fails to recognize the Maine Tribes as separate sovereigns, for purposes of downstream water quality protection.

EPA's response

EPA has addressed earlier in this RTC document the question of the sovereign status of the Maine Tribes and the extent to which that factor does or does not play a part in EPA's analysis of whether Maine has jurisdiction to establish WQS in Indian lands and how EPA views the general trust responsibility to the Maine Tribes.

Further, as noted earlier in relation to a similar comment about Maine's interactions with the Maine Tribes, the accuracy of factual statements such as this one is not a factor that can affect the jurisdictional arrangement established by MIA and MICSA. EPA's earlier explanation in this document about its ability and obligation to protect the Maine Tribes' fishing practices under the CWA, as demonstrated by EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands, shows how the Tribes' concerns about Maine's future intentions with regard to their sustenance fishing practices under the CWA are being addressed by EPA in compliance with CWA requirements.

Additionally, any NPDES permits issued by Maine must ensure adequate protection of WQS that may apply in tribal waters. Thus, if Maine or EPA were to promulgate more stringent WQS applicable to waters in Indian lands in Maine, in response to EPA's disapproval of Maine's HHC, any NPDES permits issued by Maine must ensure adequate protection of such WQS.

VIII. Maine's comments (not already responded to earlier in this RTC document).

1. **Maine's comment: Under the operative statutes Maine has authority and responsibility to establish WQS for all state waters, including waters near or within Indian territories.**

EPA's response

EPA's letter to Maine in response to its WQS submissions indicates that EPA agrees that Maine has adequate legal authority to establish WQS for all state waters, including waters in Indian lands. See EPA's Decision Support Document for a more detailed discussion.

2. **Maine's comment: The applicable statutes don't permit EPA or the Tribes to establish WQS in the State's stead.**

EPA's response

Today, EPA is affirming that Maine has the legal authority to set WQS for waters in Indian lands. Maine's assertion that the Tribes and EPA do not have the legal authority to establish such standards instead of Maine no longer is pertinent given EPA's determination that Maine has such authority. However, if Maine does not address in a timely manner under the CWA the WQS deficiencies EPA's decision letter has identified, the CWA *requires* EPA to promulgate such standards in the State's stead. Furthermore, as noted earlier in this RTC document in relation to Maine's assertion that the Maine Indian Tribes are not eligible for TAS status under CWA section 518, EPA's decision is not addressing whether the Tribes separately have such authority.

3. **Maine's comment: EPA must make a formal finding that the State lacks jurisdiction before it can assert federal jurisdiction, which EPA cannot do under MIA and MICSA and *Maine v. Johnson*.**

EPA's response

Today, EPA is affirming that Maine has such legal authority but has found that certain of Maine's WQS are not approvable under the CWA. In addition, Maine's assertion that EPA does not have the legal authority at this time to establish such standards is no longer pertinent given EPA's determination that Maine has such authority. However, if Maine does not address in a timely manner under the CWA the WQS deficiencies EPA's decision letter has identified, the CWA *requires* EPA to promulgate such standards in the State's stead.

4. **Maine's comment: EPA approved many WQS submissions, some including in the Penobscot River, without mentioning jurisdictional issues, and also approved designated uses that do not mention anything about tribal interests or sustenance fishing. EPA's NPDES record belies EPA's own legal position.**

EPA's response

See EPA's Decision Support Document for a partial response to and discussion of the issues raised by this comment.

In addition, as of 2004, EPA's letters to Maine responding to the State's proposed new and revised water quality standards expressly stated that EPA's decision to approve or disapprove did not apply to waters within Indian Country. Consequently, there would not have been a reason for EPA to address in those letters tribal interests in waters in Indian lands, including sustenance fishing. Moreover, the fact that ME DEP may have issued NPDES permits to facilities that discharged directly or indirectly into the Penobscot River, and that EPA may not have offered any comments about those permits, does not constitute an acknowledgment by EPA that Maine's WQS had been approved by EPA to apply in waters in Indian lands.

As to NPDES permits that EPA issued to the Penobscot Nation's POTW, EPA included language that indicated, not that Maine's WQS directly applied to such discharges as a legal matter, but that as a practical matter Maine's WQS provided some guidance as to how the NPDES permit's effluent limits for pollutants should be written or determined. When EPA recited that those permits met Maine WQS that applied "in the proximity" of the discharge, the Agency very consciously used a formulation that did not recite that Maine's WQS applied at the point of discharge. Basically, EPA looked to the nearest approved WQS as guidance for the discharge limits in those permits. The State's WQS approved outside Indian lands provided that guidance. In the absence of federal, state or Indian WQS applicable under the CWA at the point of discharge, this course of action makes abundant practical sense.

5. **Maine's comment: The State has asked EPA to explain its legal basis for not applying State WQS in Indian Territory and EPA has never responded.**

EPA's response

Whether or not the State's comment is accurate is no longer a relevant point because EPA's decision today has answered that question. In addition, EPA notes that a lack of a response before its decision today would, in any event, not be able to affect the outcome of a legal analysis dictated by the settlement acts and the CWA.

6. **Maine's comment: The "trust responsibility" only applies to trust lands, not reservation lands in Maine (which are not held in trust).**

EPA's response

See discussion above beginning at page 11.

7. **Maine's comment: MICSA's savings clauses render the "the trust obligation" inapplicable in Maine.**

EPA's response

See discussion above beginning at page 38.

8. **Maine's comment: Indian Tribes in Maine are not eligible for TAS status under CWA Section 518.**

EPA's response

See discussion above beginning at page 15.

9. **Maine's comment: Maine asserts that there is no basis for EPA to treat waters within Indian territories any differently than the waters in Maine outside of Indian territories.**

EPA's response

EPA's Decision Support Document demonstrates the inaccuracy of Maine's comment and discusses in detail the reasons why EPA has determined that there is a significant difference between such waters and their uses for purposes of the CWA.

10. **Maine's comment: EPA's current review is unlawful and unnecessary.**

    a. **Statute gives EPA 90 days to act and require changes to submitted WQS. EPA did not require changes within 90 days, so EPA cannot require changes now.**

EPA's response

EPA disagrees with Maine's reading of the CWA provisions at issue. As described by the United States Department of Justice in legal pleadings filed in Maine's case filed against EPA, State of Maine, et. al. v. McCarthy et. al., Civil Action No. 1:14cv264, (United States District Court for the District of Maine 2014), no provision of the CWA or its implementing regulations preclude EPA from disapproving a state's WQS on the basis that EPA did not inform such state within 90 days of its WQS submission to EPA that

changes to the state's proposed WQS are necessary. The following description of the relevant CWA authorities sets forth the correct sequence of events in relation to a state's WQS submission and EPA's review.

States must hold public hearings for the purpose of reviewing their WQS, and, as appropriate, modifying and adopting standards, at least once every three years beginning with October 18, 1972. 33 U.S.C. § 1313(c)(1). This review and revision process is commonly referred to as the triennial review process. Any new or revised WQS adopted by a state must be submitted to EPA for a determination of whether it meets the CWA's requirements. 33 U.S.C. § 1313(c)(1) and (3); 40 C.F.R. §§ 131.5, 131.6 and 131.20. EPA's review of such WQS involves the application of EPA's legal, scientific and policy expertise. *See* 40 C.F.R. § 131.5. If EPA determines that the new or revised WQS is consistent with the CWA, then EPA shall so notify the relevant state within 60 days from the date of submission. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(1).

If EPA determines that the new or revised WQS is not consistent with the CWA, EPA shall notify the state within 90 days from the date the WQS is submitted that it is disapproved, and must specify necessary changes. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(2). If the state then fails to adopt the specified changes within 90 days of EPA's notice, EPA must "promptly" propose a federal WQS for the waters involved. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a). Then, unless the state revises its WQS and EPA approves that revision, EPA must proceed to promulgate the WQS itself. 33 U.S.C. § 1313(c)(4)(A).

In the context of its CWA citizen suit claim, Maine asserted that EPA has waived its authority to disapprove Maine's outstanding WQS, that EPA is barred from disapproving such WQS, and that EPA is required to approve such WQS, apparently on the theory that EPA loses its authority to disapprove WQS when it misses the statutory deadline to do so. Congress provided EPA with authority to approve or disapprove new or revised WQS regardless of whether EPA has met the statutory deadline for doing so under CWA section 303(c)(3).
As discussed above, new and revised WQS must be submitted to EPA for review. 33 U.S.C. § 1313(c)(2)(A). *If* EPA determines that the new or revised WQS meets the requirements of the CWA, EPA shall approve the WQS within 60 days. *Id.* at § 1313(c)(3). *If* EPA determines that the new or revised WQS is not consistent with the requirements of the CWA, EPA shall within 90 days of submission disapprove the WQS and specify necessary changes. *Id.* "On its face, this language plainly supports . . . that Congress did not intend new or revised state standards to be effective until after EPA had reviewed and approved them." *Alaska Clean Water Alliance v. Clarke*, 1997 WL 446499 * 3 (W.D. Wash. July 8, 1997). Indeed, the CWA does not even remotely suggest that Congress intended for EPA to lose its authority to approve or disapprove a WQS, or that the WQS must automatically be deemed approved, if EPA fails to act by the 60 or 90-day statutory deadlines. *See* 33 U.S.C. § 1313(c)(2)(A); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.").

Moreover, to the extent the CWA is ambiguous on this point, EPA has explained in the context of a CWA rulemaking that "the concept of a default approval of state and tribal WQS submissions is not consistent with section 303 of the CWA [because] [s]ection 303(c)(3) requires EPA to make an affirmative finding that the standards revisions submitted to EPA are consistent with the CWA." 65 Fed. Reg. 24,641, 24,646 (Apr. 27, 2000). EPA's interpretation of CWA section 303(c) as not providing for automatic approvals or disapprovals of WQS if EPA does not act within the 60 or 90 day windows of that section is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In addition, Congress has expressly provided a remedy when EPA fails to timely respond to a WQS submission. The CWA citizen suit provision provides the district courts with jurisdiction to order EPA to perform its mandatory duty to approve or disapprove a new or revised WQS when EPA has failed to timely respond. 33 U.S.C. § 1365(a). As the Supreme Court has explained, "[w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

b. Maine's comment: There is no basis for separate federal notice and comment.

EPA's response

See EPA's introduction to this RTC document for a response to this comment.

c. Maine's comment: The Maine Tribes were well aware and participated in the State's action.

EPA's response

EPA reviewed Maine's notice to the public and the public's comments on Maine's proposed WQS revisions. In the first instance, while the Tribes in Maine participated in the State's public process, their comments focused entirely on the adequacy of the state standards and whether they would protect sustenance fishing. The Tribes' comments did not focus on the State's authority to set standards for waters in the Tribes' lands. It is reasonable to assume that the Tribes were concerned about how Maine's WQS might impact sustenance fishing opportunities in waters outside Indian lands. It was not clear that Maine's notice alerted the public and the Tribes to the State's assertion of jurisdiction to set WQS for waters in the Tribes' lands.

Ultimately, EPA determined that, in light of the great deal of interest in the jurisdictional and technical issues involved in Maine's proposal, it would be prudent to err on the side of caution by taking additional steps to ensure that the Maine Tribes and other members of the public had clear notice of the implications of Maine's proposed WQS revisions.

EPA had never before approved or disapproved in Maine WQS revisions to be applied to waters within Indian lands. Moreover, EPA received additional comments from the Maine Tribes and from the ME DEP and the Maine Office of the Attorney General that were not part of Maine's administrative record for its WQS revisions at the state level; and to that extent the record before EPA is now more complete.

d. Maine's comment: Maine accuses EPA of bad faith, "creating" jurisdictional controversy where there is none.

EPA's response

As set forth in great detail in EPA's Decision Support Document, EPA's decision has two essential components, a legal jurisdictional component and a scientific/technical component. The latter required a complex assessment by EPA of the adequacy of Maine's criteria in relation to the designated uses of the waters in Indian lands, once EPA determined that Maine had jurisdiction. The complexity of the issues with which EPA was confronted, demonstrated by the content of its decision documents both as to the jurisdictional analysis and technical determinations, shows that EPA was not creating a jurisdictional controversy where there was none. In fact, it is a significant mischaracterization of the issues confronting EPA, and of EPA's deliberative process, to portray EPA's activities and process as nothing more than "creating" a jurisdictional controversy.

In the end, EPA concluded that there is no valid legal basis to distinguish or depart from the First Circuit's reasoning and decision in *Maine v. Johnson* that Maine has jurisdiction to implement the CWA NPDES program in Indian lands. A careful analysis was warranted, however, due to the arguable differences between the NPDES and WQS programs, and due to the copious substantive comments EPA received from the State and Maine Tribes on the jurisdictional question. For EPA not to have ensured that its decision had the benefit of the full explanation of the State's and the Tribes' views on this question could have led to a decision for which there was an incomplete and possibly flawed administrative record.

11. Maine's comment: Maine's submitted WQS are approvable and there is no basis upon which EPA may disapprove them.

EPA's response

EPA's Decision Support Document explains in detail the bases upon which EPA has decided to disapprove Maine's HHC for waters in Indian lands. EPA disagrees with Maine's assertion that "there is no basis upon which EPA may disapprove" any of Maine's WQS. In summary, EPA's disapproval of Maine's HHC for waters in Indian lands is based on the fact that Maine did not use a fish consumption rate that results in criteria that are sufficient to protect the designated use of sustenance fishing in those waters. EPA's Decision Support Document also contains an explanation of EPA's

identification of the sustenance fishing designated uses for waters in Indian lands that derives from Congress's purpose in confirming and establishing, through the settlement acts, sustenance fishing in the Southern Tribes' reservations and in the trust land waters of the Southern and Northern Tribes. We refer the reader to EPA's Decision Support Document for more detailed information relevant to Maine's comment.

12. Maine's comment: Maine's WQS protect sensitive subpopulations that engage in sustenance fishing.

EPA's response

EPA's Decision Support Document discusses EPA's determination, consistent with the requirements of the CWA, that Maine's HHC do not adequately protect the Maine Tribes' health given the Tribes' sustenance fishing practices and the designated use of sustenance fishing in waters in Indian lands. EPA also disagrees with Maine's characterization of the Maine Tribes as "sensitive subpopulations" of the State's general population. EPA's Decision Support Document explains that the Maine Tribes constitute their own *general* population in the geographic areas defined by their reservations and trust lands and that it would therefore be inappropriate to treat the Tribes merely as a "sensitive subpopulation" of Maine's general population in waters located within Indian lands. We refer the reader to EPA's Decision Support Document for more detailed information relevant to Maine's comment.

13. Maine's comment: Maine's WQS are based on technically sound and objective data and analysis regarding cancer risk, fish consumption rates and bioconcentration.

EPA's response

EPA has approved many of Maine's WQS as being technically sound regarding cancer risk, fish consumption rates and bioconcentration. However, for the reasons set forth in EPA's Decision Support Document, EPA does not agree that Maine's HHC meet CWA requirements as applied in waters within Indian lands in Maine, because the fish consumption rate on which they are based is not representative of the Tribes' sustenance fishing. See also EPA's responses to comments VIII. 10 and 11 above, regarding fish consumption rates used by Maine and the fact that it would not be consistent with the requirements of the CWA, as informed by the settlement acts, to treat the Maine Indian Tribes as a "sensitive subpopulation" of Maine's general population.

14. Maine's comment: EPA has used in the past some of this data (meaning the data used in establishing the WQS submitted to EPA in January 2013).

EPA's response

EPA has never "used" the data Maine refers to in its comment for purposes of determining whether Maine's WQS meet CWA requirements in waters within Indian lands in Maine. The fact that EPA may have considered this data in the past to approve Maine's HHC in waters outside Indian lands, including whether such criteria are protective of highly exposed subpopulations fishing in waters outside of Indian lands, is not relevant to the question whether Maine's WQS meet CWA requirements for the target population of tribal members engaged in sustenance fishing in waters located in Indian lands.

15. Maine's comment: Maine's human health criteria are grounded in the empirical, local population-specific data that EPA prefers.

EPA's response

EPA acknowledges that Maine's HHC are based in part on local, population-specific fish consumption data, and EPA has approved those criteria for waters outside of Indian lands. However, as discussed in EPA's Decision Support Document and summarized briefly in earlier responses above to some of Maine's other comments, EPA has determined that the localized data are not representative of unsuppressed tribal sustenance fish consumption in waters in Indian lands, and therefore the HHC that are based on the localized data are not adequate to protect the sustenance fishing use in those waters. Maine must use fish consumption data that are representative of unsuppressed tribal sustenance fish consumption in waters in Indian lands, such as the data from the Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Study"), which was completed in 2009, rather than the 1990 study conducted by McLaren/Hart – ChemRisk, of Portland, Maine (the "ChemRisk Study"[10]) that was actually used by Maine. See also EPA's responses above relating to Maine's calculation of a fish consumption rate and the fact that the Maine Tribes are the general population to which HHC should be targeted for waters in Indian lands.

[10] ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers*, as revised July 24, 1992. See also Ebert, E.S., N.W. Harrington, K.J. Boyle, J.W. Knight, R.E. Keenan, *Estimating Consumption of Freshwater Fish among Maine Anglers*, North American Journal of Fisheries Management, 13:4, 737-745 (1993); http://dx.doi.org/10.1577/1548-8675(1993)013<0737:ECOFFA>2.3.CO;2

IX. Maine Tribes' comments regarding the adequacy of Maine's WQS

1. **Tribal comment: Apart from the jurisdictional question, Maine's WQS for arsenic, phenol and acrolein are scientifically and legally flawed, and are arbitrary and capricious.**

EPA's response

EPA's Decision Support Document explains in detail the bases of EPA's decision to disapprove the three HHC identified in the comment, along with the rest of Maine's HHC, as applied to waters within Indian lands. We therefore refer the reader to that document. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

2. **Tribal comment: As to arsenic, EPA received comments from the Maine Tribes that Maine's arsenic standard failed to consider other exposure routes and synergistic effects; that the ChemRisk Study used by Maine to establish a fish consumption rate is flawed for a number of reasons; that unscientific manipulation of variables used by Maine to calculate in-stream criteria shouldn't be accepted by EPA; and that the fish consumption rate and cancer risk level used for arsenic by Maine are unacceptable.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's arsenic standard as it would apply to waters within Indian lands in Maine. While EPA's decision was not based on all of the objections raised by the Maine Tribes' comments, EPA agrees that Maine's arsenic criteria are not approvable under the CWA for waters in Indian lands. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

3. **Tribal comment: Using inconsistent fish consumption rates and cancer risk levels for different WQS is arbitrary and capricious.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. Because EPA is disapproving all of the HHC for waters in Indian lands due to an inadequate fish

consumption rate, it is not necessary at this time to consider the extent to which differing fish consumption rates or cancer risk levels for different criteria might be approvable for those waters.

4. **Tribal comment: The arsenic in-stream concentration is increasing as compared to Maine's prior in-stream concentration for arsenic, which imposes increased risks to tribal members.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC, including arsenic, as they would apply to waters within Indian lands in Maine. Because EPA is disapproving Maine's arsenic criteria as it would apply to waters in Indian lands, it is premature to address how Maine's arsenic HHC for waters in Indian lands will compare with the prior criterion.

5. **Tribal comment: The Penobscot Nation comments that the Wabanaki study contains "site specific" data, and that the CWA does not preclude the use of site-specific data from any particular time period in establishing WQS.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. EPA agrees with the Penobscot Nation that, based on the data and information available at this time, fish consumption data from the Wabanaki Study is the best available representative data and thus, barring any better data being collected, must be used in establishing HHC for waters in Indian lands in Maine. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

6. **Tribal comment: The Penobscot Nation comments that its sustenance fishing right is an "existing use" and a "designated use" as those terms are used in the CWA. The Tribe further comments that Maine's human health WQS submission shows that these uses will not be protected in waters within Indian lands.**

EPA's response

EPA's Decision Support Document sets forth in detail the bases for EPA's disapproval of Maine's HHC as they would apply to waters within Indian lands in Maine. Included in the Decision Support Document is EPA's explanation of its identification of the designated use of sustenance fishing for waters within Indian lands and its relationship

both to CWA requirements and to Congress's purpose in establishing the Maine Tribes' reservations and trust lands under the settlement acts. EPA agrees that Maine's current HHC are not adequate to protect the designated use of sustenance fishing that applies to waters in Indian lands and therefore has disapproved those criteria. See also EPA's responses to comments VIII. 10, 11 and 12 above, regarding fish consumption rates used by Maine and the fact that it is not consistent with the requirements of the CWA to treat the Maine Indian Tribes as a "sensitive subpopulation" of the general population in Maine.

7. **Tribal comment: EPA has a duty to collect more accurate fish consumption rate data, and such data must account for suppression of fish consumption. Maine's WQS fail to consider and account for suppressed fish consumption.**

EPA's response

EPA does not agree that the CWA imposes a duty to collect more accurate fish consumption rate data. But states (or EPA, if EPA is developing the HHC) must use the best available fish consumption data or information to derive HHC that represent an unsuppressed fish consumption rate. EPA agrees that the fish consumption data used by Maine to establish its HHC is not representative of unsuppressed fish consumption associated with tribal sustenance fishing in waters in Indian lands. EPA's Decision Support Document explains the bases of the data derived from the Wabanaki Study and the ChemRisk Study Maine actually used. The Decision Support Document also explains EPA's basis for concluding that the Wabanaki Study provides the best available existing fish consumption data and information for deriving HHC based on an unsuppressed sustenance fish consumption rate for waters in Indian lands in Maine.

8. **Tribal comment: The situation at the Penobscot Nation is not dissimilar to that at other tribes, traditionally dependent upon a subsistence fishery. As EPA concluded in studying fish consumption rates at such tribes in the Northwest, there is "a simple relationship between tribal fish-consuming populations in the Pacific Northwest; people eat what's available to them, what's culturally preferred and at high consumption rates." EPA, TECHNICAL SUPPORT DOCUMENT FOR ACTION ON THE STATE OF OREGON'S NEW AND REVISED HUMAN HEALTH WATER QUALITY CRITERIA FOR TOXICS AND REVISIONS TO NARRATIVE TOXICS PROVISIONS SUBMITTED ON JULY 8, 2004 (June 1, 2010) at 47.**

EPA's response

See EPA's response to comment IX. 7., immediately above.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 POST OFFICE SQUARE SUITE 100
BOSTON, MASSACHUSETTS 02109-3912

February 2, 2015

Patricia W. Aho, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Review and Decision on Water Quality Standards Revisions

Dear Commissioner Aho:

By letter of January 14, 2013, the Maine Department of Environmental Protection ("DEP") submitted revisions of the State's surface water quality standards ("WQS") to Region 1 of the United States Environmental Protection Agency ("EPA" or "Region") for review and approval or disapproval. The revisions were adopted by the DEP on July 13, 2012. By letter to EPA dated January 9, 2013, Maine's Assistant Attorney General in the Natural Resources Division certified the revisions as having been duly adopted pursuant to state law. By letter of May 16, 2013, EPA approved the revision to the arsenic criteria to protect human health in state waters outside of Indian territories and lands, but did not act on the arsenic criteria for waters in Indian territories and lands. In the approval letter EPA also indicated that the additional revisions submitted by DEP were still under review.

I commend DEP for the 2012 adoption of revisions to its water quality standards that strengthen the ability to protect Maine's waters including the adoption of new aquatic life criteria for acrolein, diazinon, and nonylphenol.

DEP submitted additional revisions of the State's surface water quality standards to the Region for review and approval or disapproval by letter of February 27, 2014. The revisions were certified on February 26, 2014, by Maine's Assistant Attorney General in the Natural Resources Division as having been duly adopted pursuant to state law. Before now, EPA had not acted on any of these revisions for any waters in Maine.

In both of the above-referenced submission letters, DEP requested that EPA approve Maine's WQS in Indian territories and lands ("Indian lands"). As discussed in the attached Decision Support Document (Attachment A), EPA has concluded that the State of Maine has the authority to adopt WQS that are applicable to waters in Indian lands. Accordingly, EPA is herein responding to the remaining unapproved elements of the 2013 and 2014 WQS revisions for waters throughout the State, including in Indian lands.

In addition to the 2013 and 2014 submissions, DEP submitted numerous WQS revisions to EPA from August 26, 2003, through July 8, 2011, for review and approval or disapproval.[1] In EPA's letters approving WQS revisions contained in those submissions, EPA noted that it was not taking action on the WQS with respect to any waters in Indian lands. In light of EPA's determination that the State of Maine has the authority to adopt WQS for waters in Indian lands, EPA is herein responding to those WQS revisions for those waters.[2]

Many of the WQS revisions under review for approval or disapproval for waters in Indian lands are water quality criteria, and the Clean Water Act ("CWA") requires that criteria be protective of designated uses. As discussed in the Decision Support Document, EPA has not yet approved any WQS, including designated uses, for waters in Indian lands.

Therefore, in order to evaluate whether the submitted criteria are protective of designated uses, EPA must first approve designated uses for these waters. Accordingly, EPA is herein approving Maine's surface water classifications and corresponding designated uses for waters in Indian lands.[3] Because EPA has not previously approved these WQS for waters in Indian lands, EPA considers them to be "new" WQS as applied to such waters. EPA is also approving 38 M.R.S. § 6207(4) and (9) (a provision of the Maine Implementing Act, or MIA, which settled the Maine Indian land claims as a matter of Maine law), as an explicit designated use for certain waters in Indian lands.

The following paragraphs state EPA's decisions on Maine's new and revised WQS described above. The decisions include approvals and disapprovals, and the detailed explanations for the decisions are provided in Attachment A. EPA has also identified several provisions that EPA is not taking action on, primarily because DEP is planning to update them soon, and some provisions that EPA is not taking action on because we have concluded that they are not WQS requiring EPA review and approval; these are also explained in Attachment A. EPA is not responding to new or revised Maine WQS other than those explicitly identified in this letter.

Approvals

Pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. part 131, I hereby approve the following new or revised WQS:

Classifications and Designated Uses

For all waters in Indian lands:

- Maine's standards for classification and corresponding designated uses in 38 M.R.S. § 465(1.A), (2.A), (3.A) and (4.A)(for fresh waters); § 465-A(1.A) (for great ponds and natural lakes and ponds less than 10 acres in size, and impoundments of rivers that are

[1] A list of those submissions is provided in Section 4.10 of Attachment A.

[2] Maine's July 8, 2011 submission was for EPA's review of a reclassification of the Kennebec River. Although EPA's July 20, 2011 letter approving the reclassification included the caveat about not acting with respect to waters in Indian lands, the Kennebec River is nowhere near Indian lands. Therefore, EPA is taking no further action today with respect to that submission.

[3] EPA intends to review and approve or disapprove all remaining Maine WQS that could apply to waters in Indian lands, such as dissolved oxygen criteria, definitions, antidegradation provisions, etc., as soon as possible.

defined as great ponds pursuant to 38 M.R.S. § 480-B), including the definition of "great ponds" in 38 M.R.S. § 480-B(5); and § 465-B(1.A), (2.A) and (3.A) (for estuarine and marine waters);

- The classification of specific waters in 38 M.R.S. § 467 (Classification of major river basins) and § 468 (Classification of minor drainages); and § 469 (Classification of estuarine and marine waters);
- The addition of agriculture as a designated use to freshwaters (Classes AA, A, B, C, and GPA), submitted to EPA on August 26, 2003; and
- The reclassifications, submitted to EPA on December 7, 2009, of Otter Creek, a tributary of Seboeis Stream, Alder Stream, and South Branch Stream, a tributary to the Mattamiscontis Stream, from Class B to Class A; and of Grand Falls Flowage between Route 1(Princeton and Indian Township) and Black Cat Island from Class B to Class GPA.

Criteria

For waters throughout the State of Maine, including in Indian lands, the following water quality criteria provisions contained in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 14, 2013:

- Freshwater and marine aquatic life criteria for diazinon and nonylphenol;
- Freshwater aquatic life criteria for acrolein;
- Corrections of Federal Register Cites/Sources in Tables I and II of Appendix A; clarifications in footnote II in Table I, and footnotes A and C and Additional Note 4 in Table II; and
- Footnote aME in Table I of Appendix A *except* for the first sentence related to arsenic, which EPA is taking no action on.

For all waters in Maine *except* for waters in Indian lands, the following water quality criteria contained in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 14, 2013:

- Human health criteria for the consumption of water plus organisms for acrolein; and
- Human health criteria for the consumption of organisms only for acrolein and phenol.

For all waters in Indian lands, the following water quality criteria provisions:

- The provision regarding dissolved oxygen measurement requirements in riverine impoundments contained in 38 M.R.S. § 464(13), submitted to EPA on August 26, 2003;
- Aquatic life criteria provisions in 38 M.R.S. § 420(1-B.A.(1)),(1-B.C),(1-B.D), and (1-B.E), submitted to EPA on May 14, 2004, *except for* revisions made at in 38 M.R.S. § 420(1-B.C.(1)) and (1-B.C.(2)) that describe the state regulatory procedures for establishing site-specific bioaccumulation factors and which are not WQS (see below);
- The Classification Attainment Evaluation Using Biological Criteria for Rivers and Streams, contained in DEP Rule Chapter 579, submitted to EPA on May 14, 2004;
- All provisions of DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, including Appendix A, submitted to EPA on January 11, 2006, *except for:*
  - All human health criteria in Appendix A, which EPA is disapproving (see below);

- the ammonia aquatic life criteria in Appendix A and 7.C, on which EPA is taking no action at this time (see below); and
- provisions which are not WQS (see below);

- The 30-day average dissolved oxygen criterion of 6.5 ppm for certain Class C waters, contained in 38 M.R.S. § 465(4.B), submitted to EPA on January 11, 2006;
- The instream design flows for the application of water quality criteria for aquatic life and human health protection, which are consistent with EPA's current guidance (1Q10 low flow for acute aquatic life criteria, 7Q10 low flow for chronic aquatic life criteria, and harmonic mean flow for human health criteria), contained in DEP Rule Chapter 530, § 4.B, submitted to EPA on January 11, 2006; and
- Revisions at 38 M.R.S. § 465(3.C.(2)) and § 465-B(2.C) enacted in Chapter 291, L.D. 1274, "An Act to Allow the Discharge of Aquatic Pesticides Approved by the Department of Environmental Protection for the Control of Mosquito-borne Diseases in the Interest of Public Health and Safety."), submitted to EPA on April 8, 2008.

General

For all waters in Indian lands:

- The provisions in 38 M.R.S. § 464(3.B) that ensure that a hearing will be held at least once every three years for the purpose of reviewing Maine's water quality standards, and revising them as appropriate, consistent with 40 C.F.R. § 131.20, submitted to EPA for review on May 14, 2004.

Disapprovals

Pursuant to Section 303(c)(3) of the CWA and 40 C.F.R. part 131, I hereby disappeove the following new and revised water quality standards:

For all waters in Indian lands:

- The mercury human health criteria revision at 38 M.R.S. § 420(1-B.A.(2)), submitted to EPA May 14, 2004;
- All human health criteria in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 11, 2006; and
- Human health criteria revisions related to arsenic, acrolein, and phenol in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, and the last sentence in Ch. 584, § 5.C related to the fish consumption rate, submitted to EPA on January 14, 2013.

Revisions for Which EPA is Not Making a Decision at This Time

EPA is not deciding to approve or disapprove the following new or revised WQS at this time:

For all waters in Indian lands:

- The ammonia criteria for protection of aquatic life in DEP Rule Chapter 584, Appendix A, submitted to EPA on January 11, 2006;

- The recreational (bacteria) numeric criteria for the protection of primary contact recreation for Class B and C waters in 38 M.R.S. § 465(3.B) and (4.B), submitted to EPA on January 11, 2006;
- The revisions made in L.D. 1450 at 38 M.R.S. § 465-B(2.B) and (3.B), which extended the applicability of the bacteria criteria for Class SB and Class SC waters to include bacteria of domestic animal origin, submitted to EPA on January 11, 2006; and
- The first sentence of Footnote aME in Table 1 of Appendix A and the last sentence in Ch. 584, § 4 (the cancer risk level to be used to calculate human health criteria for inorganic arsenic).

For all waters throughout Maine, including in Indian lands:

- The revision made in L.D. 1304 at 38 M.R.S. § 464(4.A(3)(a)), and § 465((3.C.(1)) and (4.C), related to certain pesticide discharges, submitted to EPA on January 11, 2006;
- The revisions made in L.D. 1304 at 38 M.R.S. § 465(3.B) and (4.B), which extended the applicability of the bacteria criteria for Class B and Class C waters to include bacteria of domestic animal origin, submitted to EPA on January 11, 2006;
- The revision made in L.D. 1778 at 38 M.R.S. § 465-A(1.B), which extended the applicability of the bacteria criteria for Class GPA waters to include bacteria of domestic animal origin, submitted to EPA on April 8, 2008;
- The phenol criteria for the protection of human health consumption of water plus organisms, in DEP Rule Chapter 584, Appendix A, submitted to EPA on January 14, 2013; and
- The revision made in L.D. 1430 at 38 M.R.S. § 464(4.A(3)(b)), related to certain pesticide discharges to tributaries of GPA waters, submitted to EPA on February 27, 2014.

For waters outside of waters in Indian lands:

- The reclassification of a 0.3 mile segment of Long Creek that flows through Westbrook from Class B to Class C, submitted to EPA on December 7, 2009.

Revisions That are not WQS and do Not Require an EPA Decision

I have concluded that the following revisions, which relate to exemptions from discharge prohibitions, testing and licensing provisions related to discharges, updates of federal statutory and regulatory references, and procedural provisions that establish processes for adopting alternative criteria and establishing site-specific bioaccumulation factors, are not water quality standards requiring EPA review and approval or disapproval:

- Revisions made at 38 M.R.S. § 465(1.C.(2)) and (2.C.(2)), enacted as Chapter 574, L.D. 1833 "An Act to Amend Water Quality Laws to Aid in Wild Atlantic Salmon Restoration," submitted to EPA on May 14, 2004;
- Revisions made at 38 M.R.S. § 420(1-B.B) related to discharger compliance, submitted to EPA on May 14, 2004;
- Revisions made at in 38 M.R.S. § 420(1-B.C.(1)) and (1-B.C.(2)) that describe the state regulatory procedures for establishing site-specific bioaccumulation factors, submitted to EPA on May 14, 2004;

- Revisions made at 38 M.R.S. § 361-A(1-J) and (1-K), enacted as Chapter 330, L.D. 1588, Sections 7 and 8, which updated the definitions of "Code Of Federal Regulations" and "Federal Water Pollution Control Act" to include their amendments through January 1, 2005, submitted to EPA on January 11, 2006;
- Revisions made at 38 M.R.S. § 464(4.A.(1)(c) and (d)); § 465(1.C.(3)) and (2.C.(3)); and § 465-A(1.C), enacted as Chapter 182, L.D. 1304 "An Act Concerning Invasive Species and Water Quality Standards," submitted to EPA on January 11, 2006;
- Revisions made at DEP Rule Chapter 584 § 3, submitted to EPA on January 11, 2006, regarding adoption procedures for alternative statewide and site specific criteria. This includes: the requirement in Chapter 584 § 3(A.(2)) that "statewide criteria must be initiated in accordance with the petition for rulemaking provisions of the State Administrative Procedures Act, 5 M.R.S.A., Section 8055"; the provision in the first paragraph of Chapter 584 § 3(B) that site specific criteria "must only be adopted by the Board as part of a waste discharge license proceeding pursuant to 38 MRSA Sections 413, 414 and 414-A"; and the first two sentences of the second paragraph of Chapter 584 § 3(B);
- Revisions made at 38 M.R.S. § 464(4.A.(1)(e)); § 465(1.C.(4)) and (2.C.(4)); § 465-A(1.C.(4)); and § 465-B(1.C.(2)), enacted as Chapter 291, L.D. 1274, "An Act to Allow the Discharge of Aquatic Pesticides Approved by the Department of Environmental Protection for the Control of Mosquito-borne Diseases in the Interest of Public Health and Safety," submitted to EPA on April 8, 2008;
- Revisions made at 38 M.R.S. § 420(1-B)(F) and § 464(4)(J) and (K), related to testing and licensing requirements for waste discharges that were included in LD 515, submitted to EPA on January 14, 2013; and
- Revisions made at 38 M.R.S. § 464(4.A.(1)(f)); § 465(1.C.(5)) and (2.C.(5)); § 465-A (1.C.(5)); and § 465-B(1.C.(4)), enacted as Chapter 193, L.D. 1430, "An Act to Clarify the Permitted Use of Aquatic Pesticides," submitted to EPA on February 27, 2014.

EPA looks forward to continued cooperation with Maine in the development, review and approval of water quality standards pursuant to our responsibilities under the Clean Water Act. EPA would like to begin discussions with DEP as soon as possible about the criteria that EPA is disapproving and those about which EPA is making no decision. EPA will contact you next week to schedule such discussions. In the meantime, please contact Ellen Weitzler (at weitzler.ellen@epa.gov or 617-918-1582) if you have any questions.

Sincerely,

H. Curtis Spalding
Regional Administrator

ATTACHMENT A

Analysis Supporting EPA's February 2, 2015 Decision to Approve, Disapprove, and Make No Decision on, Various Maine Water Quality Standards, Including Those Applied to Waters of Indian Lands in Maine

EXECUTIVE SUMMARY

Maine's Department of Environmental Protection (DEP) submitted numerous new or revised water quality standards (WQS) to EPA for review and approval under the Clean Water Act (CWA) between 2003 and 2014. In its decisions from 2004-2013 following review of such WQS, EPA limited its approvals of the new or revised WQS to state waters outside of Indian territories and lands in Maine ("Indian lands"), and explicitly refrained from taking any action on the WQS for waters in Indian lands. In its decision today, EPA is responding to the outstanding new and revised WQS from 2003-2014 as they relate to waters in Indian lands, and, in the case of some of the WQS, also as they relate to state waters outside of Indian lands.

As summarized below and explained in more detail in the body of this decision support document, Maine has the authority to establish WQS for waters in Indian lands, subject to EPA's authority under the CWA to review and approve or disapprove such standards. After evaluating the various new and revised WQS contained in DEP's submissions from 2003-2014, EPA is today approving all of the aquatic life criteria for toxic pollutants for waters in Indian lands except for ammonia, and all but one of the new aquatic life criteria submitted in 2013 for all waters, including in Indian lands.[1] EPA is also approving a number of other WQS provisions for waters in Indian lands, as well as Maine's classifications and designated uses for those waters. EPA is disapproving Maine's human health criteria as they apply to waters in Indian lands. Finally, EPA has identified a number of provisions on which it is taking no action because they are not WQS and therefore are not subject to EPA review.

The bases for two aspects of EPA's decision today are summarized below because of their complexity -- EPA's conclusion that Maine has the authority to establish WQS in waters in Indian lands, and EPA's conclusion that Maine's human health criteria do not protect the designated uses and therefore must be disapproved.

[1] EPA is taking no action on the ammonia criteria and certain provisions related to bacteria and pesticides, based on our understanding from discussions with DEP staff that DEP will be revising these criteria and provisions in light of recent EPA criteria recommendations and to ensure the protection of designated uses, nor is EPA taking action on the reclassification of a non-tribal water (Long Creek), pending further discussion with DEP. See section 4.8 below. EPA is also taking no action on one of the new phenol criteria for all waters pending DEP's correction of a mathematical error, which DEP has agreed to correct. See section 4.3 below. Finally, EPA is taking no action on the cancer risk level for arsenic in light of EPA's disapproval of the arsenic criteria for waters in Indian lands. See section 4.2.4 below.

The Issue: The State of Maine submitted numerous new and revised water quality standards (WQS) for EPA to approve under the Clean Water Act in the territories and lands of the federally recognized Indian Tribes in Maine – the Penobscot Nation, Passamaquoddy Tribes, Houlton Band of Maliseet Indians, and Aroostook Band of Micmacs. Under well-established principles of federal Indian law, states generally do not have authority to regulate the environment in Indian country. Maine asserts that in the Maine Indian Claims Settlement Act (MICSA) Congress granted the State jurisdiction to regulate the environment in the Tribes' lands, including the authority to set WQS. The Tribes contest that assertion, noting especially that state WQS have the potential to determine how much fish they may safely eat in waters where the Tribes fish for their sustenance. The Tribes assert the State has not adequately accounted for their sustenance fishing practices in setting the WQS submitted to EPA.

Jurisdiction to set WQS: EPA analyzed the jurisdictional provisions of MICSA extensively, including a careful review of comments from the Tribes and Maine on the jurisdictional provisions of the statute. EPA concludes that under the unique jurisdictional formula Congress established in Maine, the State has jurisdiction to set WQS in the waters on the Tribes' lands. See *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). But the Agency also finds that this authority is not unconstrained. EPA is required under the Clean Water Act to review state WQS, and will approve them when they comply with the Act. In these circumstances, where Maine is authorized to set WQS in tribal waters, EPA is informed by the operation of the Indian settlement acts in Maine and will require that WQS in tribal waters protect the Tribes' sustenance fishing use of those waters.

Sustenance Fishing Use in Tribal Waters: 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 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 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.

Protecting the Sustenance Fishing Use: To adequately protect that sustenance fishing use, the State must revisit two aspects of its analysis supporting the human health criteria that determine how clean the waters must be to allow the Tribes to safely consume fish for their sustenance. First, the analysis must treat the tribal population exercising the sustenance fishing use as the target general population, not as a high-consuming subpopulation of the State. EPA guidance

calls for WQS that provide a high level of protection for the general population, while recognizing that small subpopulations may face greater levels of risk. However, the Tribes are not a subpopulation using the waters on their own lands; they are the population for which that land base was established and set aside. Second, the data used to determine the fish consumption rate for tribal sustenance consumers must reasonably represent tribal consumers taking fish from tribal waters and fishing practices unsuppressed by concerns about the safety of the fish available to them to consume. The data on which the State relied to develop fish consumption rates for these WQS did not include information about the sustenance practices of tribal members fishing in their own waters, nor did they represent consumption levels that were unsuppressed by concerns about pollution. EPA concludes that the best available data that represent the unsuppressed sustenance fishing practices of tribal members fishing in tribal waters are contained in the Wabanaki Lifeways study, which looked at the historic sustenance practices of the Tribes in Maine.

EPA has received a written legal opinion dated January 30, 2015 from the Solicitor of the Department of the Interior (DOI) addressing several of the issues involved in EPA's decision. EPA sought DOI's 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. *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 794 (1st Cir. 1996) (DOI is the department that administers MICSA). DOI has provided EPA important insight into how the Indian settlement acts in Maine address the Tribes' right to fish and the critical relationship between those rights and water quality. In making our decision on Maine's WQS, EPA has carefully considered and relied upon the DOI Solicitor's analysis, which is reflected in DOI's written opinion and is included in the administrative record for this decision.

The Remedy: EPA is disapproving Maine's human health criteria because they are not protective of human health for the target population. They are based on a fish consumption rate of 32.4 grams per day, with the exception of arsenic which is based on 138 grams per day. However, the Wabanaki study indicates that consumption values between 286 and 514 grams per day represent the sustenance fishing use in tribal waters. EPA is approving Maine's regulation requiring that human health criteria, except for arsenic, be based on a cancer risk level of no more than one in a million (10^{-6}) as applied to the Tribe's waters, because that is a reasonable level of risk for a general target population. EPA is appeoving nearly all the State's aquatic life criteria, because they are consistent with the Clean Water Act and unlike the human health criteria, they do not implicate the safety of fish for human consumption. The Clean Water Act gives the State 90 days to address the bases for EPA's disapproval of the human health criteria, after which time, if the State does not do so, EPA will propose and promulgate appropriate human health criteria for waters in Indian lands in Maine.

1 Background

1.1 Overview

On January 14, 2013, the Maine Department of Environmental Protection (DEP) submitted a request to EPA to approve five new or revised water quality criteria (WQC) and specifically asked EPA to approve them in all waters located in the State of Maine, including waters in the territories and lands of the federally recognized Indian Tribes in Maine.

EPA's review of the State's submission determined that when the State provided public notice on its proposed WQS revisions, it was not clear on the record that the State had solicited comment on the question of the State's authority to set WQS in waters in the Tribes' territories and lands (as explained further below, hereinafter EPA will use the term Indian or tribal "lands" to refer to the entire tribal land base in Maine). Although EPA does not customarily provide public notice for state WQS submissions, the Agency exercised its discretion in the unique circumstances of this submittal to invite public comment on the issue of applying state WQS in waters in Indian lands in Maine. EPA identified two general areas for comment. First, has the State demonstrated adequate authority to set WQS in waters in Indian lands? Second, if so, are the WQC that the State submitted based on sound scientific rationale and adequate under the Clean Water Act (CWA) to protect uses in those waters?

This document contains the detailed explanation to accompany EPA's decision letter acting on the State's request that EPA approve these WQS for waters in Indian lands. In addition, from 2004 through 2010, in response to Maine's 2003 to 2009 submittals of new or revised WQS, EPA approved WQS for waters outside of Indian lands, but specifically stated that EPA was taking no action to approve or disapprove WQS within Indian lands. Today's decision addresses all of Maine's WQS submissions from 2003 through 2014 as they relate to waters in Indian lands, as well as certain submissions on which EPA has not yet acted for any waters in Maine.[2]

In summary, EPA finds that Maine has jurisdiction to set WQS for waters in Indian lands. Because EPA has not yet approved any of Maine's WQS for waters in Indian lands, EPA is first approving the State's classifications and associated designated uses for these waters. All of the relevant classifications include a designated use of "fishing," which the Agency interprets to include sustenance fishing consistent with these Tribes' sustenance practices in waters on their lands. EPA is also approving a specific sustenance fishing use for the inland waters of the reservations of the Penobscot Nation and Passamaquoddy Tribe. EPA is approving all but one of the State's aquatic life criteria. EPA has determined that Maine's human health criteria, however, do not adequately protect the designated use of sustenance fishing in the waters in tribal lands and, therefore, do not comply with the CWA's requirement that criteria protect the

[2] EPA is also approving today certain pre-2004 WQS for waters in Indian lands to the extent necessary to act on the submissions from 2003 through 2014. EPA intends to act on other pre-2004 WQS applicable to those waters as soon as possible. Before 2004, EPA's approvals or disapprovals of new or revised WQS in Maine did not address waters in Indian lands, or expressly consider the State's jurisdiction to establish WQS for such waters or the sufficiency of the State's WQS for such waters under the CWA. EPA thus takes the position that it has not previously approved any of the State's pre-2004 WQS for waters in Indian lands in Maine.

uses of the waters to which they apply. In a separate document EPA will respond to specific comments that interested parties submitted.

1.2 Indian Tribes in Maine

There are four federally recognized Indian Tribes in Maine represented by five governing bodies. The Penobscot Nation and the Passamaquoddy Tribe have reservations and trust land holdings in central and coastal Maine. The Passamaquoddy Tribe has two governing bodies, one on the Pleasant Point Reservation and another on the Indian Township Reservation. The Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs have trust lands further north in the State. To simplify the discussion of the legal framework that applies to each Tribe's territory, EPA will refer to the Penobscot Nation and the Passamaquoddy Tribe together as the "Southern Tribes" and the Houlton Band of Maliseet Indians and Aroostook Band of Micmacs as the "Northern Tribes." EPA acknowledges that these are collective appellations the Tribes themselves have not adopted, and the Agency uses them solely to simplify drafting this decision.

1.3 Settlement Acts in Maine

1.3.1 MIA and MICSA

In 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA), which resolved litigation in which the Southern Tribes asserted land claims to a large portion of the State of Maine. 25 U.S.C. §§ 1721, *et seq*. MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA), which was designed to embody the agreement reached between the State and the Southern Tribes. 30 M.R.S. §§ 6201, *et seq*. In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA. 30 M.R.S. § 6205-A, 25 U.S.C. § 1724(d)(1). Since it is Congress that has plenary authority as to federally recognized Indian Tribes, MIA's provisions concerning jurisdiction and the status of the Tribes are effective as a result of, and consistent with, the Congressional ratification in MICSA.

1.3.2 MSA and ABMSA

In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs. 30 M.R.S. §§ 7201, *et seq*. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. 25 U.S.C. § 1721, Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143. One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Maliseets in MICSA. See ABMSA § 2(a)(4) and (5). In 2007, the Federal Court of Appeals for the First Circuit confirmed that the Micmacs and Maliseets are subject to the same jurisdictional provisions in MICSA. *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007).

Where appropriate, this document will refer to the combination of MICSA, MIA, ABMSA, and MSA as the "settlement acts."

1.4 Indian Territories and Lands in Maine

MICSA, MIA, MSA and ABMSA establish a unique framework for confirming and enhancing the Tribes' land base in Maine. For the Southern Tribes, MIA uses the term "Indian territory" to describe the combination of the Southern Tribes' reservations, as described in treaties with the States of Maine and Massachusetts, plus 150,000 acres of land for each Tribe to be held in trust for the Tribes by the United States. 30 M.R.S. § 6205(1) and (2). As such, the Southern Tribes' land base is made up of both the reservations continuously occupied by the Tribes, and subsequently acquired trust lands.

The land base for the Northern Tribes is made up entirely of trust lands. MIA provides for the Houlton Band of Maliseet Indians to acquire trust land, and Congress provided $900,000 in MICSA to fund that acquisition. 30 M.R.S. § 6205-A, 25 U.S.C. § 1724(d)(1). Similarly, the MSA provides for the Aroostook Band of Micmacs to acquire trust land, and Congress again provided $900,000 in ABMSA to fund that acquisition. 30 M.R.S. § 7204, ABMSA §§ 4(a) and 5(a).

In this document, where appropriate depending on the context, EPA will refer to the tribal land base relevant to this decision as follows: "territories" for the Southern Tribes' land base, which as described above includes both reservations and trust lands; "trust lands" for the Northern Tribes' land base; and "Indian" or "tribal" lands for the entirety of all the Tribes' land base in Maine.[3]

1.4.1 Identification of waters covered by this decision

The Penobscot Indian Nation and Passamaquoddy Tribe have reservation lands as defined in MIA. 30 M.R.S. § 6203(5) (defining Passamaquoddy Indian Reservation); § 6203(8) (defining Penobscot Indian Reservation). The trust lands acquired for the Maine tribes are the product of modern conveyances. Generally, based on the default Maine property rule under which owners of riparian land also own out to the thread, or middle, of most streams, *Wilson & Son v. Harrisburg*, 107 Me. 207, 212-213 (1910), Indian waters include waters adjacent to land held in trust by the Secretary of the Interior and lands in the Tribes' reservations as defined in the Settlement Acts.[4] In addition, Maine common law provides that owners of shore land above the mean high water mark presumptively hold title in fee to intertidal land. *Bell v. Town of Wells*, 557 A.2d 168 (Supreme Judicial Court of Maine, 1989). In *Bell* (often referred to as the "Moody Beach case"), the court explained that such title is subject only to the public's right to fish, fowl, and navigate, and that the rule of law governing titles to intertidal land has its origin in the

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[3] In addition to their reservations and trust lands, the Tribes also hold certain lands in fee, which are not at issue in this matter. Any action EPA has taken to approve Maine WQS for waters outside Indian lands would apply to waters in these fee lands.

[4] See Report of the Joint Select Committee on Indian Land Claims, Maine Legislature (1980), par. 14. ("The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law. Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law. However, the Common Law of the State, including the Colonial Ordinances, shall apply to this ownership. The jurisdictional rights granted by this bill are coextensive and coterminous with land ownership.")

Colonial Ordinance of 1641-47 of the Massachusetts Bay Colony. As stated in an article written by the Marine Law Institute, University of Maine School of Law, "[t]he Moody Beach Case affirms that in Maine owners of beachfront property or property adjoining tidelands (also called littoral or riparian owners) have property rights to the low water mark or low tide area subject only to a public easement for fishing, fowling, and navigation." See Citizens' Guide to Ocean and Coastal Law, Public Shoreline Access and the Moody Beach Case, August, 1990. Therefore, the Passamaquoddy Tribe's reservation at Pleasant Point would include at least the waters present in the intertidal zone.

EPA acknowledges that there are remaining uncertainties over what waters are associated with Indian lands in Maine in a few locations. For instance, the boundaries of the Penobscot Nation's reservation are currently the subject of litigation in the United States District Court for the District of Maine. *Penobscot Nation v. Mills*, Case No. 1:12-cv-254-GZS. The United States has intervened in that case, and it is the Government's position that the reservation includes Penobscot River waters, while the State of Maine alleges it does not. Pending resolution of this dispute, EPA's decision to approve or disapprove Maine's WQS for Indian waters includes at least some portion of the Penobscot River in the main stem from Indian Island north surrounding the islands in the Nation's reservation.

In addition, this decision treats the Passamaquoddy Tribe's reservation as including the "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 . . ." as specifically enumerated in MIA's definition of the reservation. 30 M.R.S. 6203(5).

It is not necessary or reasonable for EPA to suspend its decision on the State's WQS submissions to await an authoritative resolution of disputes over the boundaries of Indian waters. If any disputes over reservation boundaries result in an authoritative adjudication inconsistent with the assumptions made in this decision, EPA will revisit or clarify the scope of the Agency's determinations in this decision.

2 EPA's Determination that Maine has Authority to Set WQS in Indian Territories

EPA concludes that MICSA provides the State with jurisdiction to set WQS in the Northern Tribes' trust lands and that the federal statute ratifies provisions of MIA that provide the State with such authority in the Southern Tribes' territories. Although in both cases the settlement acts provide the State jurisdiction to establish WQS, EPA notes that MICSA provides a different jurisdictional framework for the Northern Tribes than that which applies to the Southern Tribes.

2.1 Northern Tribes

MICSA provides that the Northern Tribes are subject to state law:

> Except as provided in section 1727(e) and section 1724(d)(4) of this title, all Indians, Indian nations, or Tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, Tribe or band of Indians and any

> lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, Tribe, or band of Indians 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). In addition, MICSA ratified MIA, which also provides that all tribes in Maine, including the Northern Tribes are subject to state law:

> 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. Both statutes make it clear that laws of the State include regulation and that lands and natural resources include water and water rights. 25 U.S.C. §§ 1722(b) and (d); 30 M.R.S. § 6203(3) and (4). The only exceptions to state jurisdiction provided in MIA apply to the Southern Tribes. There are no such exceptions for the Northern Tribes. Notably, the U.S. Court of Appeals for the First Circuit has expressly found that the State's jurisdictional reach in the Northern Tribes' lands is greater than in the Southern Tribes' territories. *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74-75 (1st Cir. 2007). That same year the First Circuit ruled that, even as to the Southern Tribes, MICSA and MIA grant the State jurisdiction to regulate surface water discharge permitting. *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). As discussed below, EPA has concluded that the court's analysis controls our decision as to the State's authority to set WQS in the Southern Tribes' territories. Given that MICSA gives the State a broader scope of jurisdiction over the Northern Tribes than over the Southern Tribes, which are nevertheless subject to the State's authority to set WQS, it is clear that state law applies to the Northern Tribes, and the State has authority to set WQS for waters in these Tribes' trust lands.

The Aroostook Band of Micmacs has argued that the passage of ABMSA impliedly repealed the application of MICSA to the Tribe, and, therefore, that the Micmacs were not subject to the same jurisdictional framework as the Houlton Band of Maliseet Indians. The First Circuit, however, rejected that argument. *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 60-62 (1st Cir. 2007).

2.2 Southern Tribes

MICSA addresses the jurisdictional relationship between the Southern Tribes and the State by reference to MIA, which MICSA ratifies:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the Tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the

> manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. § 1725(b)(1). As discussed above, MIA in turn provides generally that all Indian Tribes in the State are subject to state law:

> 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. Importantly, MIA section 6204 refers to exceptions to the grant of state jurisdiction found elsewhere in the statute, and those exceptions are all applicable to the Southern Tribes. *See, e.g.*, §§ 6206 (internal tribal matters); 6207 (hunting and fishing in Indian territories); 6209-A & B (minor crimes, small claims, child custody, and domestic relations). EPA has carefully considered whether any of the exceptions provided in MIA operate to block the grant of jurisdiction to the State in the area of setting WQS in the Southern Tribes' waters. EPA concludes that they do not impede the State's jurisdiction to establish WQS under the CWA for the Southern Tribes' waters.

2.2.1 Maine v. Johnson Decision

The U.S. Court of Appeals for the First Circuit previously adjudicated the issue of Maine's authority to regulate water quality protection in the Southern Tribes' territories. In 2003, EPA approved the State to issue national pollutant discharge elimination system (NPDES) permits under the CWA generally in the Southern Tribes' territories, except for those dischargers where EPA concluded that permitting would qualify as an internal tribal matter. MIA section 6206 exempts the Southern Tribes' internal tribal matters from state regulation. EPA determined that two tribally owned and operated public treatment works, which served only tribal members on the Tribes' reservations and had minimal water quality impacts at the point of discharge, qualified as internal tribal matters, and thus excluded those two facilities from the State's approved permitting program. In *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), the First Circuit upheld EPA's approval of the State's program in the Southern Tribes' territories, but reversed EPA's decision to withhold approval of the State to issue the permits for the two tribal treatment works.

> In ordinary statutory construction, the [internal tribal matters] proviso thus reserves to the tribe matters pertaining to tribal membership and governance structure, expenditure of fund income and *other matters of the same kind* . . .; but it does not displace general Maine law on most substantive subjects, including environmental regulation. . . . [W]e readily uphold the position of the EPA and Maine that the nineteen non-Indian discharge sources draining into tribal waters can be regulated by the state. The only real question is the EPA's carve-out of the two source points that are on tribal lands and are owned by Tribe entities. . . .

> In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected in the particular case, *unless* the internal affairs exemption applies; and the scope of that exemption is determined by the character of the subject matter. Discharging pollutants into navigable waters is not of the same character as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property.

Id. at 44-46 (emphasis in original; citations omitted). EPA has concluded that the *Maine v. Johnson* decision makes it clear that the grant of jurisdiction to the State includes the area of environmental regulation, certainly as it applies to surface water discharge permitting. The Agency also finds no basis to distinguish the analysis in that case as applied to the State's authority to set WQS for surface waters in the Southern Tribes' territories.

2.2.2 Arguments Maine Tribes have Advanced for Exceptions to State Jurisdiction for Southern Tribes

EPA considered whether, given the jurisdictional provisions of the applicable statutes and the precedent set in *Maine v. Johnson*, there is any basis for concluding that the State's authority to administer the NPDES permitting program would not apply equally to the State's WQS program. EPA concludes there is no such basis.

2.2.2.1 Internal Tribal Matters

As a threshold matter, the court in *Maine v. Johnson* concluded that environmental regulation was part of the jurisdictional grant to the State in Indian lands:

> [T]he [internal tribal matters] proviso thus reserves to the tribe matters pertaining to tribal membership and governance structure, expenditure of fund income and *other matters of the same kind* . . .; but it does not displace general Maine law on most substantive subjects, including environmental regulation.

Id. at 45 (emphasis in original; underscore added). The WQS program is clearly a form of environmental regulation that would be covered by this characterization of the State's authority. Strictly speaking, the facts on which the court's holding rests only presented the question of the State's authority to issue waste water discharge permits. Nevertheless, the court's reasoning in that case makes it clear that this exception to State jurisdiction would not block the State from setting WQS.

When the Agency withheld approval from Maine to permit the two tribal treatment works, EPA conducted an analysis of the factors the First Circuit articulated in two prior cases examining whether a particular subject matter qualifies as an internal tribal matter not subject to state regulation. *Akins v. Penobscot Nation*, 130 F.3d 482, 486-490 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 710-713 (1st Cir. 1999). In its review of EPA's decision, the *Johnson* court found it unnecessary to apply the factors developed in the *Akins* and *Fellencer* cases; rather it concluded that this multi-factor assessment is relevant only when an area of regulation is

"arguably close to the (perhaps blurred) statutory borderline" of what might qualify as an internal tribal matter. 498 F.3d at 46. The court concluded that "discharging pollutants into navigable waters is not a borderline case in which balancing . . . or ambiguity canons . . . alter the result." *Id.* (citations omitted).

EPA evaluated whether the authority to set WQS is any closer to the statutory borderline the First Circuit has outlined and, therefore, might properly be analyzed using the *Akins/Fellencer* factors rather than the more categorical analysis in the *Johnson* decision. The Penobscot Nation commented to EPA that setting WQS directly affects the quality of fish the Tribe is able to consume for its sustenance, an area of concern at the core of the Nation's existence. The Penobscot Nation's view is that this effect on the Tribe's ability to safely consume fish makes setting WQS an internal tribal matter. EPA does not agree. Indeed, the Agency concludes that setting WQS is an exercise of jurisdiction even further from the "borderline" between state jurisdiction and internal tribal matters that the *Johnson* court posited.

The decision EPA is making is approval of WQS that are an integral part of a larger legal framework provided for in the CWA. Within that framework, the CWA and EPA's regulations provide that NPDES permits for upstream dischargers must include limits that assure compliance with downstream WQS. 40 C.F.R. § 122.44(d)(4) and CWA § 401(a)(2). In reviewing Maine's NPDES program, EPA found that permitting the two tribal treatment works involved only tribal members and would have minimal effect on water quality outside the Tribes' territories. See 498 F.3d at 45 n. 8. EPA cannot make a corresponding finding here that setting a WQS would not have the potential for an effect on non-members or on water quality outside the Tribes' territories. When it established the multi-factor internal tribal matters analysis, the *Akins* court noted that "*First, and foremost*, the [stumpage policy at issue] purports to regulate only members of the Tribe . . .." 130 F.3d at 486 (emphasis added). On this "foremost" factor, EPA concludes that the WQS program can have regulatory effects beyond the Tribe. Generally, downstream WQS determine what limits upstream dischargers must meet to assure protection of those WQS, which is a legal effect that could reach beyond the membership of the Tribes and the boundaries of their territories. These effects put the setting of WQS even further from the "(perhaps blurred) statutory borderline" of what qualifies as an internal tribal matter under the MIA and MICSA.

In *Maine v. Johnson* the court was prepared to accept EPA's finding that permitting the two tribal treatment works would not have a substantial effect outside the Tribes' territories, and it still refused to treat the category of waste water discharge permitting as an internal tribal matter. Here, EPA cannot find that setting WQS will have no potential for a substantial effect outside the Tribes' territories. Therefore, under the principles announced in *Maine v. Johnson*, EPA concludes that setting WQS does not qualify as an internal tribal matter.

2.2.2.2 The Southern Tribes' Sustenance Fishing Right

EPA has also considered whether the reservation in MIA of the Southern Tribes' right to take fish for their individual sustenance within their reservations provides an exception to the State's jurisdiction. That right is reserved to the Southern Tribes "[n]otwithstanding . . . any other law of the State." 30 M.R.S. § 6207(4). Arguably, if a state law interfered with the Southern Tribes' right to take fish for their individual sustenance, this provision would block that law's

application in the Southern Tribes' reservations. However, EPA concludes that the State's administration of WQS, subject to CWA requirements and EPA's oversight, does not have the potential to interfere with the Southern Tribes' sustenance fishing right.

MIA is clear that the basic grant of jurisdiction to the State includes the authority to apply laws of the State, which include regulations, to the Tribes' natural resources, which include "water and water rights and hunting and fishing rights." 30 M.R.S. §§ 6204, 6203(3) and (4). To conclude that the reserved fishing right precludes the operation of all state laws affecting environmental regulation that might indirectly affect the fishing right, one would have to conclude that the State's regulation of water quality is inherently and necessarily inimical to the Tribes' ability to take fish for their individual sustenance. EPA cannot reach that conclusion.

First, there are many state WQS that are reasonably adequate to support a fishery that could provide for an individual tribal member's sustenance. Indeed, as discussed below, EPA is approving many state WQS provisions that EPA has determined are sufficient to protect aquatic life. In *Maine v. Johnson* the court made it clear that decisions about the scope of the State's jurisdiction in the Southern Tribes' territories should be made on the basis of the category of the subject matter at issue – the court specifically rejected EPA's attempt to find or reject state jurisdiction based on the facts of any particular application of state jurisdiction within a subject matter category. "So we accept the EPA's factual premise as to the [limited] impact of the discharges but not the EPA's legal characterization. . . . [T]he scope of [the internal tribal matters] exemption is determined by the character of the subject matter." 498 F.3d at 45-46. The subject category at issue in *Maine v. Johnson* was environmental regulation of pollutants in surface waters, the same category at issue here. The impact of a specific state WQS regulation on the Tribes' sustenance fishing rights might provide the basis for a challenge to that specific regulation, but the bare potential for such a specific challenge at some point provides no basis for precluding all state regulation of that subject area. It is possible for the State to exercise jurisdiction to set WQS without necessarily or inevitably interfering with the Tribes' fishing rights.

Second, if the State does submit a new or revised WQS that would interfere with the Tribes' reserved fishing right, EPA has authority under the CWA to ensure that the Tribes' fishing right is protected. As described further below, EPA is approving the reserved sustenance fishing right as a designated use for the tribal waters to which the right applies. Where the State adopts a new or revised WQS, EPA has the authority and the obligation under the CWA to review and determine whether such new or revised WQS is consistent with the CWA. If EPA disapproves, the CWA directs EPA to propose and promulgate a new or revised WQS unless the State adopts an adequate revision to protect the use. The CWA thus provides the mechanism to protect the sustenance fishing use and prevent interference with the Southern Tribes' reserved fishing right. EPA's oversight of Maine's WQS is adequate to protect the Tribes' right while maintaining the basic statutory grant of jurisdiction to Maine, including the authority to set WQS, as provided under MICSA in the first instance.

2.3 The Relationship Among MISCA, Jurisdiction, and the Trust Responsibility

Several Tribes in Maine commented that it would be inconsistent with the federal government's trust relationship with the Tribes for EPA to approve the State to set WQS for waters in the Tribes' lands. On the other hand, the State argues that the trust relationship does not apply in the State because of MICSA.

EPA has consistently maintained that there is a trust relationship between the federal government and the Tribes in Maine in the general sense that the Tribes are federally recognized, they have sovereign governments that EPA interacts with on a government-to-government basis, and EPA has a responsibility to consult with the Tribes to understand and consider their interests when EPA is making a decision that affects the Tribes. This general trust relationship, however, does not alter the jurisdictional framework Congress ratified in MICSA. MICSA impacts the jurisdictional relationship among the Tribes and the State, within which EPA works to address the Tribes' interests as appropriate. It is consistent with the trust relationship for EPA to approve the State's authority to set WQS for waters in the Tribes' lands, because MICSA has dramatically revised the jurisdictional framework within which the trust operates in Maine as compared to the customary jurisdictional framework that applies in Indian country outside Maine. EPA intends to continue to act consistently with the trust relationship, to consult with the Tribes, and to consider their interests as we oversee the State's WQS under the CWA.

2.4 The Penobscot Nation's Application for Treatment in the Same Manner as a State

On October 8, 2014, the Penobscot Nation submitted to EPA an application "to administer water quality standards program and for federal approval of the standards" covering the Main Stem of the Penobscot River from Indian Island north to the confluence of the east and west branches of the river. EPA is not acting today on the Nation's application. EPA is only deciding today that the State of Maine has authority to set WQS for waters in Indian lands, and then acting on the State's WQS as applied to those waters. The Nation's application raises complicated issues that EPA will address in a separate decision.

3 EPA's Determination to Approve Classifications and Designated Uses for Waters in Indian Lands

In Section 2, above, EPA focused on the settlement acts and judicial interpretation of those statutes to analyze Maine's assertion of jurisdiction to set WQS in the waters in Indian lands. Having concluded that the State has jurisdiction to set those standards, EPA must now analyze whether the State's WQS as applied to waters in Indian lands are approvable under the CWA. So the balance of this document will focus primarily on the requirements of the CWA, as applied to the unique circumstances EPA must address here where a state is setting WQS for waters in lands that Congress has set aside for federally recognized Indian tribes.

The first step in developing and reviewing WQS under the CWA is to determine the uses of the waters to which the WQS apply. Here the State is not writing on a blank slate in the selection of uses for tribal waters. As described in detail in this section 3, EPA has concluded that the settlement acts operate to require Maine and the Agency to focus on the sustenance fishing use that federal and state law provide for the Tribes in Maine in waters in Indian lands. In light of

the sustenance fishing use, the CWA requires the State's water quality criteria to protect that use as explained in section 4, below.

3.1 Status of Previous State WQS as Applied to Waters in Indian Lands

3.1.1 EPA's Prior Decisions on Maine WQS

Maine has periodically submitted new or revised WQS to EPA for review and approval or disapproval. Before 2004, EPA acted on those WQS without expressly considering or approving the State's jurisdiction to establish WQS for waters in Indian lands or the sufficiency of the State's WQS for such waters under the CWA. Since 2004, EPA has expressly stated, in all decisions that it made to approve or disapprove new or revised WQS, that its decisions applied only to Maine waters outside of Indian lands.

3.1.2 EPA's Approach to State Programs in Indian Country

The State has commented to EPA that, prior to 2004, EPA approved state WQS submissions without reference to or exclusion of waters in tribal lands. From this the State infers that EPA approved the State's WQS for waters in tribal lands prior to 2004. EPA disagrees with this inference.

First, Maine did not obtain authority to regulate in tribal lands until Congress passed MICSA in 1980. While the State asserted the authority to govern the Tribes prior to MICSA, the First Circuit's decision in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), cast considerable doubt on that proposition, and the decision in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), effectively foreclosed this argument. So any WQS that Maine submitted prior to MICSA's passage could have no legal effect in tribal lands. At that point the State had no clear authority to set WQS in those waters.

But even as to WQS that Maine submitted following the passage of MICSA in 1980, EPA's position is that none of the State's WQS, whether submitted prior to or following enactment of MICSA, were approved under the CWA for waters in Indian lands. Prior to the Agency's decision today, EPA has never made a formal determination on the record expressly addressing either the State's jurisdictional authority or the sufficiency under the CWA of the State's WQS as applied to waters in Indian lands.

Today's decision demonstrates that in acting on new or revised state WQS for waters in Indian lands, EPA must consider the adequacy of such WQS to protect the uses in those specific waters. Where, as here, waters in Indian lands have a different designated use (*i.e.*, sustenance fishing) than waters outside of Indian lands, the analysis of the adequacy of criteria will necessarily be different. It would be arbitrary for EPA to assume, without analysis, that if criteria are protective for waters outside of Indian lands, they are also protective for waters in Indian lands.

In addition, under basic principles of federal Indian law, states generally lack civil regulatory jurisdiction within Indian country as defined in 18 U.S.C. § 1151. *Alaska v. Native Vill. Of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1. (1998) ("[g]enerally speaking, primary jurisdiction

over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States."). See also *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) ("[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian Country . . . ."). Thus, EPA cannot presume a state has authority to establish WQS or otherwise regulate in Indian country. Instead, a state must demonstrate its jurisdiction, and EPA must determine that the state has made the requisite demonstration and expressly determine that the state has authority, before a state can implement a program in Indian country.[5] Such a demonstration and approval of Maine's authority to administer WQS in waters of Indian lands has not occurred prior to the decision EPA is making today.[6]

Maine cites to several actions by EPA employees that, in the State's view, indicate EPA's recognition that state WQS approved before 2004 apply in at least some tribal waters. EPA notes that some of those actions applied to stretches of rivers that either included both tribal and state waters or that were then and continue to be the subject of disputes over whether they included both tribal and state waters. As a result, those actions were inherently ambiguous as to their relevance to the tribal portions of the waters. But the Agency concedes that in some instances the Agency appeared to assume, without any express consideration or decision regarding the jurisdictional or CWA issues, that state WQS applied in certain tribal waters. For example, there are instances when the Region asked Maine DEP to certify under section 401 of the CWA that NPDES permits for tribal facilities discharging into tribal waters complied with state WQS. Simply put, those prior actions were mistakes that do not affect this decision. At the time, EPA had made no finding that Maine had jurisdiction to adopt WQS for tribal waters and had not approved the State's WQS for such waters. EPA notes that unexplained mistakes by mid-level Agency officials cannot unilaterally revise a considered Agency-wide policy. *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 299 (1st Cir. 1989).

3.2 EPA Approval of Water Classifications and Associated Designated Uses

Many of the WQS revisions under review for approval or disapproval for waters in Indian lands are water quality criteria, and the CWA requires that criteria be protective of designated uses. In order to evaluate whether the submitted criteria are protective of designated uses, EPA must first approve designated uses for these waters. Accordingly, EPA also reviewed and is approving

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[5] Consistent with EPA's responsibility to consult with Indian tribes about decisions affecting their interests, as embodied in the Agency's 1984 Indian Policy and EPA's more recent Tribal Consultation Policy, EPA would offer to consult with any Indian tribe in the context of an Agency determination that a state has authority to set standards in that tribe's territory. Notably, no such consultations occurred in the context of EPA's prior decisions on the State's WQS submissions, further evidencing that the Agency's prior approvals were not intended to extend to waters in Indian lands.

[6] Indeed, as described above in the Agency's analysis of the State's jurisdictional authority to set WQS in Indian waters, EPA's review and assessment of how Maine's WQS affect tribal uses in Indian waters is an essential step in the argument that it is possible to reconcile the State setting WQS in Indian waters with the fishing rights that MICSA reserves to Tribes in Maine. Ignoring or side-stepping EPA's role in overseeing Maine's WQS submissions as they apply to Indian waters risks creating an irreconcilable conflict between the jurisdictional grant to the State in MICSA and the provision for Tribes in Maine to sustain themselves on the land base that the Maine settlement acts established for the Tribes. Respecting EPA's oversight role effectively harmonizes those elements of the settlement acts in Maine.

Maine's surface water classifications and corresponding designated uses, adopted and submitted to EPA for review to date[7], for waters in Indian lands.[8]

The general classifications and their corresponding uses consist of the following:

- 38 M.R.S. § 465(1.A) Class AA freshwater uses: drinking water after disinfection, fishing, agriculture, recreation in and on the water, navigation, and as habitat for fish and other aquatic life. The habitat must be characterized as free-flowing and natural.
- 38 M.R.S. § 465(2.A) Class A freshwater uses: drinking water after disinfection; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as natural.
- 38 M.R.S. § 465(3.A) Class B freshwater uses: drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as unimpaired.
- 38 M.R.S. § 465(4.A) Class C freshwater uses: drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life.
- 38 M.R.S. § 465-A(1.A) Class GPA lake and pond uses: drinking water after disinfection, recreation in and on the water, fishing, agriculture, industrial process and cooling water supply, hydroelectric power generation, navigation, and as habitat for fish and other aquatic life. The habitat must be characterized as natural. This section applies to great ponds (as defined in 38 M.R.S. § 480-B (5)), natural lakes and ponds less than 10 acres in size, and impoundments of rivers that are defined as great ponds pursuant to 38 M.R.S. § 480-B (5).
- 38 M.R.S. § 465-B (1.A) Class SA estuarine and marine water uses: recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, navigation, and as habitat for fish and other estuarine and marine life. The habitat must be characterized as free-flowing and natural.
- 38 M.R.S. § 465-B (2.A) Class SB estuarine and marine water uses: recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation, and as habitat for fish and other estuarine and marine life. The habitat must be characterized as unimpaired.
- 38 M.R.S. § 465-B (3.A) Class SC estuarine and marine water uses: recreation in and on the water, fishing, aquaculture, propagation and restricted harvesting of shellfish,

[7] This includes the addition of "agriculture" as a designated use for freshwaters, submitted to EPA on August 26, 2003.

[8] There are other provisions of Maine's WQS that EPA is not approving or disapproving at this time because they are not directly related to the scope of this decision, which is responding to new and revised WQS submitted to EPA from 2003 to 2014. These remaining provisions include, for example, definitions, antidegradation policies, and WQS implementation policies in regulation and statute. EPA will review those elements in the coming months and make decisions accordingly.

industrial process and cooling water supply, hydroelectric power generation, navigation and as a habitat for fish and other estuarine and marine life.

Waters throughout Maine are identified by classification in 38 M.R.S. § 467 (classifications of major river basins), § 468 (classifications of minor drainages), and § 469 (classifications of estuarine and marine waters), which results in the assignment of designated uses for each waterbody.

Each of the classification categories identified above contains designated uses that are consistent with the requirements of Section 303(c)(2)(A) of the Clean Water Act and 40 C.F.R. § 131.6(a). In addition, EPA has concluded that the classifications as applied to specific waters in Indian lands are reasonable. Therefore, EPA is approving the general classifications and associated designated uses in 38 M.R.S. § 465(1.A), (2.A), (3.A), and (4.A); § 465-A(1.A) (and the definition of "great ponds" in 38 M.R.S. § 480-B (5)); and § 465-B(1.A), (2.A), and (3.A); as well as the classification of specific waters in 38 M.R.S. § 467, § 468, and § 468, as applied to waters in Indian lands, because they are consistent with Sections 101(a)(2) and 303(c)(2)(A) of the Clean Water Act and 40 C.F.R. §131.10(a). EPA is including in its approval of specific waterbody classifications the reclassifications, submitted to EPA on December 7, 2009, of Otter Creek, a tributary of Seboeis Stream, and Alder Stream from Class B to Class A; and of Grand Falls Flowage between Route 1(Princeton and Indian Township) and Black Cat Island from Class B to Class GPA.

3.3 EPA's Identification of the "Fishing" Designated Use as "Sustenance Fishing" in Waters in Indian Lands in Maine

3.3.1 The Purpose of the Tribal Land Base and Tribal Sustenance Fishing in Maine

The settlement acts in Maine include extensive provisions to confirm and expand the Tribes' land base, and the legislative record makes it clear that a key purpose behind that land base is to preserve the Tribes' culture and support their sustenance practices. MICSA section 1724 establishes a trust fund to allow the Southern Tribes and the Maliseets to acquire land to be put into trust. In addition, the Southern Tribes' reservations are confirmed as part of their land base. 30 M.R.S. § 6205(1)(A) and (2)(A). MICSA combines with MIA sections 6205 and 6205-A to establish a framework for taking land into trust for those three Tribes, and laying out clear ground rules governing any future alienation of that land and the Southern Tribes' reservations. Sections 4(a) and 5 of the ABMSA and 7204 of the state MSA accomplish essentially the same result for the Micmacs, consistent with the purpose of those statutes to put that Tribe in the same position as the Maliseets.

EPA has concluded that one of the over-arching purposes of the establishment of this land base for the Maine Tribes was to ensure their continued opportunity to engage in their unique cultural practices to maintain their existence as a traditional culture. An important part of the Maine Tribes' traditional culture is their sustenance life ways. The legislative history for MICSA makes it clear that one critical purpose for assembling the land base for the Tribes in Maine was to preserve their culture. The Historical Background in the Senate Report for MICSA opens with the observation that "All three Tribes [Penobscot, Passamaquoddy and Maliseet] are riverine in

their land-ownership orientation." Sen. Rep. No. 96-957, at 11. The Report's "Special Issues" section specifically refutes the concern that:

> *The Settlement will lead to acculturation of the Maine Indians.* – Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Id. at 17. As the Tribes have extensively documented in their comments, their culture relies heavily on sustenance practices, including sustenance fishing. So if a purpose of MICSA is to avoid acculturation and protect the Tribes' continued political and cultural existence on their land base, then a key purpose of that land base is to support those sustenance practices.

As explained in more detail below, MICSA, MIA, ABMSA, and MSA include very different provisions governing sustenance practices, including fishing, depending on the type of Indian lands involved. But each set of provisions in its own way is designed to make a homeland for these Tribes where they may safely practice their sustenance life ways.

3.3.1.1 Southern Tribes' Sustenance Fishing Right Reserved in Their Reservations in MIA/MICSA

If there were any doubt that sustenance practices are central to tribal culture, MICSA ratifies the MIA's reservation of the Southern Tribes' right to take fish for their individual sustenance:

> SUSTENANCE FISHING WITHIN THE INDIAN RESERVATIONS. 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 subsection 6.

30 M.R.S. § 6207(4). Under this section, "fish" is defined as "a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water." 30 M.R.S. § 6207(9).

The only limitation on the Southern Tribes' right to take fish for their individual sustenance on their reservations is the State's ability to limit the take based on a finding that the Tribes' fishing practices are threatening stocks outside the Tribes' reservations in a process in which the State carries the burden of proof. 30 M.R.S. § 6207(6). To date the State has made no such determination. So a plain language reading of this provision entitles the Southern Tribes to take as much fish as they deem necessary to sustain individual members.

The legislative history for MIA makes it clear that the Maine legislature intended to continue and ratify the State's practice of not regulating the Southern Tribes' sustenance fishing practices. See transcript of the public hearing held on March 28, 1980 by the Maine Legislature's Joint Select Committee on the Maine Indian Claims Settlement at 55-56. The special issues section of the Senate Report on MICSA confirms that the intent of this provision is to shield the Southern Tribes' right to take fish from the prospect that the State might someday interfere with it. By responding to a rhetorical assertion (in italics below), the report confirms that the Southern Tribes have a right to take fish that is subject to state regulation only under very limited circumstances:

> *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.* – Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S. 2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial [evidence] that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal lands.

Sen. Rep. No. 96-957, pp. 16-17. Importantly, MIA section 6207 did not create a fishing right for the Southern Tribes. Rather it confirmed an aboriginal right the Tribes have continuously exercised, and shielded that right from state regulation absent a finding of depletion. DOI's legal opinion confirms that this statutorily reserved fishing right is rooted in treaty guarantees that were upheld through the settlement acts.

The Senate Committee's discussion of the similarity between MIA section 6207 and the structure of more traditional Indian treaty hunting and fishing rights is instructive. Essentially, the State of Maine has adopted into state law and Congress has ratified a reserved fishing right like the rights reserved to other Indian tribes by treaties, executive orders, or other statutes. It is axiomatic that the settlement acts in Maine significantly revised the customary formulae of federal Indian law that apply outside the State. *Akins*, 130 F.3d at 484. But it is equally important to recognize those elements of the settlement acts where both the state and federal governments made careful provision for tribal rights that mirror those more commonly seen elsewhere in Indian country. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 674 (1979) (Stevens Treaties explicitly reserved to the Pacific Northwest tribes "'[t]he

right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory'"). The Southern Tribes' reserved aboriginal right to take fish for their individual sustenance within their reservations is such a right.

3.3.1.2 Federal Law Framework for Sustenance Fishing in Trust Lands

Similarly, to understand how the Maine Tribes' sustenance fishing practices are provided for in their newly acquired trust lands, it is helpful to review the federal law background against which Congress and the State of Maine were legislating when they provided for land to be taken into trust for the benefit of the Maine Tribes. Courts have found that when Congress sets aside land for a fishing tribe, it implicitly grants to the tribe the right to carry out its traditional fishing practices on that land. See *Menominee v. U.S.*, 391 U.S. 404, 405-406 (1968) (holding that lands acquired for the Menominee Tribe included the implicit right to hunt and fish on those lands); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) (recognizing the doctrine "that the grant of hunting and fishing rights is implicit in the setting aside of a reservation 'for Indian purposes.'"); see also *Katie John v. U.S.*, 720 F.3d 1214, 1230 (9th Cir. 2013) (Reserved water rights "are created when the United States reserves land from the public domain for a particular purpose, and they exist to the extent that the waters are necessary to fulfill the primary purposes of the reservation.").

Courts have found an implicit fishing right based on legislative history indicating that, in setting aside land for a tribe, Congress intended to preserve a tribe's fishing culture/practices. See *Menominee*, 391 U.S. at 405 ("The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing."); *Parravano*, 70 F.3d at 542 (In enacting the Hoopa-Yurok Settlement Act, "[o]ne of the concerns of Congress at the time" was "to protect the Tribes' fisheries."); see also id. at 546 ("Although the 1988 Hoopa-Yurok Settlement Act did not explicitly set aside fishing rights, it did make clear that partitioning would not dispossess the Tribes of their assets. The legislative history of the 1988 Act indicates that Congress was aware that each Tribes' interests in their salmon fisheries was one of its principal assets."). As explained in greater detail below, there is such legislative history here.

There is an important distinction between the Southern Tribes' aboriginal fishing right, which Congress explicitly reserved on those Tribes' reservations, and tribal sustenance fishing on the trust lands, which Congress provided for based on its demonstrated intent to preserve the Tribes' riverine culture. EPA is not determining that the Tribes in Maine have an aboriginal fishing right in their trust lands. The Agency acknowledges there is dispute over the scope of the Tribes' aboriginal resource rights following enactment of MICSA. See 25 U.S.C. §§ 1722(b) and 1723(b) and Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine, Maine Indian Tribal-State Commission: Special Report 2014/1 (June 17, 2014) at 7.

But regardless of the status of aboriginal fishing rights outside the Southern Tribes' reservations, it is possible for Congress to make provision for tribal sustenance fishing on trust lands, not based on the reservation of aboriginal rights, but based on Congressional intent to establish a land base for a tribe in order to sustain its unique culture. As described in detail below, EPA has

determined that Congress did just that in the Maine settlement acts, and when Congress did so, it acted against the backdrop of the principles outlined in the cases above. The legislative record regarding the trust land provisions in MIA, MICSA, MSA and ABMSA demonstrate Congress's intent to provide the Tribes with the opportunity to exercise their traditional sustenance lifeways, including traditional sustenance fishing in waters of tribal trust lands.

3.3.1.2.1 Sustenance Fishing in the Trust Lands of the Southern Tribes

Both MICSA and MIA make it clear that the land acquisition fund for the benefit of the Passamaquoddy and Penobscot Tribes was established to ensure these Tribes not only had a land base to occupy, but also access to natural resources to sustain their continued existence as a unique culture, including their ability to exercise their fishing rights. "The Secretary is authorized and directed to expend . . . the land acquisition fund for the purpose of acquiring land or natural resources for the Passamaquoddy Tribe, [and] the Penobscot Nation . . . and for no other purpose." 25 U.S.C. § 1724(b) (emphasis added). "Land or natural resources" are defined to include "water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b).[9]

As excerpted more fully above, MICSA's legislative history also makes it clear that the Southern Tribes would be engaged in sustenance fishing in the newly-acquired trust lands:

> Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well.

Sen. Rep. No. 96-957, pp. 16-17 (emphasis added). The legislative history of MIA also makes it clear that the Maine Legislature understood that MIA was designed to accommodate sustenance fishing practices in the Southern Tribes' trust lands. See transcript of the public hearing held on March 28, 1980 by the Maine Legislature's Joint Select Committee on the Maine Indian Claims Settlement at 151-152.[10] So it is clear that in creating the authority to take land into trust for the Southern Tribes, Congress understood that MIA made provision for the Tribes to engage in sustenance fishing in those trust lands and intended the trust lands to provide a base for the Tribes to engage in sustenance practices.

As recognized by Congress in MICSA's legislative history, the Southern Tribes' control of fishing in certain trust waters was specifically codified in MIA. Section 6207(1) provides that

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[9] Unlike MICSA, when MIA refers to Penobscot and Passamaquoddy trust lands, it uses the term "land acquired by the secretary [of Interior] for the benefit" of each tribe, without reference to natural resources. Compare 25 U.S.C. § 1724(d) with 30 M.R.S. § 6205(1)(B) and (2)(B). As explained in the section above, other provisions of MIA make it clear that the statute anticipated that those lands would include the attendant natural resources acquired with the land, especially fishing rights. Moreover, to the extent that this differing terminology suggests a conflict between MICSA and MIA in defining the scope of the tribes' interest in their trust lands and natural resources, the provisions of MICSA would control. 25 U.S.C. § 1735(a).

[10] "[The Tribes can adopt ordinances with respect to . . . fishing but only on ponds of less than ten acres in size. Those ordinances have to be equally applicable to Indians and non-Indians except that the Indians can make special provisions for sustenance hunting . . ." and fishing per MIA § 6207(1). Id. at 151.

the Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands. As with the Southern Tribes' fishing right in their reservations, this authority is subject only to the State's authority to limit the take after carrying the burden of proof that the Tribes are depleting fish stocks. MIA specifically anticipates that any tribal ordinances regulating fishing in these waters "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation." *Id.*

As to greater ponds and rivers and streams in or along the Southern Tribes' trust lands, MIA also codifies the understanding that the Tribes would be engaged in sustenance fishing in those waters. MIA creates the Maine Indian Tribal-State Commission (defined as the "commission" 30 M.R.S. § 6203(1)), made up of representatives appointed by the State and the Southern Tribes. 30 M.R.S. § 6212. MIA provides that commission the exclusive authority to promulgate fishing rules in these waters. When it does so "the commission shall consider and balance" several factors, including "the needs or desires of the Tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes, [and] the traditional fishing techniques employed by and ceremonial practices of Indians in Maine." 30 M.R.S. § 6207(3). Importantly, as analyzed in the record supporting this decision, none of the fishing regulations adopted by the commission would impinge on the ability of the Tribes to sustain themselves on fish taken from these waters.[11]

MICSA and MIA combine to authorize the establishment of trust lands for the Southern Tribes to provide a land base in which the Tribes can exercise their sustenance fishing practices. As compared with the sustenance fishing right reserved to the Southern Tribes within their reservations, MICSA and MIA allow for a greater, although still sharply limited, role for the State, through the commission, to participate in the development of fishing regulations on certain of the waters in the trust lands. But in exercising even that authority, the commission is charged with considering the Tribes' sustenance fishing practices. Therefore, it is clear that a critical purpose behind establishing the Southern Tribes' trust lands is to give the Tribes an opportunity to engage in sustenance fishing.

3.3.1.2.2 Sustenance Fishing in the Trust Lands of the Northern Tribes

Compared with the Southern Tribes' territories, the arrangement for the Northern Tribes' trust lands provides for more direct state regulation of fishing practices. Nevertheless, it appears Congress intended these trust lands to preserve the Northern Tribes' unique cultures as well. So the Northern Tribes' trust lands provide a land base in which the Tribes are able to exercise sustenance fishing practices to the extent consistent with the legal limits on their fishing. Again, similar to the situation for the Southern Tribes' trust lands, EPA is not concluding that there is an aboriginal fishing right reserved to the Northern Tribes on their trust lands. But the Agency does conclude that there is sufficient evidence in the legislative record to indicate that Congress intended the Northern Tribes to engage in sustenance practices on their trust lands to the extent they could.

[11] See memorandum from Ralph Abele to the file for this decision, regarding Effects of Maine Fishing Regulations on Sustenance Fishing by Maine Tribes, dated January 30, 2015.

Authority to establish the Northern Tribes' trust lands came in several rounds of legislation. The first involved the Maliseets, who came to the negotiations around MIA and MICSA late in the legislative process. In 1980, MICSA provided that "[t]he Secretary is authorized and directed to expend . . . the land acquisition fund for the purpose of acquiring land or natural resources for the . . . the Houlton Band of Maliseet Indians and for no other purpose." 25 U.S.C. § 1724(b) (emphasis added). "Land or natural resources" is defined to include "water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b) (emphasis added).

At the time Congress authorized land to be taken into trust for the Maliseets, it specifically acknowledged that "[a]ll three tribes [Penobscot, Passamaquoddy and Maliseet] are riverine in their land-ownership orientation." Sen. Rep. No. 96-957, at 11. Congress also specifically noted that one purpose of MICSA was to avoid acculturation of the Maine Tribes:

> *The Settlement will lead to acculturation of the Maine Indians.* – Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Id. at 17. Congress's purpose in providing for the establishment of the Maliseet trust lands was to provide a land base on which the Tribe could maintain its "cultural integrity." The Maliseets have submitted extensive comments documenting the sustenance fishing practices central to the Tribe's culture.

In 1981, the Maine Legislature added provisions to MIA to correspond to the action Congress took in MICSA to recognize the Maliseets and authorize trust lands to provide a resource base for the Tribe. In contrast to MIA's language describing the Southern Tribes' trust lands, the statute explicitly defines the Maliseet trust lands to include natural resources. 30 M.R.S.A §§ 6203(2-A) ("'Houlton Band Trust Land' means land or natural resources acquired by the secretary in trust for the Houlton Band of Maliseet Indians . . .."); see also § 6205-A ("Land or natural resources" may be taken into trust for the Maliseets). As in MICSA, MIA makes it clear that natural resources acquired for the Maliseets may include fishing rights. *Id.* at § 6203(3) ("'Land or other natural resources' means any real property or other natural resources . . . including, but without limitation, . . . water and water rights and hunting and fishing rights.")

It was not until 1989 that the Micmacs negotiated a settlement with Maine as codified in the MSA. Similar to the settlement with the Maliseets, MSA provides that the Micmacs' trust lands include natural resources. 30 M.R.S. § 7202(2) ("'Aroostook Band Trust Land' means land or natural resources acquired by the secretary in trust for the Aroostook Band of Micmacs . . .."). MSA further defines natural resources to include fishing rights. *Id.* at § 7202(3) ("'Land or other natural resources' means any real property or other natural resources . . . including, but without limitation . . . water and water rights and hunting and fishing rights.")

In 1991, Congress passed ABMSA, one key purpose of which was to ratify the MSA. ABMSA § 1(b)(4). Congress specifically found and declared that:

> 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 benefited from inclusion in the Maine Indian Claims Settlement Act of 1980.

Id. at § 1(a)(5). To that end, Congress established the Aroostook Band of Micmacs Land Acquisition Fund, *id.* at § 4(a), and provided that:

> the Secretary is authorized and directed to expend, at the request of the Band, the principal of, and income accruing on, the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band and for no other purposes. Land or natural resources acquired within the State of Maine with funds expended under the authority of this subsection shall be held in trust by the United States for the benefit of the Band.

Id. at § 5(a). ABMSA defines "Band Trust Land" to mean "land or natural resources acquired by the Secretary of the Interior and held in trust by the United States for the benefit of the Band" and defines "land or natural resources" to mean "any real property or natural resources, or any interest in or right involving any real property or natural resources, including (but not limited to) . . . water and water rights, and hunting and fishing rights." *Id.* at § 3(3) and (4). As with the Maliseets, Congress clearly intended that the Micmacs' trust lands could encompass fishing rights.

The Senate conference report from the Select Committee on Indian Affairs on ABMSA indicates that Congress intended to remedy the plight of the Micmacs, who had been deprived of a land base on which to secure the Tribe's continuation as a unique culture. "As Maine's only Native American community without a tribal land base, the Aroostook Band of Micmacs faces major challenges in its quest for cultural survival." 102 S. Rpt 136 (1991). The report describes the cultural practices of the band, including its historic homeland range along the west bank of the St. John River. "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century." It goes on to note that "[t]oday, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." The discussion of the Band's history ends by observing:

> It is remarkable that the Aroostook Band of Micmac Indians, as a long disenfranchised and landless native group, has not withered away over the centuries. To the contrary, this community in Northern Maine has demonstrated an undaunted collective will toward cultural survival.

As with the Maliseets, it is clear Congress intended to establish a land base for the Micmacs that would enable the Tribe to secure its "cultural survival" and avoid acculturation. Congress intended for the Northern Tribes' trust lands to provide a "subsistence base" on which the Tribes

could assure their continued existence as a unique culture. And Congress was aware that part of that subsistence base for the Northern Tribes was their sustenance fishing practices.

While Congress intended that the Indian lands in Maine provide a land base to support all the Tribes' sustenance practices, it ratified dramatically different regulatory frameworks within which the Southern and Northern Tribes could operate in exercising those practices. In their reservations and lesser ponds in their trust lands, the Southern Tribes are substantially free from state fishing regulations, and elsewhere in their trust lands any regulation of the Southern Tribes' fishing must consider their sustenance practices. As explained in the discussion of the State's jurisdictional authority above, the Northern Tribes and their trust lands are subject to the laws of the State, including the regulation of natural resources, which includes fishing rights. So unlike the Southern Tribes, the ability of the Northern Tribes to exercise their sustenance fishing practices is potentially subject to regulation directly under state law. As DOI's legal opinion explains, the Northern Tribes' trust lands include fishing rights appurtenant to those land acquisitions, which are subject to state regulation.

But this jurisdictional arrangement does not alter the fact that Congress established the Northern Tribes' trust lands for the purpose of providing these Tribes a land base on which to exercise their sustenance practices to the extent possible. Finding that state law applies to the Northern Tribes' fishing rights does not answer the question how those Tribes intend to use the waters on their trust lands consistent with the purpose of setting aside their land base. And the state law applicable to the Northern Tribes' fish take makes it clear that there are generous take limits that allow a catch sufficient to support sustenance fishing. As analyzed in the review of state fishing regulations supporting this decision, it appears state fishing regulations applicable to the Northern Tribes' trust lands do not impose limits that would prevent individual members of the Northern Tribes from taking fish sufficient to support a sustenance diet.[12] Further, under state law, the Department of Inland Fisheries and Wildlife has authority to set take limits on fisheries for the purposes of their preservation, protection, enhancement and use as well as the propagation of fish for the effective management of inland fisheries resources in public waters of the State. 12 M.R.S. § 10053.[13] While this regulatory process does not include the same kind of procedural and burden of proof protections MIA provides for the Southern Tribes' fishing rights, it still requires the State to have a legitimate, non-arbitrary reason for limiting the take in the Northern Tribes trust lands based on the need to preserve and protect state fisheries. So as provided under state law, there appears to be ample ability for the Northern Tribes to fish for their sustenance in tribal waters associated with their trust lands.

3.3.1.3 Passamaquoddy Marine Sustenance Fishing

The Passamaquoddy Tribe's Pleasant Point reservation is located on marine, not inland, waters. There is a dispute among the Tribe, the State, and the commission about whether the Tribe's aboriginal right to take fish in marine waters survived the passage of MICSA. See 25 U.S.C. §§ 1722(b) and 1723(b) and Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine, Maine Indian Tribal-State Commission: Special

[12] See memorandum from Ralph Abele to the file for this decision, regarding Effects of Maine Fishing Regulations on Sustenance Fishing by Maine Tribes, dated January 30, 2015.
[13] See memorandum from Greg Dain, re: Maine Fishing Regulation, December 23, 2014.

Report 2014/1 (June 17, 2014) at 7. EPA is taking no position at this time as to the Tribes' aboriginal rights to take fish in marine waters or the scope of the sustenance fishing right codified in MIA section 6207 in marine waters. Nonetheless, the marine waters that are part of the Pleasant Point reservation serve a function in supporting the sustenance of the Tribe identical to the inland waters in the Tribe's reservation and trust lands.

First, Congress understood that the Passamaquoddy Tribe exercised subsistence practices on its reservations, including the Pleasant Point Reservation. The Senate Report's discussion of Special Issues noted that "[p]rior to the settlement, Maine law recognized the Passamaquoddy Tribe's and Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time." As quoted more extensively above, the Senate Report then goes on to describe in detail MIA's provisions for the reserved sustenance fishing right of the Southern Tribes. Sen. Rep. No. 96-957 at 16-17. While some dispute whether the Southern Tribes' sustenance fishing extends into marine waters, at a minimum Congress understood that the Passamaquoddy Tribe fished for its sustenance on its reservation and that the State had accommodated that practice under state law.

Notably, Maine has continued its practice of recognizing and providing for the Passamaquoddy Tribe's sustenance marine fishing practices under state law. In 2013, the State codified a "tribal exemption" from otherwise applicable state fishing regulation of marine species for all four Indian Tribes in Maine to exercise a "sustenance use if the tribal member holds a valid sustenance fishing license issued by the tribe, nation or band . . .." That same subsection goes on to define "sustenance use" as:

> . . . all noncommercial consumption or noncommercial use by any person within Passamaquoddy Indian territory, as defined in Title 30, section 6205, subsection 1, Penobscot Indian territory, as defined in Title 30, section 6205, subsection 2, or Aroostook Band Trust Land, as defined in Title 30, section 7202, subsection 2, or Houlton Band Trust Land, as defined in Title 30, section 6203, subsection 2-A, or at any location within the State by a tribal member, by a tribal member's immediate family or within a tribal member's household.

12 M.S.A. § 6302-A(2)(emphasis added). This section imposes seasonal limits on the taking of sea urchins and limits on the number of lobster traps used to harvest lobsters for sustenance use. But it is a clear acknowledgement of and provision for the Passamaquoddy Tribe to take marine species for their sustenance "within Passamaquoddy Indian territory" as defined in MIA, which includes the Tribe's reservations.

Again, EPA acknowledges that there is a current dispute about the extent of the State's authority to regulate the Tribes' marine fishing practices. In citing section 6302-A, EPA does not take a position on the merits of that dispute. EPA is concluding, however, that even if EPA accepts the State's position on its ability to regulate the Passamaquoddy Tribe's marine fishing practices, state law makes ample provision for sustenance fishing on the Tribe's reservation. Therefore, as with the Northern Tribes' trust lands, even if the State has authority to regulate the Tribe's take of marine species, EPA concludes that one important purpose of the Tribe's reservation is to

serve as a land base for the Tribe's exercise of sustenance practices at least to the extent consistent with Maine law regulating the taking of fish. And consistent with that Maine law, the Tribe can consume sufficient marine species to sustain themselves under section 6302-A.

3.3.2 Purpose of MIA, MICSA, MSA, ABMSA and Water Quality

As explained above, all four settlement acts in Maine provide for the Tribes to exercise sustenance fishing practices on waters in Indian lands in Maine. The statutory mechanism supporting this conclusion is quite different depending on which element of Indian lands is involved. But the fundamental conclusion that Congress understood and intended that the Tribes be able to sustain their unique cultures and sustain themselves on Indian lands in Maine is clear.

EPA concludes that the purpose to which Congress dedicated these Indian lands has important implications for water quality regulation under the CWA. Some in Maine have argued that the fishing right reserved to the Southern Tribes in their reservations is simply an exception from otherwise applicable state creel limits, but has no bearing on whether the water supporting that fishing right must be clean enough to ensure that the fish that tribal members are consuming is safe to eat. EPA does not agree with this narrow approach to the relationship between the provisions for tribal sustenance practices on the one hand and water quality on the other. Fundamentally, the Tribes' ability to take fish for their sustenance under the Maine settlement acts would be rendered meaningless if it were not supported by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance.

There are several examples of the courts finding that fishing rights for tribes encompass subsidiary rights that are not explicitly included in treaty or statutory language, but are nonetheless necessary to render those rights meaningful. One line of cases focuses on the tribes' ability to access fish. *See, e.g., United States v. Winans*, 198 U.S. 371, 384 (1905) (tribe must be allowed to cross private property to access traditional fishing ground); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-34 (9th Cir. 1985) (tribe's fishing right protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch); *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Mich. Dept of Nat. Resources*, 141 F.3d 635 (6th Cir. 1989) (treaty right to fish commercially in the Great Lakes found to include a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially).

Another line of cases focuses on water quantity sufficient to support fish habitat. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle." 723 F .2d 1394, 1409-10 (9th Cir. 1983). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 -48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).

The preceding cases focus on fishing rights, and the attendant or implicit requirement that those fishing rights not be denied through collateral action impairing that right. Analogously, when diminished water quality has hindered tribal uses of water outside the fishing context, courts have held in favor of tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. This occurred in an Arizona case, *United States v. Gila Valley Irrigation District*, in which farmers whose properties were located upstream from an Indian reservation were required to take steps to decrease the salinity of the river reaching the tribe's reservation so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops." 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), *aff'd*, 117 F. 3d 425 (9th Cir. 1997).

So there is precedent for the proposition that, when Congress identifies and provides for a particular purpose or use of specific Indian lands, an Agency should consider whether its actions have an impact on a tribe's exercise of that purpose or use and, to the extent possible, ensure that its actions protect that purpose or use. If a tribe could not survive on its land base without water, or water clean enough to farm, for example, courts have recognized that the purpose of that reservation or trust land would be entirely defeated. So too here, it would defeat the purpose of MIA, MICSA, MSA and ABMSA if the Maine Tribes cannot safely sustain themselves from the fish they can catch from their waters. DOI's legal opinion concludes that "fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right." If EPA were to ignore the impact that water quality, and specifically water quality standards, could have on the Tribes' ability to safely engage in their sustenance fishing practices on their lands, the Agency would be contradicting the clear purpose for which Congress ratified the settlements in Maine and provided for the establishment of Indian lands in the State. Therefore, it is incumbent upon EPA when applying the requirements of the CWA to harmonize those requirements with this Congressional purpose.

3.3.3 Tribal Fishing Rights, the CWA, and the MICSA Savings Clauses

Accordingly, as explained in more detail below, EPA is identifying "sustenance fishing" to be a designated use in tribal waters, and is disapproving Maine's human health criteria because they are not stringent enough to protect the sustenance fishing use. EPA considered whether taking this action is prohibited by the so-called "savings clauses" in MICSA that are designed to block application of federal law in the State if it would both accord or relate to a special status or right for Indian tribes and affect or preempt the jurisdiction of the State. 25 U.S.C. §§ 1725(h) and 1735(b). EPA concludes that the savings clauses do not preclude EPA's actions under the CWA.

EPA is addressing the provisions of MICSA, which specifically provides for a land base for the Maine Tribes that is set aside for the purpose of preserving the Tribes' culture and sustenance practices, in the Agency's implementation of the CWA, which requires that water quality criteria protect designated uses and be based on sound scientific rationale. Unless EPA acts to ensure that the Tribes are able to safely exercise their sustenance practices, a key purpose behind the provisions in MICSA, MIA, ABMSA and MSA to assemble and preserve the Maine Tribes' land base and cultures would be largely defeated. When EPA identifies Maine's designated use of "fishing" to mean "sustenance fishing" in tribal waters, it is giving effect to MICSA within the

framework of Agency oversight of WQS provided for in the CWA. It certainly cannot be the case that the savings clauses in MICSA somehow operate to prevent the government from addressing MICSA itself.

In addition, the savings clauses cannot block operation of the CWA oversight authority EPA is exercising in this case. EPA's authority to review and approve or disapprove new or revised state WQS rests on the requirements of CWA section 303(c)(3), which provides general authority and a non-discretionary duty to review and approve or disapprove all new or revised WQS from states. Because this authority under the CWA neither "accords or relates to a special status or right of or to any Indian . . . tribe," nor "affects or preempts the ... regulatory jurisdiction of the State of Maine...," it is not blocked by the operation of the applicable MICSA savings clause. See 25 U.S.C. § 1725(h)(note that section 1735(b) would not apply to CWA section 303, because section 303 was enacted in 1972, and section 1735(b) applies only to laws enacted in and after 1980.). Nothing about EPA's oversight of Maine's WQS limits the State's jurisdiction to set WQS for waters in Indian lands. As to the adequacy of the WQS, no state has authority under the CWA to set standards that are "not consistent with the applicable requirements of this chapter [of the CWA]." 33 U.S.C. § 303(c)(3). In determining whether Maine's new or revised criteria are protective of the sustenance fishing designated use in Indian waters, EPA is simply exercising the same oversight authority it would exercise inside or outside Indian country anywhere in the nation. So this action does not accord the Indian Tribes in Maine a "special status or right."

EPA also considered whether, in looking to the federal common law of reserved tribal fishing rights when interpreting MICSA and implementing the CWA, EPA has somehow applied federal law to affect the application of state law. As a threshold matter, the MICSA savings clauses appear to be drafted entirely with Congressional statutory enactments in mind, and do not appear to address federal common law. For example, MICSA section 1725(h) provides that "no law or regulation of the United States" in existence at the time MICSA passed will apply in Maine if the conditions of that section are met. The formulation of "law or regulation" suggests Congress had in mind statutes that are routinely implemented by regulation. And the example provided in the Senate Committee Report of the operation of that section is a description of how section 164 of the Clean Air Act, a statutory law, would not apply in Maine. Sen. Rep. No. 96-957, p. 31.[14]

Finally, the operation and effect of these savings clauses is irrelevant to the use that EPA is making of federal common law in this case. The savings clauses are designed to prevent the federal government from unintentionally re-writing the jurisdictional deal embodied in MICSA. Only Congress has the authority to do that. In referencing certain principles of federal common

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[14] Section 1735(b) is the companion "savings" provision to section 1725(h), and it blocks the application of federal law enacted after 1980 if that law would benefit the Tribes and affect or preempt the application of state law. That section refers to "enacted Federal law" and includes the idea that a federal law may apply in Maine if it is made specifically applicable in Maine. This provision also appears aimed at statutes that Congress enacts where Congress has the opportunity to decide whether to call out Maine in particular. The Senate Report on MICSA confirms this reading: "*Subsection 16(b)* [codified as section 1735(b)] provides a rule of construction to govern interpretation of Federal statutes enacted after the date of enactment of this Act." Sen. Rep. No. 96-957, p. 35 (underscore added). Thus it appears that both of these savings provisions were designed to operate in combination to address congressional enactments and resulting regulations that might apply in Maine, not common law.

law noted above, EPA is merely acknowledging useful precedent that can inform how to interpret the purpose to which Congress dedicated the Tribes' lands under MICSA and the other settlement acts. Doing so does not revise MICSA or change its jurisdictional formula; rather EPA is ensuring that the tribal territories can continue to serve the purpose for which they were created under MICSA. This is precisely consistent with First Circuit precedent in which the court has looked to federal principles of Indian law to help interpret the meaning of MICSA. *Akins*, 130 F.3d at 489-490 and *Fellencer*, 164 F.3d at 711-712.

3.3.4 Designated Use of Sustenance Fishing

In section 3.2 above, EPA describes its approval of the designated uses contained in the various classifications of waters in Indian lands. Each classification includes the designated use of "fishing." As explained below, EPA is interpreting the designated fishing use for all waters in Indian lands to mean "sustenance fishing"; and for certain waters in the Southern Tribes reservations, EPA is also approving a sustenance fishing designated use specified in MIA.

3.3.4.1 EPA's Decision to Approve a Sustenance Fishing Use in the Southern Tribes' Inland Reservation Waters

As discussed above, MIA provides that: "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 subsection 6." 30 M.R.S. § 6207, sub-§ 4. "Fish" is defined to mean "a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water." 30 M.R.S. § 6207, sub-§ 9.

These provisions clearly codify a tribal right of sustenance fishing for inland, anadromous, and catadromous fish in the inland waters of the Penobscot Nation's and Passamaquoddy's reservations.[15] This right is subject only to 30 M.R.S. § 6207, sub-§ 6, which authorizes Maine's Commissioner of Inland Fisheries and Wildlife to, among other things, adopt remedial measures, including the rescission of any tribal ordinance or regulation by the Maine Indian Tribal-State Commission, to prevent substantial diminution of fish stocks in waters outside of the boundaries of lands or waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or the Commission.

EPA has evaluated whether 30 M.R.S. § 6207, sub-§§ 4 and 9, constitutes a new or revised water quality standard, in light of the Agency's recent guidance regarding how it determines what is or is not a new or revised WQS, summarized in EPA's 2012 Frequently Asked Questions (FAQ) publication on the subject.[16] As explained in the FAQ, EPA considers four questions in making this determination, and in this case, all four questions are answered in the affirmative. First,

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[15] EPA is taking no position here on whether this codified right includes or excludes fish in marine waters. See section 3.3.1.3, above. EPA is approving these provisions for inland waters where there is no ambiguity.
[16] EPA, What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions, October 2012.

these provisions are legally binding and were established as a matter of state law. Second, they include and address one of the three core components of a water quality standard (i.e., a designated use), since they articulate a specific fishing use for the specified waters. Third, they express or establish the desired condition of the waters, or level of protection afforded the waters, by specifically providing for *sustenance* fishing. (As discussed above, to protect sustenance fishing, the water quality must be both adequate to support healthy fish populations at levels that provide a sufficient quantity of fish to be taken for sustenance purposes, and adequate to ensure that such fish may be safely consumed at sustenance rates by tribal members.[17]) Lastly, these provisions establish a new water quality standard since they have not previously been approved by EPA.

Based on this evaluation, EPA has determined that 30 M.R.S. § 6207, sub-§§ 4 and 9, constitutes a new or revised water quality standard, specifically a designated use, subject to EPA review and approval or disapproval under section 303(c) of the CWA.[18] EPA further finds that the sustenance fishing designated use established by 30 M.R.S. § 6207, sub-§§ 4 and 9, is consistent with the provisions of sections 101(a) and 303(c)(2) of the CWA, as well as EPA's implementing regulations. Accordingly, EPA is today approving the designated use of sustenance fishing for inland, anadromous, and catadromous fish, applicable to all inland waters of the Southern Tribes' reservations in which populations of fish are or may be found.[19]

3.3.4.2 EPA's Decision to Interpret the State's Designated Use of "Fishing" to Mean Sustenance Fishing for Waters in the Northern and Southern Tribes' Trust Lands

As explained above, EPA is approving the State's designated use of "fishing" as it applies to waters in Indian lands. In inland waters of the Southern Tribes' reservations EPA is also approving a specific additional designated use of sustenance fishing, as explained immediately above. In the trust lands for all the Tribes in Maine and the marine waters of the Passamaquoddy Tribe's reservation, EPA must determine how to interpret the fishing use that EPA is approving for those waters. EPA concludes that to protect the function of these waters to preserve the Tribes' unique culture and to provide for the safe exercise of their sustenance practices, EPA must interpret the fishing use to include sustenance fishing.[20]

In reviewing Maine's WQS as they apply to waters in Indian lands, EPA must reconcile two statutory frameworks. On the one hand, the CWA generally assigns to a state the responsibility of determining the designated uses in its waters (subject to certain restrictions at 40 C.F.R. § 131.10). 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A). On the other hand, as explained above, the

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[17] As noted above, the sustenance fishing use is subject to the limitations of 30 M.R.S. § 6207, sub-§ 6, which authorizes Maine's Commissioner of Inland Fisheries and Wildlife to take steps to prevent substantial diminution of fish stocks. EPA considers this to be a fisheries management provision, and not a restriction on the quality of water needed to protect the sustenance fishing use.

[18] EPA's authority and duty to review and approve or disapprove new or revised WQS does not depend on whether such WQS have been submitted by the State to EPA for review, or on where in state law they are codified. *FAQ* at 2.

[19] EPA interprets this designated use of sustenance fishing as not applying to inland waters that are inherently incapable of sustaining fish populations, such as most ephemeral streams and vernal pools.

[20] EPA interprets the designated "fishing" use for the inland waters of the Southern Tribes' reservations in the same manner. However, because EPA is also approving a specific sustenance fishing use contained in 30 M.R.S. § 6207, sub-§§ 4 and 9 for those waters, the discussion in this section is focused on the waters in the Trust lands.

settlement acts in Maine recognize and create specific areas in the State to provide for the Tribes to use their waters in a way that is distinct from waters outside Indian lands. EPA is bound to attend to and comply with both statutory frameworks to the extent EPA is able to reconcile how they apply to the Agency's review of Maine's WQS in Indian waters.

It is possible to harmonize these two statutory frameworks by recognizing that the State's designated fishing use under the CWA must include the concept of sustenance fishing as provided for in the settlement acts. To do otherwise would run the risk that state WQS could be based on assumptions about fish consumption rates that could lead to criteria that fail to protect the Tribes' ability to safely consume fish for their sustenance. The settlement acts, adopted between 1980 and 1991, are designed to establish a land base on which the Tribes can sustain themselves as unique cultures going forward. Therefore, the Agency will interpret the designated fishing use to include the ability of tribal members to safely take fish for their individual sustenance.

The extent to which existing state law either codifies or at least accommodates tribal sustenance fishing supports this approach to harmonizing the settlement acts with the structure of the WQS program under the CWA. As described above, MIA codifies an express provision for sustenance fishing in the Southern Tribes' trust lands. The state fishing code as it applies to waters in the Northern Tribes' trust lands imposes take limits that appear to be consistent with those Tribes' ability to fish for their sustenance. And finally, in 2013, Maine explicitly provided for all the Tribes in Maine to take marine species for their sustenance. The role of tribal sustenance fishing is woven into the fabric of Maine law, so requiring that use to be protected in the State's WQS program as applied to tribal waters will not conflict with state law governing how the Tribes may use these waters.

As described above, EPA acknowledges that the Tribes' sustenance fishing practices are not free from state regulation. The State has varying degrees of authority to regulate the quantity of fish that can be taken depending on the type of Indian land involved. In the Southern Tribes' reservations, the State has very narrow authority to set limits in the reservations to prevent depletion of fish stock in waters outside the Southern Tribes' reservation waters. The commission can regulate fish take on certain waters on the Southern Tribes' trust lands based on factors enumerated in MIA. On the Northern Tribes' trust lands the State regulates take consistent with state law.[21] However, the State's authority to limit the taking of fish to manage fisheries for their protection and preservation is not inconsistent with the settlements acts' provision of sustenance fishing in tribal waters and EPA's identification of "sustenance fishing" as the designated use for these waters. Neither does the State's authority to limit take mean that state water quality criteria need not protect sustenance fishing in those waters. Water quality criteria must be sufficient to protect the designated uses, whether or not the uses are currently being achieved. CWA 303(c)(2)(A) and 40 C.F.R §§131.3(f) and 131.11.

[21] As noted earlier, EPA is not taking a position one way or the other on whether the State may regulate Passamaquoddy marine sustenance fishing where such fishing occurs within their reservation.

4 EPA's Decisions on Maine's New or Revised Water Quality Standards Submissions From 2003 through 2014

4.1 General Background

Section 303 of the CWA requires each state to adopt water quality standards to protect public health and welfare, enhance the quality of water, and otherwise serve the purposes of the CWA.[22] Any new or revised standard adopted by a state under section 303(c) must be submitted to EPA for review, to determine whether it meets the CWA's requirements, and approval or disapproval. 33 U.S.C. § 1313(c)(1) and (3); 40 C.F.R. §§ 131.5, 131.6 and 131.20.

WQS describe the desired condition of a waterbody and consist of three principle elements: (1) the "designated uses" of the state's waters, such as public water supply, recreation, propagation of fish, or navigation; (2) "criteria" specifying the amounts of various pollutants, in either numeric or narrative form, that may be present in those waters without impairing the designated uses; and (3) antidegradation requirements, providing for protection of existing water uses and limitations on degradation of high quality waters. EPA's regulations at 40 C.F.R. part 131describe the minimum requirements for each of these three elements of WQS.

In accordance with CWA § 303(c) and 40 C.F.R. §§ 131.5 and 131.11, EPA must ensure that new or revised criteria are based on sound scientific rationale and contain sufficient parameters or constituents to protect designated uses.

4.2 EPA's Decision to Disapprove Maine's Human Health Criteria for Waters in Indian Lands because They Do Not Protect the Designated Use of Sustenance Fishing in Waters in Indian Lands in Maine, and to Approve Maine's Cancer Risk Level of 10^{-6}

4.2.1 Maine's Human Health Criteria Submitted to EPA on May 14, 2004, January 11, 2006 and January 14, 2013

On May 14, 2004, DEP submitted revisions to the human health criteria for mercury at 38 M.R.S. § 420(1-B.A.(2)) to EPA for review and approval or disapproval. On January 11, 2006, Maine DEP submitted numeric Human Health Criteria ("HHC") for toxic pollutants, among other revisions, to EPA for review and approval or disapproval (the "2006 HHC").[23] These criteria replaced Maine's previous regulation that incorporated EPA's CWA § 304(a) recommended criteria by reference. The revisions reflected DEP's use of a statewide fish consumption rate ("FCR") of 32.4 g/day (an increase from the 6.5 g/day FCR on which EPA's

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[22] Section 303's requirements also apply to tribes that are authorized to implement a WQS program. Since EPA's decision today relates to a state's WQS program, the discussion of general statutory and regulatory requirements and guidance are framed in terms of state actions only.

[23] HHC are established to protect human health from exposure to pollutants that occur through the ingestion of water and/or contaminated fish and shellfish. Any human health criterion for a toxicant is based on at least three interrelated considerations: cancer potency or systemic toxicity, exposure (e.g., fish consumption rate), and risk characterization. http://water.epa.gov/scitech/swguidance/standards/handbook/chapter03.cfm#section13

then CWA § 304(a) recommended criteria were based).[24] The HHC revisions included a requirement that HHC for carcinogens be based on a cancer risk level (CRL) of $1x10^{-6}$. DEP Rule Chapter 584 § 4. Accordingly, all of the HHC for carcinogens submitted to EPA in 2006 were calculated using a 10^{-6} CRL. EPA approved the mercury criteria for waters outside of Indian lands on January 25, 2005, and approved the other criteria for waters outside of Indian lands on July 7, 2006 and September 18, 2006. EPA is today addressing these criteria for waters in Indian lands.

On January 13, 2014, DEP submitted new HHC for acrolein and phenol, and revised criteria for arsenic (discussed separately below), to EPA for review and approval. Similar to the 2006 HHC, the new HHC for acrolein and phenol were based on the statewide fish consumption rate of 32.4 g/day and a CRL of 10^{-6}. EPA is addressing these criteria in its decision today for all waters in the State, including in Indian lands.

In 2011, Maine's legislature enacted LD 515, which required DEP to revise Maine's HHC for arsenic by basing it on a CRL of 1 in 10,000 ($1x10^{-4}$) rather than the previous CRL of 1 in 1,000,000 ($1x10^{-6}$). DEP adopted the new criteria based on the 10^{-4} CRL and a revised FCR of 138 g/day, in order to protect highly exposed state subpopulations, and on January 14, 2013, submitted them to EPA for review and approval. EPA approved the revised arsenic criteria only for waters outside of Indian lands on May 16, 2013. EPA is addressing these criteria in its decision today for waters in Indian lands.

4.2.2 EPA's Analysis of the Adequacy of Maine's HHC for Waters in Indian Lands

4.2.2.1 EPA Guidance

As explained in EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (the "2000 Human Health Methodology" or "2000 Guidance"), EPA recommends that states provide adequate protection from adverse health effects to the general population, as well as to highly exposed populations, such as recreational and subsistence fishers, two distinct groups whose fish consumption rates may be greater than the general population.[25] EPA provides national default fish consumption rates ("FCR") of 17.5 grams per day ("g/day") for the general population and recreational anglers, and of 142.4 g/day for subsistence fishers.[26] However, because the level of fish consumption in highly exposed populations varies by geographic location, EPA strongly recommends that states use local or regional data over the default values. EPA has also recently explained that in order to provide for safe fish consumption, it is important that HHC avoid any suppression effects that may occur

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[24] Although not explicitly stated in DEP Regulation Chapter 584, the mercury criteria in 38 M.R.S. § 420(1-B.A.(2)) were based on the Maine Bureau of Health Fish Tissue Action Level of 0.2 mg/Kg, which was derived using a fish consumption rate of 32.4 g/day. See *Development of Ambient Water Quality Criteria for Mercury, A Report to the Joint Standing Committee on Natural Resources*, by DEP, dated January 15, 2001.

[25] EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004, p. 2-2. Available at: http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf

[26] Id., pp. 1-12 and 1-13.

when a group's consumption rate is artificially diminished due to perceptions of pollutant contamination of the fish.[27]

4.2.2.2 Tribal Sustenance Fishers to be Protected as the Target Population in Tribal Waters

EPA concludes that when analyzing how the WQS program applies to the sustenance fishing use in the waters of Indian lands in Maine, the tribal population must be considered to be the "target population" for the purpose of determining whether the State's human health criteria are adequate to protect the tribes' health, including determining the appropriate fish consumption rate applicable in those waters and weighing the risk level to which tribal members should be exposed. Congress set aside Indian lands to provide a place for the Tribes to reside and to exercise their sustenance practices. Therefore, that tribal population and its sustenance fishing use must be the focus of the risk assessment supporting water quality criteria to adequately protect that use. To do otherwise risks undermining the purpose for which Congress established and confirmed the Tribes' land base.

EPA's 2000 Human Health Methodology provides that when developing in-stream water quality criteria to protect human health, states have some flexibility in determining which populations the state's criteria are designed to protect. Generally the guidance recommends that states consider how to protect both susceptible and highly exposed populations when setting criteria.

> When choosing exposure factor values [including fish consumption rates] to include in the derivation of a criterion for a given pollutant, EPA recommends considering values that are relevant to population(s) that is (are) most susceptible to that pollutant. In addition, highly exposed populations should be considered when setting criteria.[28]

EPA's approach in this guidance is to recommend protection of the general population based on fish consumption rates designed to represent "the general population of fish consumers," and then to recommend that states assess whether there might be more highly exposed subpopulations or "population groups" that require the use of a higher fish consumption rate to protect them as the "target population group(s)." *Id.* at 4-24 – 25. The guidance leaves states considerable discretion in determining which populations to target for protection using either statewide criteria or more geographically focused site-specific criteria.

The 2000 Guidance does not directly speak to the unique situation EPA confronts in this action, where 1) a state has authority to set human health criteria for waters in Indian lands, and 2) those lands have been set aside by Congress for, among other reasons, the preservation of tribal cultural practices, including sustenance fishing. Nevertheless, it is possible to apply the principles outlined in the 2000 Guidance to this situation, informed by the settlement acts. As discussed below, the settlement acts lead EPA to consider the Tribes to be the general target population in their waters, and the Guidance's recommendations on exposure and cancer risk for the general target population can be applied accordingly.

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[27] EPA 2013, Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions, page 2. Available at:
http://water.epa.gov/scitech/swguidance/standards/criteria/health/methodology/upload/hhfaqs.pdf

[28] EPA 2000 Human Health Methodology at 4-17.

In Maine, the State has authority to set WQS for the waters in tribal lands where tribal members are the exclusive or predominant population. See 30 M.R.S. § 6206(1) (Penobscot Nation and Passamaquoddy Tribe control "the right to reside within the respective Indian territories" as an internal tribal matter.) Some of those lands and the waters in them are subject to a statutorily reserved tribal fishing right; some are set aside for the purpose of giving the resident tribe a land base on which to exercise traditional sustenance practices. What all the waters in these Indian lands have in common is, as explained above, that the fishing activity on them will involve tribal members, and may be predominated by tribal members, who have the right to, and desire to, fish for their sustenance. Also as explained above, consistent with the purpose of the settlement acts to preserve the Tribes' culture, these tribal members intend to fish for their sustenance. They are not a highly exposed or high-consuming subpopulation in their own lands; they are the general population for which the federal set-aside of these lands and their waters was designed.[29]

Therefore, as described above, EPA has identified and approved a designated sustenance fishing use applicable to waters in these Indian lands. That designated use requires the Agency to focus its analysis on sustenance fishers as the target general population. In effect, the settlement acts have determined how EPA and Maine must analyze the use of these waters and the population to be targeted for protection, because those acts established Indian lands in Maine for the clearly identifiable purpose of allowing the Tribes to sustain themselves on their own lands and waters.

A similar analysis applies to another critical factor in deriving human health criteria, the cancer risk level. For carcinogenic pollutants, EPA's 2000 Guidance recommends that states protect the general population to a level of risk no greater than one in one hundred thousand to one in one million (1×10^{-5} to 10^{-6}) of an additional cancer occurring in that population. Maine DEP has selected 10^{-6} as the level of risk that must be used to establish human health criteria for carcinogenic pollutants, with the exception of arsenic. Maine Rule Chapter 584 § 4. EPA's 2000 Guidance indicates that if there are highly exposed groups or subpopulations within that target general population, such as subsistence consumers, water quality standards should protect those consumers to a level of risk no greater than one in ten thousand (1×10^{-4}).[30] EPA and Maine relied on this aspect of the guidance in approving Maine's recently submitted revision to its human health criterion for arsenic as it applies to waters outside Indian lands. The Agency analyzed whether the State's revised arsenic criterion adequately protected subsistence consumers *outside* tribal waters as a *subpopulation* to a risk level of 10^{-4}.

Again, EPA concludes that it would be inconsistent with the intent of the settlement acts to treat the Tribes as a subpopulation of the State when developing HHC for waters in their own lands, and to expose them to levels of risk above what would be reasonable for the general population of the State. Therefore, the CWA requires that when establishing WQS for these waters, the tribal members must be considered to be the target general population for the purposes of setting

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[29] EPA recognizes that tribal members will not be the only population fishing from some of these waters. On major rivers such as the Penobscot River, for example, the general population has the right to pass through the waters in Indian lands. The presence of some nonmembers fishing on these waters, however, does not change the fact that the resident population in the Indian lands is made up of tribal members who expect to fish for their sustenance in the waters in Indian lands pursuant to the settlement acts.

[30] EPA 2000 Human Health Methodology at 2-6.

risk levels to protect the sustenance fishing use. In Maine, the State has codified a risk level of 10^{-6} for all but one carcinogen, and EPA is today approving that provision in Chapter 584 to apply to waters in Indian lands, as discussed further below.

4.2.2.3 Fish Consumption Rate

In evaluating the adequacy of Maine's HHC to protect the sustenance fishing designated use for waters in Indian lands, EPA reviewed the basis for the FCR used by Maine, and also considered whether other localized information exists that would be relevant and appropriate to consider in determining an adequate sustenance fishing consumption rate that is not artificially suppressed by pollution concerns.

4.2.2.3.1 ChemRisk Study

DEP derived the 32.4 g/day FCR, used for all of its HHC except arsenic, in part[31] from the results of a 1990 study conducted by McLaren/Hart – ChemRisk, of Portland, Maine (the "ChemRisk Study"[32]). While DEP considered several sources of information about fish consumption rates to develop the 2006 HHC, the ChemRisk Study contains the only localized data that DEP used. EPA reviewed the ChemRisk Study as well as additional information about the Study contained in comments from a primary author of the Study and responses to comments from DEP, contained in DEP's May 25, 2012 Response to Comments document submitted to EPA on January 14, 2013, to determine the Study's relevance to the target tribal populations' sustenance fish consumption rates in waters in Indian lands.

In 1990, to characterize the rates of freshwater fish consumption by Maine's resident anglers, ChemRisk conducted a statewide mail survey of Maine residents holding a valid Maine fishing license in 1989. The survey asked respondents to report the number of freshwater fish caught in Maine, their species, and the average length of each fish that was eventually consumed by them, including fish caught by other members of the respondent's household and by individuals outside the household. Along with other demographic information, respondents were asked to self-identify their ethnic background (white/non-Hispanic, Hispanic, Native American, Asian/Pacific Islander, Black, or other). Of the 2,500 surveys mailed, 1,612 were completed and returned. Of these, 1,053 anglers reported having consumed freshwater and anadromous fish obtained from Maine inland waters during the 1989-1990 ice fishing season or 1990 open water fishing season. The 95th percentile FCR (as calculated by rank without any assumption of statistical distribution) for the fish consuming anglers was 26 g/day.

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[31] Maine Bureau of Health, *Fish Tissue Action Levels*, February 20, 2001, published at https://www1.maine.gov/dhhs/mecdc/environmental-health/eohp/fish/documents/action-levels-written.pdf

[32] ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers*, as revised, July 24, 1992. See also Ebert, E.S., N.W. Harrington, K.J. Boyle, J.W. Knight, R.E. Keenan, *Estimating Consumption of Freshwater Fish among Maine Anglers*, North American Journal of Fisheries Management, 13:4, 737-745 (1993): http://dx.doi.org/10.1577/1548-8675(1993)013<0737:ECOFFA>2.3.CO;2

According to the Study, 148 Native Americans participated in the survey (11% of total participants), and 96 of those reported consuming freshwater fish that had been sport-caught.[33] The consumption rate for the Native American participants equaled or exceeded the rate of all other population groups at the 66th, 75th, and 90th percentiles[34], and the 95th percentile for Native Americans was nearly double the 95th percentile for the next highest population group.[35] However, the maximum rate reported by the Native Americans respondents (162 g/day) was lower than the maximum rate reported by the entire surveyed population (182 g/day).[36]

Ultimately, DEP used a statewide fish consumption rate of 32.4 g/day to establish its HHC, which is the equivalent of one 8-oz. fish meal per week, and, according to DEP, represents the 97th percentile FCR for Maine recreational anglers for all waters, and the 94th percentile for Native American anglers in Maine.[37] It was "designed to protect the subpopulation of recreational anglers that frequently consume sport-caught fish....."[38]

As explained above, in evaluating whether the sustenance fishing designated use for waters in Indian lands is protected by Maine's HHC, EPA considers the tribal sustenance fishers to be the "target" general population for such waters. This means that the FCR for the applicable HHC must reflect, as accurately as possible, the Tribes' sustenance level FCR, and the CRL must be protective of the sustenance fishers as a general population rather than as a highly exposed subpopulation.

Maine's FCR is based primarily on statewide data, which EPA's 2000 HH Methodology generally prefers over the use of national data. However, it is not based on localized data for the specific waters in Indian lands or the target tribal populations. The ChemRisk Study was not intended to be, nor was it, a survey of tribal sustenance fishers in tribal waters. The survey was sent to state-licensed recreational anglers, but tribal sustenance fishers are not required to have state licenses to fish in waters in Indian lands.[39] Therefore, EPA is unable to conclude that the Study results are representative of a fish consumption rate for tribal sustenance fishers in tribal waters.

In addition, the Study does not reflect unsuppressed fish consumption levels. At the time the ChemRisk survey was conducted, Maine had issued fish consumption advisories for the main stem of the Penobscot River, where the Penobscot Nation reservation is located, the Androscoggin River (1985), and the Kennebec River, (1987), and it issued advisories for the Presumpscot River and West Branch of the Sebasticook River in 1990.[40] DEP has acknowledged that "public awareness of historical pollution in industrialized rivers can be expected to have suppressed fish consumption on a local basis," and that the ChemRisk

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[33] ChemRisk Study, Tables 5 and 6a.
[34] Id., Table 6a.
[35] Id., as revised (see comment by Ellen Ebert in DEP's Response to Comments, May 25, 2012, page 16).
[36] Written comments from Ellen Ebert, primary author of the Chemrisk Study, to Maine DEP, as reported in DEP Response to Comments dated May 25, 2012 and submitted to EPA January 14, 2013.DEP, page 16.
[37] Maine RTC, May 25, 2012, page 20.
[38] Maine DEP testimony to the Maine Legislature, April 25, 2011, p. 3.
[39] Id., p. 19.
[40] Id., p. 20.

"estimates of fish consumption for rivers and streams as well as the inclusive 'all waters' category are likely to have been affected to some degree."[41]

Although the responses were not tallied and not analyzed in ChemRisk's report, the ChemRisk survey did include questions regarding the impact of fish consumption advisories. EPA analysis of the survey response data[42] indicates that 35% of respondents (556 individuals) were aware of the advisories during the time of the survey. Of the 160 respondents who reported that they ate fish from locations covered by fish consumption advisories, 82% (135) reported that the advisories affected whether they kept the fish caught at those locations.[43] It is not clear (because the question was not asked) whether anglers avoided certain waters in the 1989/1990 fishing season because of the fish advisories and whether that avoidance affected their total fish consumption. Nonetheless, it is clear that the existence of the advisories did result in some anglers reducing their take from those rivers.

EPA also reviewed the results of the Penobscot Nation's draft 1991 Penobscot River Users Survey.[44] While the survey was small (210 respondents) and the response rate was only 25%, and it was limited to Penobscot Nation members and their use of the Penobscot River, it does contain information that reinforces EPA's conclusion that the ChemRisk Study does not reflect unsuppressed sustenance fish consumption in tribal waters. For example, 72.9 % of the respondents stated they did not eat fish from the Penobscot River, and a majority (66.7%) stated that they had concerns about eating fish from the river.[45] The vast majority of those concerns were related to pollution.[46] In addition, of the 37.1% who reported not using the river at all, 16.3% identified the reason as concerns about pollution.[47]

4.2.2.3.2 Wabanaki Traditional Cultural Lifeways Exposure Scenario

In considering whether there are other sources of local data to inform EPA's determination of what FCR is representative of sustenance fishing in the waters in Indian lands, EPA reviewed the Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Study"), which was completed in 2009. This peer reviewed Study was produced under a Direct Implementation Tribal Cooperative Agreement (DITCA) awarded by EPA to the Aroostook Band of Micmac Indians on behalf of all of the Maine Tribes. The purpose of the Study was to use available anthropological and ecological data to develop a description of Maine Tribes' traditional cultural uses of natural resources, and to present the information in a format that could be used by EPA to evaluate whether or not tribal uses are protected when EPA reviews or develops water quality standards in Indian lands in Maine.[48] It is relevant to contemporary water quality because another purpose of

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[41] Id., pp. 20-21.
[42] Provided by the study author, Ellen Ebert, to EPA via email October 3, 2013.
[43] EPA, *Analysis of Suppression Questions from Chemrisk Study*, Memo to File, January 30, 2015.
[44] 1991 Penobscot River Users Survey conducted by the Penobscot Nation's Department of Natural Resources (draft).
[45] Id., Appendix A, §§ A.5 and A.6
[46] Id., Appendix A, § A.6
[47] Id., Appendix A, §A.1.a
[48] Harper, Barbara and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, prepared for EPA in collaboration with the Maine Tribes, p.7, July 9, 2009.

the Study "is to describe the lifestyle that was universal when resources were in better condition and that some tribal members practice today (and many more that are waiting to resume once restoration goals and protective standards are in place)."[49] It provides a numerical representation of the environmental contact, diet, and exposure pathways of the traditional tribal lifestyle, including the use of water resources for food, medicine, cultural and traditional practices, and recreation. The Study acknowledges that "the Wabanaki homelands extended further west and south into areas with different plants and climate and where farming was possible," but notes that "the scenario itself covers only areas most heavily used by Tribal members at present, and where farming is marginal due to climate."[50]

The report used anthropological and ecological data to identify major activities that contribute to environmental exposure and then to develop exposure factors related to traditional diet, drinking water, soil and sediment ingestion, inhalation rate and dermal exposure. Credible ethno historical, ecological, nutritional, archaeological, and biomedical literature was reviewed through the lens of natural resource use and activities necessary to survive in the Maine environment and support tribal traditions. Along with single, best-professional judgment estimates for direct exposures (inhalation, soil ingestion, water ingestion) as a reasonable repeesentation (central tendency) of the traditional cultural lifeways, the Wabanaki Study provides an estimated range of diets that reflect three major habitat types.[51]

In developing the dietary component of the exposure scenario, the Wabanaki Study authors assembled information about general foraging, seasonal patterns, dietary breadth, abundance, and food storage. From these they evaluated the relative proportion of major food groups, including fish, as well as nutritional information, total calories and quantities of foods. This resulted in an estimate of a nutritionally complete diet for the area east of the Kennebec River, which is the area most heavily used by tribal members today and where farming is marginal due to climate.[52]

With regard to the consumption of fish, the Wabanaki Study identifies three traditional lifestyle models, each with its own diet:

1. Permanent inland residence on a river with anadromous fish runs ("inland anadromous"),
2. Permanent inland residence with resident fish only ("inland non-anadromous"), and
3. Permanent coastal residence ("coastal").

The study provides estimates of average consumption of aquatic resources, game, fowl, and plant based foods for each lifestyle model. Aquatic resources were divided into two categories: "resident fish and other resources" and "anadromous and marine fish and shellfish." Table 1 summarizes the consumption of aquatic resources for each lifestyle model.

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[49] Id., p. 9
[50] Id.
[51] Id., p. 16.
[52] Id., pages 8-9.

Table 1 – Consumption of Aquatic Resources by Lifestyle Model[33]

Lifestyle Model	Resident Fish & Other Aquatic Resources(g/day)	Anadromous & Marine Fish, Shellfish (g/day)[34]
Inland Anadromous	114	400
Inland Non-anadromous	286	0
Coastal	57	457

The Wabanaki Study provides a range of fish consumption rates specifically for Maine Indians using natural resources for subsistence living and reduces the uncertainties associated with a lack of knowledge about tribal exposure in Maine Indian waters. On their own, these fish consumption rates could form the basis for criteria protective of sustenance fishing. Alternatively, they could be the starting point that could be modified, based on additional information, to take into account present day circumstances related to the species composition of available fish. For example, in developing its 2014 tribal water quality criteria, the Penobscot Nation used a FCR of 286 g/day. The Nation explained that it chose the inland non-anadromous total FCR of 286 g/day because, although the Penobscot lands are in areas that would have historically supported an inland anadromous diet (with total FCR of 514 g/day), the contemporary populations of anadromous species in Penobscot waters are currently too low to be harvested in significant quantities.[35]

4.2.3 Disapproval of Maine's HHC Because They Are Based on FCRs that Fail to Protect Sustenance Fishing

EPA is today disapproving, for waters in Indian lands, the mercury human health criteria in 38 M.R.S. § 420(1-B.A.(2)) submitted to EPA on May 14, 2004; the fish consumption rate of 32.4 g/day specified in DEP Rule Chapter 584 § 5.C and all human health criteria in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 11, 2006; and the human health criteria revisions related to arsenic, acrolein, and phenol in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, as well as the last sentence in Ch. 584, § 5.C related to the fish consumption rate, submitted to EPA on January 14, 2013. The basis for the disapproval is that the HHC do not protect the sustenance fishing use in those waters. For the reasons discussed above, Maine's 32.4 g/day FCR is not representative of an unsuppressed sustenance fish consumption rate by tribal members in waters in Indian lands.

In the absence of a local survey of current fish consumption, adjusted to account for suppression, that documents fish consumption rates for sustenance fishing in the tribal waters, EPA finds that the Wabanaki Study contains the best currently available information for the purpose of deriving an FCR for HHC adequate to protect sustenance fishing for such waters. It is local, focused on the areas most heavily used by tribal members today. It identifies historic FCRs based on

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[33] Id., pp. 61-66.
[34] Includes marine mammals for coastal lifestyle model only.
[35] Penobscot Nation, Department of Natural Resources, *Response to Comments on Draft Water Quality Standards*, September 23, 2014, p. 9.

reasonable estimates for total calories and protein intake per day. Heritage rates provide reliable evidence of what unsuppressed rates would be for tribal populations.[36] The Study uses a sound methodology (peer reviewed, written by a range of experts in risk assessment and anthropology). It presents a range of FCRs from 286 g/day (freshwater fish only) to 514 g/day (combinations of freshwater, anadromous, and marine species), which can provide the basis for choosing an FCR that reflects traditional cultural practices in light of peesent day circumstances related to, for example, the species composition of available fish (as the Penobscot Nation recently did in adopting an FCR of 286 g/day).

Because the Wabanaki Study documents a substantially higher tribal sustenance fish consumption rate than the FCR on which Maine's HHC are based, EPA cannot conclude that the HHC are based on a sound scientific rationale consistent with 40 C.F.R. § 131.11(a) and protect the sustenance fishing use for the waters in Indian lands. EPA is therefore disapproving the HHC.

4.2.3.1 Remedy to Address EPA's Disapproval

Under CWA § 303(c)(3) and EPA's implementing regulations at 40 C.F.R. §§ 131.21 and 131.22, when the EPA disapproves a state's new or revised water quality standard, it must "specify the changes" necessary to meet the applicable requirements of the Act and EPA's regulations. The CWA requires that this disapproval of Maine's human health criteria for waters in Indian lands be addressed in a timely manner. In the first instance, the CWA and EPA's regulations provide the State up to 90 days to revise its WQS, and EPA prefers that Maine address this disapproval under its regulatory developement process. However, if the State does not adopt necessary changes, EPA will propose and promulgate appropriate human health criteria for waters in Indian lands in Maine.

To address this disapproval action, Maine must develop new human health criteria for waters in Indian lands that protect tribal sustenance fishers as the target general population and are based on a fish consumption rate that repeesents unsuppressed susteranee fishing by tribal members.

Among the available existing information on fish consumption, the Wabanaki Study is most relevant for Maine to consider in revising human health criteria in Indian lands. As discussed in section 4.2.2.3, the Wabanaki study is directly applicable to the Maine Tribes fishing in waters on Indian lands. The fish consumption rates developed in the Wabanaki study are estimates of unsuppeessed tribal fish consumption that could be used in the derivation of criteria protective of contemporary tribal sustenance fishing. In addressing the disapproval, Maine should use the fish consumption rates developed in the Wabanaki study either on their own or modified, based, for instance, on information that may be provided by the Maine Tribes, to take into account changes in species composition in tribal fisheries and contemporary tribal sustenance fishing goals.

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[36] National Environmental Justice Advisory Council, *Fish Consumption and Environmental Justice*, November 2002 (revised), page 49.

4.2.4 Approval of Maine's Cancer Risk Level of 10^{-6} and No Action on Maine's Arsenic CRL of 10^{-4}

Maine's water quality regulations specify that water quality criteria for carcinogens be based on a CRL of 10^{-6} for all pollutants except arsenic. DEP Rule Chapter 584 § 4. This CRL is consistent with the range of CRLs that EPA considers to be appropriate for the general population and is the risk level that EPA uses when publishing its CWA § 304(a) recommended criteria.[37] As explained above, EPA has determined that the Tribes are the target general population for waters in Indian lands. EPA is therefore today approving Maine's requirement to use 10^{-6} CRL for all carcinogens except arsenic (discussed further below) for the waters in Indian lands. Criteria based on this low level of cancer risk, along with other appropriate factors (including an appropriate FCR), will protect the sustenance fishing use for waters in Indian lands.

EPA recognizes that the Maine Legislature enacted a law that requires DEP to use a CRL of 10^{-4} when establishing arsenic criteria,[38] and that DEP Rule Chapter 584 was revised in 2012 to reflect this requirement. Since EPA is disapproving Maine's arsenic criteria along with all of the other HHC for waters in Indian lands due to an inadequate FCR, EPA is not acting on Maine's CRL for arsenic (i.e., the last sentence in Ch. 584, § 4, related to the cancer risk level to be used to calculate human health criteria for inorganic arsenic, and the first sentence of Footnote aME in Table I of Appendix A of Chapter 584). However, we note that when Maine revises its arsenic criteria, it must ensure that the criteria protect the Tribes as the general target population in these waters, not as a subpopulation. Based on the analysis above, the use of a sustenance level FCR developed for all of the HHC, in combination with a CRL of 10^{-4} for arsenic, would not protect the designated use of sustenance fishing.

4.3 EPA's Decision to Approve Maine's Human Health Criteria for Acrolein for the Consumption of Organisms Only and for the Consumption of Water and Organisms, and Phenol for the Consumption of Organisms Only, and to Take No Action on Phenol for the Consumption of Water and Organisms, in Waters Outside Waters in Indian Lands

For all waters in Maine *except* for waters in Indian lands, EPA approves the following water quality criteria contained in DEP Rule Chapter 584, Surface Water Quality Criteria for Toxic Pollutants, Appendix A, submitted to EPA on January 14, 2013:

- Human health criteria for the consumption of water plus organisms for acrolein; and
- Human health criteria for the consumption of organisms only for acrolein and phenol.

Maine's revised human health criteria for acrolein and phenol were derived using the same methodology and equations used to calculate EPA's current 304(a) recommended criteria for non-carcinogens. EPA updated recommended human health criteria for acrolein and phenol in 2009 based on new Integrated Risk Information System Reference Doses (RfDs) for the pollutants[39]. Consistent with EPA's criteria derivation, Maine has made no changes to the

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[37] *2000 Human Health Methodology*, p. 1-8.

[38] 38 M.R.S. § 420(1-B.J).

[39] Federal Register: June 10, 2009 (Volume 74, Number 110)

parameters incorporated into these criteria or to the equations used other than the new RfDs. The criteria calculations are summarized in attached Tables 1 and 2 below.

Table 1 – Calculation of Approved Acrolein Human Health Criteria

Parameter	2012 criteria
Reference Dose (RfD)	0.0005 mg/(kg-d)
Body Weight (BW)	70 kg
Water Consumption (DW)	2 L/day
Bioconcentration Factor (BCF)	2.15 L/kg
Fish Consumption Rate (FCR)	0.0324 kg/day
Criteria to protect human health for consuming fish and drinking water (water + organism) = $\frac{1,000\ \mu g/mg \times RfD \times BW}{DW + (BCF \times FCR)}$	3.9 µg/L
Criteria to protect human health for consuming fish only (organism only) = $\frac{1,000\ \mu g/mg \times RfD \times BW}{BCF \times FCR}$	5.0 µg/L

Table 2 – Calculation of Approved Phenol Human Health Criteria

Parameter	2012 criteria
RfD for Phenol	0.30 mg/(kg-d)
Body Weight (BW)	70 kg
Water Consumption (DW)	2 L/day
Bioconcentration Factor (BCF)	1.4 L/kg
Fish Consumption Rate (FCR)	0.0324 kg/day
Criteria to protect human health for consuming fish only (organism only) = $\frac{1,000\ \mu g/mg \times RF \times BW}{BCF \times FCR}$	462,963 µg/L

EPA's approval of Maine's revisions to its human health criteria for acrolein and to the human health criteria for phenol for the consumptions of organisms only is based on a review of whether the criteria protect the applicable designated uses, including consideration of EPA's National Recommended Water Quality Criteria published pursuant to Section 304(a) of the CWA. EPA finds that the revised criteria are scientifically defensible and are protective of designated uses for waters outside of Indian lands, for the reasons explained in the EPA criteria documents for each chemical constituent.

EPA understands that DEP will be revising the phenol criteria for the consumption of water and organisms to address a mathematical error made in the criteria derivation. Therefore, at this time EPA is not taking action on the human health criteria for phenol for the consumption of water and organisms, for waters outside of Indian lands, with the anticipation that the revised phenol criteria will be adopted and submitted to EPA for review and action within the coming months.

4.4 EPA's Decision to Approve Maine's Aquatic Life Criteria for Acrolein, Diazanon and Nonylphenol for waters throughout the State of Maine, including in Indian Lands

EPA's review of Maine's new aquatic life criteria for acrolein, diazanon and nonylphenol, submitted to EPA on January 14, 2013, is based on whether the criteria protect aquatic life uses, including consideration of EPA's National Recommended Water Quality Criteria published pursuant to Section 304(a) of the CWA. EPA finds that the revised criteria are scientifically defensible and are protective of designated uses for the reasons explained in the EPA criteria documents[60] for acrolein, diazanon and nonylphenol.

4.5 EPA's Decision to Approve Maine's Aquatic Life Criteria Tables I and II in DEP Rule Chapter 584, except for Ammonia, Approve Aquatic Life Criteria in 38 M.R.S. § 420(1-B.A.(1)), (1-B.C), (1-B.D), and (1-B.E), and Approve Biological Criteria in DEP Rule Chapter 579 for Waters in Indian lands

EPA's review of the aquatic life criteria, other than ammonia, in DEP Regulation Chapter 584 Tables I and II, submitted to EPA on January 11, 2006, and in 38 M.R.S. § 420(1-B.A.(1)), (1-B.C)[61],(1-B.D), and (1-B.E), submitted to EPA on May 14, 2004 (related to mercury and referenced in Table I of Chapter 584), for waters in Indian lands, is based on whether the criteria protect aquatic life uses, including consideration of EPA's National Recommended Water Quality Criteria published pursuant to Section 304(a) of the CWA. EPA finds that the revised criteria are scientifically defensible and are protective of designated uses for the reasons explained in the EPA criteria documents[62] for those pollutants. EPA approved these criteria for waters outside Indian lands on January 25, 2005 and July 7, 2006, and is now approving them for waters in Indian lands.

DEP Rule Chapter 579 provides numeric biological criteria that quantify aquatic life standards for Class AA, A, B and C waters. The rules use the benthic macroinvertebrate community as a surrogate to determine conformance with statutory aquatic life standards. EPA approves of these criteria because they are based on sound scientific rationale and are protective of designated aquatic life uses, as required by Section 303(c)(2)(B) of the CWA and 40 C.F.R. § 131.11. EPA approved this rule for waters outside Indian lands on January 25, 2005, and is now approving it for waters in Indian lands.

4.6 EPA's Decision to Approve Maine's Narrative Criteria for Toxic Pollutants and Implementation Policies Regarding the Development of Statewide Criteria and Site-Specific Criteria, except for Specified Fish Consumption Rates, in DEP Rule Chapter 584, for Waters in Indian Lands

EPA's review of Maine's narrative water quality criteria, as expressed in Chapter 584, §§ 1, 2, and 3.A(1), and submitted to EPA on January 11, 2006, is based on whether those provisions are protective of designated uses, as required in 40 C.F.R. § 131.11. Since the narrative criteria specifically call for waters to be free of pollutants in concentrations that cause waters to be

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[60] See http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm#table for National Recommended Water Quality Criteria and access to criteria documents for each pollutant.

[61] Not including 38 M.R.S §420(1-B.C.(1)) and (1-B.C.(2)), which are not WQS requiring EPA review and approval – see section 4.9 below.

[62] See http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm#table for National Recommended Water Quality Criteria and access to criteria documents for each pollutant.

unsuitable for the designated uses of the water body, EPA finds that they are consistent with the requirements. EPA approved these provisions for waters outside Indian lands on July 7, 2006, and is now approving them for waters in Indian lands.

EPA's review of Maine's implementation policies regarding the development of statewide criteria and site specific criteria in Chapter 584 §§ 3 and 5 (other than the fish consumption rates of 32.4 g/day and 138 g/day, which EPA is disapproving as discussed above) is based on whether the criteria developed from those policies would protect the applicable designated uses including a consideration of EPA's ambient water quality criteria guidance, published pursuant to Section 304(a) of the CWA. The implementation policies include requirements for developing scientific bases for new or revised criteria as well as assumptions regarding ambient waters characteristics (such as pH, temperature, and salinity), and human health (such as water consumption rate and average body weight). EPA approved these policies for waters outside Indian lands on July 7, 2006 and now approves the implementation policies in Chapter 584 §§ 3 and 5 (other than the fish consumption rates) for waters in Indian lands because they require criteria to protect designated uses, and since the procedures and numeric assumptions are consistent with currently published EPA guidance.

EPA is not taking action on the procedures described in Chapter 584 § 3 which describe how alternative statewide and site-specific criteria are to be initiated, reviewed and adopted under state law.[83] Such procedures are not WQS requiring review and approval by EPA. Any new or revised criteria developed under the procedures for statewide, alternative statewide, or site-specific criteria must be submitted to EPA for review and approved by EPA pursuant Section 303(c)(3) of the Clean Water Act and 40 C.F.R. part 131 in order to be effective for Clean Water Act purposes.

4.7 EPA's Decision to Approve Maine's Dissolved Oxygen (DO) Criteria for Class C waters, Requirements for Compliance with DO criteria in Riverine Impoundments, Requirements for Instream Design Flows, the Requirement to Hold a WQS Review Hearing Every Three Years and Provisions that Allow for Pesticide Discharges into Class B and SB Waters for Mosquito Control, for Waters in Indian Lands

EPA's review of the revision to the DO criteria for Class C waters in 38 M.R.S. §465(4.B), submitted to EPA on January 11, 2006, is based on whether the criteria protect aquatic life uses, particularly cold waters species. For the reasons provided in our July 7, 2006 approval of these criteria for waters that are not in Indian lands, EPA finds that the criteria are protective of aquatic life uses and approves them in Indian lands as well.

EPA's review of the revision to DO measurement requirements for riverine impoundments in 38 M.R.S. §464(13), submitted to EPA on August 26, 2003, is based on whether the criteria protect existing and designated uses for waters in Indian lands. As explained in our February 9, 2004

[83] Specifically, these provisions are: the requirement in Chapter 584 § 3(A.(2)) that "statewide criteria must be initiated in accordance with the petition for rulemaking provisions of the State Administrative Procedures Act, 5 M.R.S.A., Section 8055"; the provision in the first paragraph of Chapter 584 § 3(B) that site specific criteria "must only be adopted by the Board as part of a waste discharge license proceeding pursuant to 38 M.R.S.A. Sections 413, 414 and 414-A"; and the first two sentences of the second paragraph of Chapter 584 § 3(B).

approval of this revision for waters that are not in Indian lands. EPA finds that the narrative standard that accompanies the measurement requirements ("dissolved oxygen concentration in existing riverine impoundments must be sufficient to support existing and designated uses of these waters") ensures that, notwithstanding the measurement restrictions in this provision, the revision is consistent with the requirements of the Clean Water Act.

EPA's review of the revisions to DEP Rule Chapter 530 § 4(B), which contains instream design flows for the application of water quality criteria for aquatic life and human health, submitted to EPA on January 11, 2006, is based on whether the provision protect existing and designated uses for waters in Indian lands. The instream design flows (1Q10 low flow for acute aquatic life criteria, 7Q10 for chronic aquatic life criteria, and harmonic mean flow for human health criteria), are consistent with guidance intended to ensure protection of uses provided in Section 5.2 of EPA' Water Quality Standards Handbook[84]. EPA approved this provision for waters outside Indian lands on April 17, 2006, and is now approving it for waters in Indian lands.

EPA's review of the revision to provisions in 38 M.R.S. § 464(3.B), that ensure that a hearing will be held at least every three years for the purpose of reviewing Maine's WQS, and revising them, as appropriate, submitted to EPA on May 14, 2004, is based on whether the provision is consistent with federal WQS review requirements. This revision reversed a previous change to 38 M.R.S. § 464(3.B)[85] that specified hearings only every four years. Since CWA § 303(c)(1) and 40 C.F.R. § 131.20 require states to hold public hearings every three years, the revision is consistent with federal WQS requirements. EPA approved this provision for waters outside Indian lands on January 25, 2005, and is now approving it for waters in Indian lands.

Revisions submitted on April 8, 2008 included the addition of 38 M.R.S. § 465(3.C.(2)) and § 465-B(2.C) which allow the discharge to Class B and SB waters of aquatic pesticides approved by DEP for control of mosquito-borne diseases. EPA's review is based on whether the provision will protect existing and designated uses for waters in Indian lands and is consistent with the requirements of the Clean Water Act. Given the requirements that the methods and materials used be protective of non-target species, EPA anticipates that no degradation of water quality would occur due to the discharge of aquatic pesticides authorized under these revisions. EPA approved these provisions for waters outside Indian lands on August 19, 2009 and is now approving it for waters in Indian lands.

4.8 EPA's Decision to Take No Action on Maine's Ammonia and Recreational Bacteria Criteria for Waters in Indian lands; on the Reclassification of Long Creek; and on Certain Bacteria and Pesticide Provisions for Waters throughout Maine, Including Waters in Indian Lands

EPA understands that Maine will be conducting a comprehensive triennial review in the coming months and will be reviewing the ammonia criteria for protection of aquatic life and the bacteria

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[84] EPA-820-B-14-004, September 2014, provided on line at http://water.epa.gov/scitech/swguidance/standards/handbook/chapter05.cfm#section52.

[85] EPA did not act on the previous revision (calling for hearings every 4 years) which DEP submitted to EPA on August 26, 2003, since DEP agreed at that time to propose changing the requirement back to hearings every 3 years.

criteria for the protection of primary contact recreation, in light of EPA's recommendations[66] for these widespread pollutants, issued in 2013 and 2012, respectively. EPA expects that DEP will be revising these criteria for all waters in Maine, including waters in Indian lands, so that they are based on sound science and protective of the designated uses. For this reason, for waters in Indian lands, we are not taking action at this time on Maine's ammonia criteria for the protection of aquatic life in DEP regulation Chapter 584, Appendix A, and the numeric bacteria criteria for the protection of primary contact recreation for Class B and C waters in 38 M.R.S. §465(3.B) and (4.B), and the extension of the applicability of bacteria criteria for Class SB and SC waters to include bacteria of domestic animal origin in 38 M.R.S. § 465-B(2.B) and (3.B). For the same reason, we are not taking action for waters throughout the State, including waters in Indian lands, on the revisions to 38 M.R.S. §465(3.B) and (4.B) and 38 M.R.S. § 465-A(1.B), which extended the applicability of the bacteria criteria for Class B, C, and GPA waters to include bacteria of domestic animal origin. EPA would be happy to provide assistance to DEP as it develops the new criteria.

In addition, EPA is not taking action on the reclassification of a section of Long Creek (which is a water outside of Indian lands) from Class B to Class C. This downgrade in classification was adopted to achieve consistency in the Creek where the upstream and downstream reaches were already Class C waters. EPA agrees with DEP that it is unusual for a downstream section of a flowing water to be at a higher classification that the upstream section. However, EPA would like to discuss this reclassification further with DEP in the coming months to explore whether there are other means to remedy the inconsistency, such as reclassifying the upstream section to Class B if the restoration of Long Creek and Class B uses there are attainable.

EPA also reviewed the provisions related to certain pesticide discharges submitted to EPA in 2006, 2008 and 2014 and finds that many of these are not water quality criteria requiring review and approval by EPA (as discussed in the section that follows) and two are WQS that we have approved herein (as discussed in the preceding section). However, EPA finds that some of these revisions are WQS which EPA has not yet acted on for waters anywhere in Maine. The revisions related to pesticides that are WQS that we are continuing to take no action on are:

- The revisions made in L.D. 1304 at 38 M.R.S. § 464(4.A.(3)(a)), and § 465((3.C.(1)) and (4.C), related to certain pesticide discharges, submitted to EPA on January 11, 2006;
- The revision made in L.D. 1430 at 38 M.R.S. § 464(4.A.(3)(b)), related to certain pesticide discharges to tributaries of GPA waters, submitted to EPA on February 27, 2014.

The revisions made at 38 M.R.S. § 464(4.A.(3)(a) and (b)), would allow, in GPA waters and tributaries to GPA waters, the impairment of characteristics and designated uses and increase in trophic state due to discharges of aquatic pesticides or chemical discharges for the purpose of restoring biological communities affected by an invasive species or that are the unintended or incidental result of the spraying of pesticides. The revision made at 38 M.R.S. § 465((3.C.(1)) would allow, in Class B waters, impairment of the resident indigenous biological community due to discharges of aquatic pesticides or chemical discharges for the purpose of restoring biological

[66] See December 2, 2013 letter from EPA Region 1 Office of Ecosystem Protection Director, Ken Moraff to DEP Bureau of Land and Water Quality Director, Michael Kuhns.

communities affected by an invasive species. Similarly, the revision made at 38 M.R.S. § 465(4.C) would allow impairment of the function and structure of the indigenous biological community due to discharges of aquatic pesticides for the purpose of restoring biological communities affected by and invasive species. EPA understands from recent discussion with DEP, that Maine will be revising these provisions during the upcoming months to ensure that they are protective of designated uses. For this reason EPA is not taking action on these revisions at this time.

4.9 EPA's Determination That Various Provisions Submitted to EPA from 2004 through 2014 Are Not Water Quality Standards and Therefore EPA is Taking No Action on These Provisions

EPA has reviewed the following provisions and determined that they are not water quality standards and therefore EPA is taking no action on these provisions:

- Revisions made at 38 M.R.S. § 465(1.C.(2)) and (2.C.(2)), enacted as Chapter 574, L.D. 1833 "An Act to Amend Water Quality Laws to Aid in Wild Atlantic Salmon Restoration," submitted to EPA on May 14, 2004;
- Revisions made at 38 M.R.S. § 420(1-B.B) related to discharger compliance, submitted to EPA on May 14, 2004;
- Revisions made at in 38 M.R.S. § 420(1-B.C.(1)) and (1-B.C.(2)) that describe the state regulatory procedures for establishing site-specific bioaccumulation factors, submitted to EPA on May 14, 2004;
- Procedures in DEP Rule Chapter 584 that describe how alternative statewide and site-specific criteria are to be initiated, reviewed and adopted under state law, submitted to EPA on January 11, 2006;[47]
- Revisions made at 38 M.R.S. § 361-A(1-J) and (1-K), enacted as Chapter 330, L.D. 1588, Sections 7 and 8, which updated the definitions of "Code Of Federal Regulations" and "Federal Water Pollution Control Act" to include their amendments through January 1, 2005, submitted to EPA on January 11, 2006;
- Revisions made at 38 M.R.S. § 464(4.A.(1)(c) and (d)); § 465(1.C.(3)) and (2.C.(3)); and § 465-A(1.C), enacted as Chapter 182, L.D. 1304 "An Act Concerning Invasive Species and Water Quality Standards," submitted to EPA on January 11, 2006;
- Revisions made at 38 M.R.S. § 464(4.A.(1)(e)); § 465(1.C.(4)) and (2.C.(4)); § 465-A(1.C.(4)); and § 465-B(1.C.(2)), enacted as Chapter 291, L.D. 1274, "An Act to Allow the Discharge of Aquatic Pesticides Approved by the Department of Environmental Protection for the Control of Mosquito-borne Diseases in the Interest of Public Health and Safety," submitted to EPA on April 8, 2008;
- Revisions made at 38 M.R.S. § 420(1-B.F) and § 464(4.J) and (4.K), related to testing and licensing requirements for waste discharges that were included in LD 515, submitted to EPA on January 14, 2013; and

[47] Specifically, these provisions are: the requirement in Chapter 584 § 3(A.(2)) that "statewide criteria must be initiated in accordance with the petition for rulemaking provisions of the State Administrative Procedures Act, 5 M.R.S.A., Section 8055"; the provision in the first paragraph of Chapter 584 § 3(B) that site specific criteria "must only be adopted by the Board as part of a waste discharge license proceeding pursuant to 38 M.R.S.A. Sections 413, 414 and 414-A"; and the first two sentences of the second paragraph of Chapter 584 § 3(B).

- Revisions made at 38 M.R.S. § 464(4.A.(1)(f)); § 465(1.C.(5)) and (2.C.(5)); § 465-A (1.C.(5)); and § 465-B(1.C.(4)), enacted as Chapter 193, L.D. 1430, "An Act to Clarify the Permitted Use of Aquatic Pesticides," submitted to EPA on February 27, 2014.

Since many state and tribal laws that establish WQS include related provisions that are not themselves WQS, as defined by the Clean Water Act and EPA's regulations, EPA routinely reviews state submissions and identifies revisions that, while an important element of state law, are not WQS requiring EPA review and approval or disapproval pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. part 131. EPA has in the past considered certain discharge prohibition exceptions, discharge licensing requirements, and alternative criteria adoption procedures in Maine to be WQS revisions and acted on them accordingly.[88] However, since the Region last considered such a revision in Maine, EPA has clarified how it determines what is or is not a new or revised WQS, as summarized in EPA's 2012 Frequently Asked Questions (FAQ) publication on the subject.[89] After careful review of Maine's submissions in light of this clarification, EPA finds that the provisions listed above are not WQS requiring EPA review and approval or disapproval.

As noted in the FAQ, one salient feature of a water quality standard is that it includes or addresses one of the three core components of WQS: designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States. The provisions listed above, in contrast, do not establish, alter, or in any other way include or address designated uses, criteria or antidegradation requirements. Rather, most of the provisions allow the DEP to issue discharge licenses for certain previously prohibited discharges to occur in certain waters, and address compliance and testing requirements for certain discharges. In all cases, such discharges would still need to satisfy all applicable water quality standards. Therefore, the provisions are more accurately characterized as permit implementation provisions rather than water quality standards. The remaining provisions are purely procedural in nature, updating federal statutory and regulatory references, and establishing processes for adopting alternative criteria and establishing bioaccumulation factors, but they do not themselves alter uses, criteria, or antidegradation requirements, or mandate how they must be expressed or established in the future.

EPA has previously written approval letters for some of the above-listed provisions as applied in state waters, assuming that they were WQS (such as the discharge prohibition exceptions), or without calling out embedded non-WQS language in a longer narrative (such as the state adoption procedures in DEP rule Chapter 584). However, under CWA §303(c), EPA only has authority to approve or disapprove new or revised state WQS. Therefore, EPA's prior "approval" letters related to these provisions have no legal effect. EPA is hereby clarifying that

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[88] The latest example of EPA action on discharge prohibition exemptions in Maine as WQS was EPA's August 19, 2008 approval of discharge prohibition exemptions related to the discharge of aquatic pesticides for the control of mosquito-borne diseases in the interest of public health and safety using methods and materials that provide for the protection of non-target species.

[89] EPA, *What is a New or Revised Water Quality Standard Under CWA Section 303? Frequently Asked Questions*, October 2012.

in spite of letters that might indicate otherwise, the Agency has not taken action pursuant to CWA §303(c) on any of these provisions.

With respect to the new provisions enacted in L.D. 1304, submitted to EPA on January 11, 2006, and L.D. 1430, submitted to EPA on February 27, 2014 (both listed above), it is important to note that federal antidegradation regulations and Maine's WQS require that water quality in Outstanding National Resource Waters (ONRWs) be "maintained and protected" (*See* 40 C.F.R. § 131.12(a)(3) and Title 38 M.R.S. § 464(4)(F)(2)). EPA has interpreted that language to mean that states may only allow "some limited activity which may result in temporary and short-term changes in water quality" (*See* 48 FR 51402, November 8, 1983 preamble to changes in 40 C.F.R. part 131). The new provisions enacted in L.D. 1430 do not alter antidegradation requirements. Therefore, in any review of a request to apply pesticides to Class AA or other ONRWs, DEP must ensure that such application will result in no more than temporary and short term changes in water quality, as well as comply with all other CWA applicable WQS requirements.

4.10 List of Submissions from 2003 through 2014

DEP submissions from 2003-2014 to which EPA is responding in today's decision are:

- August 26, 2003 submission which included enacted legislative chapters from the 2002-2003 legislative session;
- May 14, 2004 submission which included statutory amendments and rulemakings from 2000 to 2004 that had not been previously submitted to EPA ;
- January 11, 2006 submission which included statutory amendments and rulemakings from 2004 and 2005;
- April 8, 2008 submission which included statutory amendments from the 2007 legislative session;
- December 7, 2009 submission which included statutory amendments from the 2009 legislative session;
- May 16, 2013 submission which included statutory amendments from the 2011-2012 legislative session and 2012 rulemaking; and
- February 27, 2014 submission which included statutory amendments from the 2013 legislative session.