UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1 – New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912

May 27, 2020

Gerald D. Reid, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Withdrawal of Certain of EPA's February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Lands

Dear Commissioner Reid:

On November 6, 2019, EPA proposed to withdraw its February 2, 2015, Clean Water Act (CWA) Section 303(c) interpretations and approvals[1] of a sustenance fishing designated use for waters in Indian lands in Maine; to withdraw its associated disapproval of human health criteria for waters in Indian lands in Maine; and to approve Maine's fishing designated use without EPA's interpretation that it means sustenance fishing for waters in Indian lands in Maine. *See* Attachment A. EPA provided the public with an opportunity to comment on these proposals. The comment period ended on January 21, 2020. EPA received comments from six different entities, including the State, the Penobscot Nation, and the Houlton Band of Maliseet Indians. EPA has included with this letter its detailed response to comments document, Attachment B.

After careful consideration of all of the comments received, EPA has decided to finalize its decisions as they were proposed. EPA's finalization of these decisions is based on and hereby incorporates the rationales as articulated in the November 6, 2019, proposal document. EPA has provided further explanation of its decisions in response to the comments it received.

Accordingly, pursuant to Section 303(c)(3) of the CWA and 40 C.F.R. Part 131, the following approvals are hereby withdrawn, as more specifically described and for the reasons explained in the attachments:

- EPA's February 2, 2015, interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use in all waters in Indian lands.

[1] Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (Feb. 2, 2015).

- EPA's February 2, 2015, interpretation and approval of certain provisions in the Maine Implementing Act, 30 M.R.S.A. § 6207, sub-§§ 4 and 9, as a sustenance fishing designated use for the inland reservation waters.

Additionally, pursuant to Section 303(c)(3) of the CWA and 40 C.F.R. Part 131, the following disapproval is hereby withdrawn, as more specifically described and for the reasons explained in the attachments:

- EPA's February 2, 2015, disapproval of certain human health criteria that were tied to the sustenance fishing designated use.

Finally, pursuant to Section 303(c)(3) of the CWA and 40 C.F.R. Part 131, the following provision is hereby approved, as more specifically described and for the reasons explained in the attachments:

- The State of Maine's "fishing" designated use for waters in Indian lands without the interpretation that it means "sustenance fishing" for such waters.[2]

As we review Maine's 2020 human health water quality criteria, submitted to EPA on April 24, 2020, we look forward to continued cooperation with your Department and consultation with the federally recognized Indian Tribes in Maine as appropriate. Please contact Ralph Abele (617-918-1629) if you have any questions.

Sincerely,

DENNIS DEZIEL

Digitally signed by DENNIS DEZIEL
Date: 2020.05.27 09:08:44 -04'00'

Dennis Deziel
Regional Administrator
EPA Region 1

Attachments

cc: Chief Clarissa Sabattis, Houlton Band of Maliseet Indians
Chief Kirk Francis, Penobscot Nation
Don Witherall, MEDEP
Brian Kavanah, MEDEP

[2] EPA notes that the State recently chose to adopt a sustenance fishing designated use subcategory to apply to specifically enumerated waters, some of which are waters in Indian lands. Consistent with 40 CFR § 131.11(a), EPA approved that subcategory on November 6, 2019. This decision does not in any way alter the approval or the effect of that subcategory, as described in EPA's November 6, 2019, approval.

Attachment A

Public Notice of the EPA's Proposals to 1) Withdraw its February 2, 2015 Clean Water Act Section 303(c) Approval of Maine's "Fishing" Designated Use for All Waters in Indian Lands with the Interpretation that for Such Waters the Use Means "Sustenance Fishing"; 2) Withdraw its February 2, 2015 Clean Water Act Section 303(c) Approval of Provisions in the Maine Implementing Act as a Sustenance Fishing Designated Use for Certain Reservation Waters; 3) Approve Maine's "Fishing" Designated Use for All Waters in Indian Lands Without the Interpretation that for Such Waters the Use Means "Sustenance Fishing"; and 4) Withdraw its February 2, 2015, Clean Water Act Section 303(c) Disapprovals of Human Health Criteria for Waters in Indian Lands.

Summary

On February 2, 2015, the EPA approved many of Maine's new and revised water quality standards (WQS), and disapproved some of them, as they applied to waters in Indian lands in Maine. Among the approvals were the EPA's interpretation and approval of Maine's "fishing" designated use to mean "sustenance fishing" for all waters in Indian lands (i.e., all waters associated with reservations and trust lands of the four federally-recognized Indian tribes in Maine). The EPA also interpreted certain provisions in the Maine Implementing Act (MIA) (specifically 30 MRSA § 6207, sub-§§ 4 and 9) as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations, and approved those provisions accordingly. The EPA made these interpretations despite the fact that the State had never described or defined its fishing use to mean sustenance fishing in any waters. The EPA then disapproved a number of Maine's human health criteria (HHC) as being inadequate to protect the sustenance fishing designated uses (SFDU) that the EPA unilaterally interpreted and approved.

Maine challenged the EPA's approvals of the SFDUs and the EPA's disapprovals of the HHC in federal district court in *Maine v. Wheeler*, 1:14-cv-00264-JDL (D. Maine).[1] On July 27, 2018, the EPA filed a motion for a voluntary remand of the challenged decisions, based on the EPA's stated intention to change, and not defend, its decisions interpreting and approving the SFDUs and its decisions disapproving the HHC. The court granted the EPA's motion for remand on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA's reconsideration of its decisions.

Pursuant to the court's remand, and in accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, EPA proposes to withdraw its 2015 approvals of the SFDUs, primarily because those decisions exceeded EPA's statutory authority and failed to appropriately defer to the State's interpretation of its water quality standards, and to approve Maine's "fishing" designated use for waters in Indian lands without EPA's prior interpretation that it means sustenance fishing in such waters. EPA also proposes to withdraw its 2015 disapprovals of HHC for waters in Indian lands because the disapprovals were based on the SFDU decisions that EPA now proposes to withdraw.

[1] The EPA promulgated federal HHC to replace the disapproved HHC on December 19, 2016 (81 Fed. Reg. 92486); these federal HHC have not been challenged in court.

Request for Comment

EPA is requesting comment on its proposal to withdraw EPA's 2015 interpretation and approvals of Maine's "fishing" designated use as a "sustenance fishing" designated use for all waters in Indian lands; and EPA's interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations; and to withdraw EPA's associated disapprovals of HHC in waters in Indian lands. EPA also seeks comment on its proposal to approve Maine's "fishing" designated use for waters in Indian lands without EPA's interpretation that it means sustenance fishing in such waters. The more detailed bases for EPA's proposals are outlined in the Technical Support Document available at https://www.epa.gov/wqs-tech/proposed-withdrawal-certain-epa-actions-related-maines-fishing-designated-use https://www.epa.gov/wqs-tech/proposed-withdrawal-certain-epa-actions-related-maines-fishing-designated-use https://www.epa.gov/wqs-tech/proposed-withdrawal-certain-epa-actions-related-maines-fishing-designated-use.

Comments on these proposals must be submitted no later than January 21, 2020, to mainewqscomments@epa.gov.

Technical Support Document

The EPA's Proposed Withdrawals of EPA's February 2, 2015, Interpretation and Clean Water Act Section 303(c) Approvals of a Sustenance Fishing Designated Use for Waters in Indian Lands in Maine; Proposed Approval of Maine's Fishing Designated Use Without EPA's Interpretation that it Means Sustenance Fishing for Waters in Indian Lands in Maine; and Proposed Withdrawal of EPA's February 2, 2015 Clean Water Act Section 303(c) Disapproval of Human Health Criteria for Waters in Indian Lands in Maine.

November 6, 2019

I. Introduction

On February 2, 2015, the EPA approved many of Maine's new and revised water quality standards (WQS), and disapproved some of them, as they applied to waters in Indian lands in Maine. Among the approvals were the EPA's interpretation and approval of Maine's "fishing" designated use to mean "sustenance fishing" for all waters in Indian lands (i.e., all waters associated with reservations and trust lands of the four federally-recognized Indian tribes in Maine). The EPA also interpreted certain provisions in the Maine Implementing Act (MIA) (specifically 30 MRSA § 6207, sub-§§ 4 and 9) as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations, and approved those provisions accordingly. The EPA made these interpretations despite the fact that the State had never described or defined its fishing use to mean sustenance fishing in any waters. The EPA then disapproved a number of Maine's human health criteria (HHC) as being inadequate to protect the sustenance fishing designated uses (SFDU) that the EPA unilaterally interpreted and approved.

Maine challenged the EPA's approvals of the SFDUs and the EPA's disapprovals of the HHC in federal district court in *Maine v. Wheeler*, 1:14-cv-00264-JDL (D. Maine).[2] On July 27, 2018, the EPA filed a motion for a voluntary remand of the challenged decisions, based on the EPA's stated intention to change, and not defend, its decisions interpreting and approving the SFDUs and its decisions disapproving the HHC. The court granted the EPA's motion for remand on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA's reconsideration of its decisions.

Pursuant to the court's remand, and in accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, EPA proposes to withdraw its 2015 approvals of the SFDUs, primarily because those decisions exceeded EPA's statutory authority and failed to appropriately defer to the State's interpretation of its water quality standards, and to approve Maine's "fishing" designated use for waters in Indian lands without EPA's prior interpretation that it means sustenance fishing in such waters. EPA also proposes to withdraw its 2015 disapprovals of HHC for waters in Indian lands because the disapprovals were based on the SFDU decisions that EPA now proposes to withdraw.

II. Background

A. Clean Water Act Requirements for Water Quality Standards

Under Clean Water Act (CWA) section 303(c) and EPA's implementing regulations at 40 C.F.R. Part 131, states have the primary responsibility for reviewing, establishing, and revising water quality standards (WQS), which include the designated uses of a waterbody or waterbody

[2] The EPA promulgated federal HHC to replace the disapproved HHC on December 19, 2016 (81 Fed. Reg. 92486); these federal HHC have not been challenged in court.

segment and the water quality criteria necessary to protect those designated uses. EPA's regulations at 40 C.F.R. § 131.11(a)(1) provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."

CWA section 303(c)(2)(B) requires states to adopt numeric water quality criteria for toxic pollutants listed pursuant to section 307(a)(1), 33 U.S.C. § 1317(a)(1), for which EPA has published national recommended criteria under section 304(a), 33 U.S.C. § 1314(a), where the discharge or presence of these toxics could reasonably be expected to interfere with the designated uses adopted by the state. In adopting such criteria, states can establish numeric water quality criteria based on one of the following: (1) section 304(a) criteria; (2) section 304(a) criteria modified to reflect site-specific conditions; or, (3) other scientifically defensible methods. 40 C.F.R. § 131.11(b). For pollutants not addressed by section 303(c)(2)(B), states can establish narrative criteria where numeric criteria cannot be established, or to supplement numeric criteria.

At least once every three years, states are required to review their applicable WQS and, as appropriate, modify these standards or adopt new standards. 40 C.F.R. § 131.20. If a state does not adopt new or revised criteria for parameters for which EPA has published new or updated section 304(a) criteria, the state must provide an explanation when it submits the results of its review. Id. CWA section 303(c) requires states to submit new or revised WQS to the EPA for review to determine whether the revisions to surface WQS are consistent with the CWA and EPA's implementing regulations. In addition, the state must follow its own legal procedures for adopting such standards, 40 C.F.R. § 131.5, and submit a certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law. 40 C.F.R. § 131.6(e).

The EPA has developed a frequently asked questions document that sets forth an interpretation of what constitutes a new or revised WQS that the Agency has the CWA section 303(c) authority and duty to approve or disapprove.[3] The document outlines a four-part test the Agency uses for determining what constitutes a new or revised WQS:

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?

2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters for the United States?

3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?

4. Does the provision establish a new WQS or revise an existing WQS?

[3] EPA, *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*, October 2012.

If all four questions are answered "yes," then the provision likely constitutes a new or revised WQS that is subject to EPA review under CWA section 303(c)(3).

B. Overview of EPA's February 2015 Review and Decisions on Maine's Water Quality Standards for Waters in Indian Lands

On January 9, 2013 and February 27, 2014, Maine submitted several new and revised WQS to EPA for review and approval, along with an explicit request that EPA approve its state WQS under the federal CWA to apply to all waters in Maine, including waters in the territories of the federally recognized Indian tribes in Maine (the Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians, and Aroostook Band of Micmacs). Outside Maine, states generally do not have authority to set environmental standards under statutes administered by the EPA in Indian reservations. But in 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA) to resolve litigation in which the Penobscot Nation and Passamaquoddy Tribe asserted land claims to a large portion of the State of Maine.[4] 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 Penobscot and Passamaquoddy Tribes.[5] 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.[6]

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.[7] In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA.[8] One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Maliseets in MICSA.[9] 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.[10] Together, these state and federal statutes are referred to as the "Settlement Acts."

MICSA included a grant of authority to the State to apply state law, with certain exceptions, to the Tribes in Maine and their lands. In response to Maine's 2013 and 2014 submittals, on February 2, 2015, the EPA determined that the unique provisions of MICSA authorize Maine to set WQS under the CWA in the waters of the Tribes' reservations and trust lands (referred to herein as "waters in Indian lands").

After determining that Maine could set WQS for waters in Indian lands, the EPA evaluated Maine's new and revised WQS submitted to the EPA from 2003-2014 and other provisions of state law that had not been submitted to EPA. Among these WQS, the EPA reviewed Maine's classifications and designated uses for those waters. In its February 2015 decisions, EPA approved Maine's fishing designated use after unilaterally recharacterizing it to mean sustenance fishing as applied to all waters in Indian lands, even though the State had never described or

[4] Pub. L. No. 96-420, 94 Stat. 1785 (Oct. 10, 1980)
[5] 30 M.R.S.A. §§ 6201, *et seq*.
[6] 30 M.R.S.A. § 6205-A; Pub. L. No. 96-420, 94 Stat. 1785, § 5.
[7] 30 M.R.S.A. §§ 7201, *et seq*.
[8] Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143.
[9] *See* ABMSA § 2(a)(4) and (5)
[10] *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007)

defined its fishing use to mean sustenance fishing in any waters. The EPA also deemed certain provisions of MIA first established in 1979 (that had not been submitted to EPA) to be new or revised WQS and approved them as a sustenance fishing designated use for inland reservation waters. The EPA then disapproved many of Maine's HHC for toxic pollutants as applied to waters in Indian lands because they were based on fish consumption data that did not represent the higher fish consumption rates associated with the Tribes' sustenance fishing practices, and therefore did not support the sustenance fishing designated uses that EPA interpreted and approved.[11]

C. EPA's Feb 2015 Sustenance Fishing Designated Use Approvals

1. Interpretation and Approval of Maine's "Fishing" Designated Use as "Sustenance Fishing" for All Waters in Indian Lands

The EPA evaluated the Settlement Acts and found that they provided for sustenance fishing by the Tribes in the waters of their reservations and trust lands. The EPA then unilaterally interpreted Maine's fishing designated use to mean sustenance fishing for those waters and approved it for CWA purposes.

The rationale the EPA articulated in the designated use approval decision was based on a new legal framework within which the EPA and states must "harmonize" treaties and other federal laws (such as MICSA) that provide for sustenance fishing by tribes with the CWA when establishing or reviewing WQS, including designated uses and HHC.[12] Under this framework, the EPA stated that it was harmonizing MICSA's language providing for the Tribes' sustenance fishing practices with the CWA by concluding that Maine's fishing designated use must be interpreted to mean sustenance fishing when applied to waters in Indian lands.

EPA's creation of a sustenance fishing designated use through interpretation and approval of the state's general fishing designated use was one of the bases for EPA's subsequent actions. The EPA stated that to protect that sustenance fishing use, HHC would need to provide the same level of protection to tribal populations engaged in sustenance fishing as to the State's general population, by treating tribal populations as the "target general population" and selecting a fish

[11] *See also*, Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (March 16, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (June 5, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Avery Day, Acting Commissioner, Maine Department of Environmental Protection, "Re: Water Quality Standards in Maine" (September 21, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Paul Mercer, Commissioner, Maine Department of Environmental Protection, "Re: Withdrawal of Disapprovals, and Issuance of Approvals, of Maine's Human Health Criteria for Copper, Absestos, Barium, Nitrates, Iron and Manganese" (Jan. 19, 2016); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Paul Mercer, Commissioner, Maine Department of Environmental Protection, "Re: Withdrawal of Disapprovals, and Issuance of Approvals, of Maine's Human Health Criteria for Multiple Pollutants" (April 11, 2016).

[12] Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (Feb. 2, 2015), Attachment A at 2.

consumption rate (FCR) that reflects a sustenance level of consumption.[13] This rationale led the EPA to disapprove most of Maine's HHC because they were based on a FCR that EPA concluded did not reflect an adequate sustenance level of consumption.[14]

2. Approval of Provisions of the Maine Implementing Act as a Sustenance Fishing Designated Use for Inland Reservation Waters

The EPA evaluated certain provisions of MIA[15] that codify a tribal right of sustenance fishing in the waters of the Penobscot Nation's and Passamaquoddy's reservations to determine whether they constituted a new or revised WQS subject to EPA review and approval or disapproval under CWA section 303(c). The State did not submit these provisions of MIA to EPA for review as new or revised WQS, and EPA had never before considered MIA to contain a designated use for Clean Water Act purposes. The EPA considered its frequently asked questions document regarding how to determine what is or is not a new or revised WQS,[16] and determined that certain provisions of MIA were a new WQS because they are binding under state law; they articulate a specific fishing use for the specified waters; they express the desired condition of the waters or level of protection afforded the waters by specifically providing for sustenance fishing; and they are new in that the EPA had never acted on them. The EPA therefore reviewed and approved those provisions in MIA as a sustenance fishing designated use applicable to the inland reservation waters. The EPA's analysis of how HHC should be derived to protect the use was the same as that outlined in section II.C.1. above.

D. Summary of Litigation and Current Status

On October 8, 2015, Maine filed a second amended complaint in federal district court in ongoing litigation against the EPA.[17] The State sought judicial review of the EPA's February 2015 decisions interpreting and approving Maine's fishing designated use as a sustenance fishing designated use in waters in Indian lands in Maine; approving provisions of MIA as a sustenance fishing designated use for the inland reservation waters; and disapproving Maine's HHC for failure to protect the sustenance fishing designated uses that EPA interpreted and approved.

The EPA moved for a voluntary remand of its February 2015 decisions on July 27, 2018, and informed the court that it had decided to revise, rather than defend, those decisions. The court granted the EPA's motion on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA's reconsideration of its decisions.

III. The EPA's Proposed Withdrawals of its 2015 Sustenance Fishing Designated Use Interpretations and Approvals

[13] *Id*. At 3, 38.
[14] *Id.* at 3.
[15] Specifically, 30 M.R.S.A. § 6207, sub-§§ 4 and 9.
[16] EPA, *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*, October 2012.
[17] *State of Maine, et al., v. Andrew Wheeler, et al*, Civil Action No. 1:14-cv-264-JDL (D. Maine).

In accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, the EPA is now proposing to withdraw its 2015 interpretations and approvals of Maine's fishing designated use as a "sustenance fishing" designated use for all waters in Indian lands and to withdraw the interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations.

A. Withdrawal of EPA's Interpretation and Approval of Maine's Fishing Designated Use as a Sustenance Fishing Designated Use in Waters in Indian Lands

The EPA proposes to withdraw its interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use in all waters in Indian lands because the approval was inconsistent with the State's unambiguous fishing designated use and exceeded EPA's CWA authority by recharacterizing that use. The State's recent creation of a sustenance fishing subcategory through its legislative process underscores that the EPA's interpretation and approval of Maine's "fishing" designated use was incorrect and inconsistent with state law, which supports the proposed withdrawal.

Pursuant to the CWA and the EPA's regulations at 40 C.F.R. § 131.10(a), states are responsible for specifying appropriate designated uses to be achieved and protected. But in its 2015 approval decision, the EPA unilaterally interpreted and recharacterized the State's "fishing" designated use to be a "sustenance fishing" designated use for waters where the State has jurisdiction to set WQS and federal law provides for sustenance fishing by Tribes in those waters, regardless of how the State had promulgated or interpreted its designated use. In fact, Maine had not defined, nor did it interpret, its fishing use to mean sustenance fishing in any waters. Indeed, Maine recently launched its own process to address sustenance fishing in its WQS and legislatively created a new sustenance fishing subcategory, within the fishing use, that applies only in specific legislatively determined waterways. EPA approved that new subcategory and attendant provisions on November 6, 2019.[18] EPA's prior interpretation of the CWA that would allow for it to interpret and recharacterize a state's designated use is inconsistent with the CWA's carefully struck balance between the federal government and the states. *See, e.g., Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) ("[T]he specification of a waterway as one for fishing, swimming, or public water supply is closely tied to the zoning power Congress wanted left to the states.").

In its 2015 approval decision, EPA stated that it was "bound to attend to and comply with both statutory frameworks [the CWA and the Settlement Acts] to the extent EPA is able to reconcile how they apply to the Agency's review of Maine's WQS in Indian waters," and then concluded

[18] On June 21, 2019, Governor Janet T. Mills approved a law establishing a sustenance fishing designated use subcategory of the State's general "fishing" designated use and a new fish consumption rate (FCR) that must be used to calculate human health criteria to protect the sustenance fishing use. The law also identifies waters in Maine to which the new subcategory applies. Maine submitted the law to the EPA for approval as a new water quality standard on August 12, 2019. The EPA approved the new sustenance fishing subcategory, its application to certain waters in Maine, and related statutory provisions as new and revised WQS on November 6, 2019. This action by Maine and EPA's approval of it are separate from the proposals set forth herein. Maine is currently in the process of revising and updating its HHC both for the sustenance fishing subcategory waters and for all other waters statewide.

that "[i]t 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."[19] EPA has now determined that it lacked statutory authority to recharacterize the State's general fishing designated use to mean sustenance fishing. Even if EPA had this authority—which EPA now concludes that it did not—the Agency now believes that it was inappropriate and unnecessary to reinterpret the State's fishing use to mean sustenance fishing in an attempt to "harmonize" the Settlement Acts and the CWA. Contrary to the EPA's 2015 statement that it "must interpret the fishing use to include sustenance fishing," the Settlement Acts do not expand EPA's CWA authority, nor do they require Maine to designate a general fishing use with a sustenance component or EPA to recharacterize a designated use to mean sustenance fishing. The Settlement Acts similarly do not limit or prohibit EPA from taking an otherwise lawful action under the CWA, such as approval of Maine's fishing designated use that does not mean sustenance fishing.

The EPA concludes that reinterpreting and recharacterizing the State's designated use of fishing with no express intent in State law to be considered a designated use, went beyond the EPA's CWA authority. Under the CWA, the designated use defines the limit of a state's obligations in establishing criteria. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1). It exceeded the EPA's statutory authority to reinterpret and recharacterize the State's designated use as meaning sustenance fishing when it approved the use for waters in Indian lands. Therefore, the EPA proposes to withdraw the February 2015 approval.

B. Withdrawal of EPA's Interpretation and Approval of MIA Provisions as a Sustenance Fishing Designated Use

The EPA proposes to withdraw its interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland reservation waters. After reconsideration, the EPA has concluded that MIA is not a new or revised WQS and that in reaching its earlier decision, the EPA erred in interpreting MIA to represent a sustenance fishing designated use for reservation waters. When MIA was passed in 1980, Maine already had in place a fishing designated use that it had adopted for all waters in the State, and that designated use was recodified in 1986. MIA's reference to the right to take fish for individual sustenance in reservation waters does not address or reference designated uses or water quality criteria, nor does it express or establish the desired condition or use goal of the waters to which the provisions apply. Rather, MIA refers to a type of fishing/consumption that can occur in certain waters, and it can be protected under the State's fishing designated use. EPA's longstanding view, consistent with the 2000 Methodology, is that populations engaged in sustenance fishing, including tribes, can be protected under a fishing designated use.[20] The EPA now concludes that while MIA's provision of sustenance fishing rights in the Southern Tribes' reservations may be a clear recognition of where sustenance fishing can occur, it does not constitute the establishment

[19] Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (Feb. 2, 2015), Attachment A at 32.

[20] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, Page 1-12. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA–822–B–00–004. http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf

of a new or different water quality goal use that the EPA must review under the CWA. The State's recent legislation did not alter, amend, or even reference MIA allowing a further inference that the State did not consider the provisions in MIA to be WQS.

IV. The EPA's Proposed Approval of Maine's Fishing Designated Use Without EPA's Interpretation that it Means Sustenance Fishing in Waters in Indian Lands

In conjunction with its proposal to withdraw its February 2015 interpretation and approval of Maine's "fishing" designated use to mean "sustenance fishing" for all waters in Indian lands, EPA proposes to approve Maine's fishing designated use for waters in Indian lands without the sustenance fishing interpretation. The EPA previously approved Maine's general "fishing" designated use, now codified at 38 M.R.S.A. §§ 465-465-B, in 1986. As with all EPA approvals of Maine's WQS before 2015, the EPA's 1986 approval did not extend to waters in Indian lands. The EPA now proposes to approve this designated use for all remaining waters in Maine. Maine's "fishing" designated use includes consumption of fish, which Maine, in its discretion, has chosen to protect through the adoption, in 2006, of HHC using an FCR of 32.4 g/day. This use is consistent with the section 101(a)(2) use goals of the CWA and 40 C.F.R. §131.10(a), and the EPA therefore proposes to approve it for waters in Indian lands.[21]

V. The EPA's Proposed Withdrawal of its 2015 Disapprovals of HHC for Waters in Indian Lands

As described above, under the Clean Water Act, state WQS include the water quality criteria necessary to protect the designated uses that apply to a water body. EPA's regulations at 40 C.F.R. § 131.11(a)(1) provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."

In its 2015 decisions, the EPA evaluated Maine's 2006 and 2013 HHC, as applied to waters in Indian lands, to determine whether they were adequate to protect the sustenance fishing designated use that the EPA had interpreted and approved for those waters. The EPA disapproved many HHC as being inadequate to protect the sustenance fishing designated use in waters in Indian lands because they were based on a fish consumption rate that did not reflect a sustenance level of fish consumption.

As a result of the EPA's proposed withdrawal of the SFDU interpretations and approvals and EPA's proposed approval of the fishing designated use without the sustenance fishing interpretation, the EPA proposes that the HHC disapprovals that were tied to the SFDU be withdrawn as well.

Maine DEP is currently in the process of revising and updating its HHC for all waters in the state, including those waters to which Maine's recently approved 2019 sustenance fishing use subcategory applies. The statute establishing Maine's sustenance fishing designated use

[21] As described above, the State recently chose to adopt a sustenance fishing designated use subcategory. Consistent with 40 CFR § 131.11(a), EPA has approved that subcategory. The State has provided in the statute establishing that subcategory that the HHC to protect the subcategory use (in the waters where it applies) will be based on a 200 g/day FCR rather than the 32.4 g/day FCR used to derive HHC in other waters in the State.

subcategory requires DEP to adopt final HHC to address that use, following public notice and opportunity for comment, no later than March, 2020. In light of this effort, the EPA would, if it finalizes the withdrawal of the HHC disapprovals as proposed herein, evaluate the adequacy of Maine's new and revised HHC (once adopted and submitted to the EPA) to protect the applicable fishing designated use or sustenance fishing use subcategory, rather than the 2006 and 2013 criteria that it previously analyzed.[22]

[22] However, if an existing (2006 or 2013) HHC that the EPA had disapproved in 2015 is not revised in DEP's 2020 promulgation, EPA would review the existing HHC and act to approve or disapprove it, as appropriate.

Attachment B

Response to Comments on EPA's Proposal to Revise EPA's 2015 Decisions on Sustenance Fishing Designated Use and Human Health Criteria in Maine

May 27, 2020

Introduction

The Environmental Protection Agency (EPA) is finalizing revisions to some of its 2015 federal Clean Water Act (CWA) water quality standards (WQS) decisions for certain waters under the State of Maine's jurisdiction. EPA is withdrawing its 2015 approvals of the sustenance fishing designated uses (SFDU), primarily because those decisions exceeded EPA's statutory authority and failed to appropriately defer to the State's interpretation of its WQS, and approving Maine's "fishing" designated use for waters in Indian lands without EPA's prior interpretation that it means sustenance fishing in such waters. EPA is also withdrawing its 2015 disapprovals of human health criteria (HHC) for waters in Indian lands because the disapprovals were based on the SFDU decisions that EPA is now withdrawing.

In revising its 2015 decisions, EPA carefully considered the public comments and feedback received from interested parties. Although it was not required to do so, EPA provided a 75-day public comment period after providing notice to potentially interested stakeholders on November 6, 2019. Six organizations submitted comments on a range of issues. Some comments addressed issues beyond the scope of the proposal, and thus EPA did not consider them in finalizing its revised decisions. Some comments also included general background information about the commenter and its interest in this matter. EPA is not responding to those portions of comments here because they did not raise specific issues related to the proposal.

This document provides a compendium of the comments submitted by commenters and EPA's responses to those comments. Excerpts from comments have been organized by topic, but otherwise comments have been copied into this document "as is" with no editing or summarizing by EPA.

EPA has sorted the comments and its responses into 11 general topic areas. For most of the topic areas, EPA provides a general essay that responds to the comments received on that topic. To the extent there are individual comments which are not covered by the general essay, EPA has provided specific responses directly following the excerpt of such comments. For a few of the topic areas EPA only responds to individual comments.

In addition to their comments, some commenters incorporated by reference additional documents, which in some cases were submitted as attachments to their comments. Where commenters affirmatively assimilated the referenced documents into their comments regarding EPA's proposal to revise certain 2015 decisions, the Agency has provided a response to those substantive comments. Where commenters note the documents with a simple incorporation by reference without any further explanation or assimilation, EPA is not providing an affirmative response to such documents. In the latter example, EPA notes that some of those documents have been filed in other proceedings and the Agency has already responded to them in those

proceedings.

1. General Support for EPA's Proposed Decisions

American Forest and Paper Association ("AF&PA"):
AF&PA supports the Proposal. With the approval of Maine' new and revised standards in November there is no basis on which EPA's 2015 actions should have any legal force or effect, and it is appropriate for EPA to withdraw them. This is consistent with the CWA and its assignment of responsibly to states – not EPA – to develop their water quality standards.

Pierce Atwood:
By letter dated June 20, 2016, we filed comments on the Environmental Protection Agency's (EPA's) proposed revisions to certain federal water quality criteria applicable to the State of Maine as set out in 81 Fed. Reg. 23239 (April 20, 2016), on behalf of the Town of Baileyville, ME; City of Calais, ME; Town of Dover-Foxcroft, ME; Town of East Millinocket, ME; Guilford-Sangerville Sanitary District; Lincoln Sanitary District; Town of Millinocket, ME; and True Textiles, Inc.; Veazie Sewer District; Verso Corporation; and Woodland Pulp LLC (the "Coalition"). On behalf of that Coalition, we now write in support of EPA's proposed withdrawal of some of its February 2, 2015 decisions concerning Maine's new and revised water quality standards (WQS).

We support EPA's proposed withdrawal of its February 2015 actions. Under the CWA, states are responsible for establishing and revising WQS. 40 C.F.R. § 131.4(a). While EPA must review and approve or disapprove state-adopted WQS, its review is limited. See 40 C.F.R. § 131.5. When EPA took action in February 2015, Maine's WQS did not include an SFDU. Nor did the MIA—which gives the State primary environmental regulatory authority and jurisdiction throughout the State of Maine, including within Indian territories—recognize such a designated use. EPA's interpretation of the "fishing" designated use as a "sustenance fishing" designated use for all waters in Indian lands amounted to a unilateral imposition of an SFDU without any legal basis.

Maine Attorney General ("AG"):
Maine supports EPA's proposed withdrawals of its interpretations and approvals of Maine's existing fishing designated use and portions of MIA as a sustenance fishing designated use, TSD Section III, as well as EPA's withdrawal of its associated disapprovals of Maine's HHC for tribal waters, TSD Section V, as such withdrawals are consistent with Maine's positions as briefed in Maine v. Wheeler, Exhibit 1. Maine also agrees that its existing statewide fishing designated use set forth in Maine's water classification program should be approved under the CWA for all applicable waters, including all tribal waters, without any EPA interpretations of that existing fishing designated use.

EPA Response:
EPA acknowledges and appreciates the support expressed by the Maine AG, as well as the AF&PA and Pierce Atwood, for EPA's proposed revisions to its 2015 WQS decisions. Comment excerpts included in this topic category did not include specific information or suggestions on EPA's proposal.

2. EPA does not need to finalize its proposed approval of the State's fishing designated use as applied to waters in Indian lands

***Maine AG**:*
But from a timing and procedural standpoint, Maine disagrees that an approval of Maine's existing statewide fishing designated use without any EPA interpretations, TSD Section IV, is necessary or properly the subject of any current proposed EPA action. This is because, as Maine has argued in Maine v. Wheeler, such a CWA approval of Maine's statewide fishing designated use already occurred long ago for all applicable waters, including tribal waters, and EPA has never had any valid basis or grounds to revisit that prior final WQS approval.

As set forth in Maine's Brief, ECF 118 at 17, 19, 22-28, 29-32, 34-37, 55-57, Maine has had statewide jurisdiction to set WQS for all Maine waters, including all tribal waters, since at least 1980 under Maine's state and federal Indian Settlement Acts, which was acknowledged by EPA in February 2015 in a decision that was not challenged, see id. at 17, 19, and again in EPA's TSD, at 6. Pursuant to this authority, Maine's existing statewide fishing designated use was already in place and finally approved by EPA for all applicable waters, including all tribal waters, but without any EPA interpretations of the kind issued in February 2015, when Maine's water classification system was revised and recodified in the 1980s and then fully approved by EPA without any such interpretations or qualifications by December 1990, ECF 118 at 34-37, 55-58.[1] See also EPA's administrative record in Maine v. Wheeler ("AR") at 372-77, 388-427 (EPA approvals from 1985-1999, including Maine's June 1999 complete CWA WQS docket) (attached as Exhibits 2 and 3).[2] Moreover, EPA, Maine, and the Tribes have long treated Maine's WQS, including its statewide fishing designated use and HHC, as applying in tribal waters for a host of CWA purposes, including for purposes of NPDES permits, CWA Section 401 water quality certifications, CWA Section 303(d) lists, and EPA administrative orders. ECF 118 at 42-44.

Accordingly, Maine disagrees with EPA's current stated position that "[a]s with all EPA approvals of Maine's WQS before 2015, the EPA's 1986 approval did not extend to waters in Indian lands." TSD Section IV at 11. EPA should clarify its proposed remand actions by eliminating (as unnecessary) its proposed new approval of Maine's existing fishing designated use in tribal waters but without any EPA interpretations, TSD Section IV, and by acknowledging that Maine's statewide fishing designated use was already fully and finally approved statewide without any qualifications or EPA interpretations long ago and that EPA has since had no basis or grounds under the CWA or otherwise to revisit that prior statewide approval for all applicable waters. These clarifications would be consistent with Maine's positions in Maine v. Wheeler, see ECF 118 at 31-32, 34-37, 55-57, EPA's recognition of Maine's unique tribal-state relationship and broad jurisdiction and authority under the Maine Indian Settlement Acts to set WQS in tribal waters, and the historical reality of the prior statewide approval and application of Maine's WQS for CWA purposes as recognized by EPA, Maine, and the Tribes.

Otherwise, Maine supports the end results of all EPA's proposed actions.

Footnote 1: EPA acknowledges that "in 1980, Maine already had in place a fishing designated use that it had adopted for all waters in the State, and that designated use was recodified in 1986." TSD at 10. As noted in Maine's Brief, ECF 118 at 57 11. 47, Maine's statewide regulatory jurisdiction and

authority to set such WQS in all Maine waters, including all tribal waters, stemmed from Maine's 1980 Indian Settlement Acts and not from the timing of EPA's subsequent recognition in February 2015 of Maine's authority under those 1980 acts. See Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (objective meaning and effect of federal Catawba act became fixed when adopted, and later pronouncements simply explained, but did not create, the operative effect). Thus, when EPA approved Maine's revised and recodified statewide fishing designated use in the mid-1980s without qualification or any EPA interpretations, it did so for all applicable waters within Maine's WQS jurisdiction, including all tribal waters. That prior approval need not be repeated by EPA now.]

[Comment footnote 2: These and all other AR materials referenced by Maine's Brief are incorporated by reference. While the AR materials specifically cited in these comments are attached hereto as Exhibits 2-3, all other AR materials cited by Maine's Brief, Exhibit I, have not been separately attached because of their voluminous nature and because they are duplicative of materials already in EPA's possession and in its AR filed in Maine v. Wheeler, which was remanded to allow for the type of revised action currently proposed by EPA. For completeness, Maine requests that EPA include all of EPA's Maine v. Wheeler AR in its entirety as part of any new record ultimately developed by EPA in connection with its final action taken on remand.]

EPA Response:
EPA appreciates the Maine AG's comment. EPA disagrees that this action approving the State's fishing designated use as applied to waters in Indian lands is unnecessary. EPA also appreciates the commenter's support for the substantive outcome of EPA's current decisions and agrees that this outcome should resolve any dispute regarding those aspects of EPA's 2015 decisions that the State had sought to redress in its judicial challenge to those decisions.

EPA notes that the Agency has comprehensively addressed similar comments regarding the effect of EPA's prior, pre-2015 approvals of Maine's water quality standards vis à vis waters in Indian lands in the context of the 2015 decisions being revised. By way of summary, EPA explained that because under principles of federal Indian law states generally lack civil regulatory jurisdiction in Indian country, EPA cannot presume that any State has authority to establish WQS or otherwise regulate in Indian country. *See, e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993). Instead, consistent with EPA's nationwide approach, 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 an environmental program under one of EPA's statutes in Indian country. EPA recognizes that certain states can make such demonstrations of jurisdiction in Indian country under federal law (in this case, the relevant Maine Indian settlement acts). However, it was not until the 2015 decisions that EPA evaluated and approved Maine's jurisdiction to establish WQS for waters in Indian lands. EPA did not propose to revoke and is not revoking or revising its prior decisions approving the State's jurisdiction. The 2015 decisions were also the first time that EPA assessed the sufficiency of the State's standards under the CWA as applied to such waters. In order to ensure an appropriate decision approving the State's standards for waters in Indian lands on a fully supported record, it is thus necessary for EPA to take action to approve the relevant State designated use to apply in such waters.

***Penobscot Nation ("Nation")**:*
Maine specifically requests that EPA not take the proposed action approving its "fishing" designated use without the interpretation regarding sustenance fishing. Maine makes this request because it believes that its fishing designated use has already been approved by EPA actions dating back to at least 1986. While the Nation disagrees with Maine's rationale, it joins in Maine's request. If EPA's purported rationale is based on respecting the State's request, (for example, refusing to look at the Settlements Acts in the absence of their express submission by the State), then EPA should honor Maine's request not to approve the fishing designated use in the manner EPA here proposes.

EPA Response:
EPA appreciates the Nation's comment. However, EPA disagrees that the Agency should refrain from finalizing its action to approve the State's fishing designated use in Indian country and also disagrees that to do so in the manner suggested by the Nation would honor a request from the State of Maine. As described above in this Response to Comments document, the Maine AG supports EPA's withdrawal of the Agency's 2015 approval of Maine's fishing designated use with the interpretation that it means sustenance fishing as applied to waters in Indian lands. The State also commented that EPA has no need to finalize any new approval of the State's fishing designated use as applied to such waters because, in the State's view, the relevant use was previously approved for such waters many years ago in the 1980's. EPA responds to that comment above. The Nation's comment rejects the Maine AG's position that the fishing use was approved for tribal waters in the 1980's, and to that extent, EPA agrees. However, the Nation also expresses agreement with the State that EPA should refrain from a new approval of the State's fishing use for tribal waters. The Nation's rationale appears to be based principally on its view that EPA should retain its 2015 interpretation of the State's use and, therefore, its disagreement with EPA's withdrawal and revision of that decision. EPA has addressed the substance of the Nation's arguments in its proposed decisions, the rationales for which are incorporated in the decision document memorializing this action, and elsewhere in this Response to Comments document. EPA notes here simply that the Nation has provided no additional procedural basis to support an argument that – following an EPA decision to withdraw its 2015 interpretation of the State's use – no final action on the State's fishing use would be needed to apply that use in tribal waters.

3. EPA lacks legal authority to reconsider previous 303(c) decisions and its proposed revisions lack adequate support

Houlton Band of Maliseet Indians ("Houlton Band"):
The plain language of the Clean Water Act precludes EPA from reversing its prior approvals and disapprovals of Maine's submitted WQS (including uses and criteria), as well as EPA's proposal to approve a "fishing" designated use that does not incorporate sustenance fishing, under the procedures it has proposed to employ here. In Section 303 of the Clean Water Act, Congress established only two procedures through which a State's WQS may be amended: 1) following a State's submission of new WQS for EPA's review and approval, or 2) following a "necessity" determination by EPA. 33 U.S.C. § 1313(c)(3)-(4). Where Congress establishes by statute specific procedures an agency must follow to complete an action, the agency is not free to

follow some other ad hoc procedure of the agency's own design. See, e.g., Ivy Sports Med., LLC v. Burwell, 767 F.3d 81, 89 (D.C. Cir. 2014) (Kavanaugh, J.) ("Because Congress created a procedure for FDA to reclassify medical devices, FDA may not short-circuit that process through what it calls its inherent authority to reverse its substantial equivalence determinations for those devices."). The CWA's specific procedure for amendment of state WQS "does not contain an express provision granting [EPA] authority to reconsider its [WQS decisions]." Ivy Sports Med., 767 F.3d at 86. EPA may not pretend that it does.

Under the first procedure for WQS amendment, a State may promulgate WQS and submit them for EPA's review and approval. 33 U.S.C. § 1313(c)(3). Maine is currently in the process of doing this. In consultation with the Tribes and EPA, the Maine legislature passed L.D. 1775, "An Act to Protect Sustenance Fishing," which Governor Janet Mills signed into law on June 21, 2019. P.L. 2019, ch. 463 (effective Sept. 19, 2019). L.D. 1775 recognizes "sustenance fishing" as a subcategory of the "fishing" designated use in certain waters in Maine, including all of the Houlton Band of Maliseet Indians' waters. Id. § 4-5. The Statute requires the Maine Department of Environmental Protection ("DEP") to promulgate rules establishing human health criteria ("HHC") that will protect that designated use by March 1, 2020. Id. § 16. DEP's comment period on its proposed HHC rule closed on December 6, 2019, and DEP is currently working to finalize its rule. See DEP, Department Rulemaking Proposals, available at https://www.maine.gov/dep/rules/index.html.

On August 12, 2019, DEP "submitted to the EPA for review and approval or disapproval under section 303(c) of the CWA, several revisions to its water quality standards." EPA, Letter from Ken Moraff, EPA Region 1 Water Division Director, to Gerald D. Reid, Maine DEP Commissioner, re "Review and Approval of Maine's Sustenance Fishing Designated Use Subcategory and the Assignment of that Subcategory to the Waters Identified" (Nov. 6, 2019). This submission requested approval of the Sustenance Fishing Designated Use ("SFDU") recognized in L.D. 1775, which use EPA approved on November 6, 2019. Even if EPA had the authority to revisit its nearly five-year-old approval (which it does not), its decision to approve Maine's SFDU would have mooted any further action regarding the 2015 approval for the waters covered in Maine's submission. Remarkably, despite having taken this action, EPA proposes now to reach back in time to revisit its 2015 decision approving a sustenance fishing designated use in these very same waters. E.g., Proposed Withdrawal at 9 & 9 n.18. EPA's Proposed Withdrawal is wholly unwarranted given that Maine has already adopted and EPA has already approved the SFDU for these waters. Section 303(c)(3) of the Clean Water Act is a forward-looking procedure intended to allow States, with EPA oversight, to ratchet down water pollution through the triennial review process, not a procedure for EPA to reverse the legal and policy conclusions of a prior administration.

. . . .

The second scenario by which EPA may alter a State's WQS is by making a necessity determination. 33 U.S.C. § 1313(c)(4)(B). In February 2015, EPA disapproved some of Maine's HHC as not being sufficiently protective of the sustenance fishing designated use under Section 303(c)(3). In April 2016, EPA made a necessity determination under Section 303(c)(4) that "for any waters in Maine where there is a sustenance fishing designated use and Maine's existing

HHC are in effect, new or revised HHC for the protection of human health in Maine are necessary to meet the requirements of the CWA." EPA, Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466, 92,469 (Dec. 19, 2016) [hereinafter "Maine Rule"]. When the State of Maine failed to address the concerns set forth in the necessity determination, EPA promulgated the "Maine Rule," id., which established HHC to protect the sustenance fishing designated use. Following that notice and comment rulemaking, EPA is not free to resurrect the State's stale HHC submission. Although a necessity determination is the only way by which EPA may unilaterally act to amend a state's WQS, EPA has quite tellingly not made a necessity determination here. This is because EPA knows full well that a necessity determination can only result in WQS that are more protective than a State's or EPA's standards. See 40 C.F.R. § 131.21 (e)… EPA already said in 2016 that more protective HHC are necessary to protect that use than what Maine previously submitted.

Nation:
The Clean Water Act itself precludes EPA from employing the procedures it has proposed here to reverse its prior approvals and disapprovals of Maine's submitted WQS (including uses and criteria), as well as EPA's proposal to approve a "fishing" designated use that preemptively precludes consideration of sustenance fishing in tribal waters. In Section 303 of the Clean Water Act, Congress established only two procedures through which a State's WQS may be amended: 1) following a State's submission of new WQS for EPA's review and approval, or 2) following a "necessity" determination by EPA. 33 U.S.C. § 1313(c)(3)-(4). Where Congress establishes by statute specific procedures an agency must follow to complete an action, the agency is not free to follow some other ad hoc procedure of the agency's own design. See, e.g., Ivy Sports Med., LLC v. Burwell, 767 F.3d 81, 89 (D.C. Cir. 2014) (Kavanaugh, J.). The CWA's specific procedure for amendment of state WQS "does not contain an express provision granting [EPA] authority to reconsider its [WQS decisions]." Ivy Sports Med., 767 F.3d at 86. EPA may not pretend that it does.

Under the first procedure for WQS amendment, a State may promulgate WQS and submit them for EPA's review and approval. 33 U.S.C. § 1313(c)(3). Maine is currently in the process of doing this. In consultation with the Tribes and EPA, the Maine legislature passed L.D. 1775, "An Act to Protect Sustenance Fishing," which Governor Janet Mills signed into law on June 21, 2019. P.L. 2019, ch. 463 (effective Sept. 19, 2019). L.D. 1775 recognizes "sustenance fishing" as a subcategory of the "fishing" designated use in certain waters in Maine, including all of the Houlton Band of Maliseet Indians' waters. Id. § 4-5. The Statute requires the Maine Department of Environmental Protection (DEP) to promulgate rules establishing human health criteria (HHC) that will protect that designated use by March 1, 2020. Id. § 16. DEP's comment period on its 34 proposed HHC rule closed on December 6, 2019, and DEP is currently working to finalize its rule. See DEP, Department Rulemaking Proposals, available at https://www.maine.gov/dep/rules/index.html. Accordingly, EPA should wait to see what Maine submits as a result of that practice, and not unlawfully take the currently proposed actions in a vacuum.

The second scenario by which EPA may alter a State's WQS is by making a necessity determination. 33 U.S.C. § 1313(c)(4)(B). In February 2015, EPA disapproved some of Maine's HHC as not being sufficiently protective of the Sustenance Fishing Designated Use under

Section 303(c)(3). In April 2016, EPA made a necessity determination under Section 303(c)(4) that "for any waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, new or revised HHC for the protection of human health in Maine are necessary to meet the requirements of the CWA." EPA, Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466, 92,469 (Dec. 19, 2016) [hereinafter "Maine Rule"]. When the State of Maine failed to address the concerns set forth in the necessity determination, EPA promulgated the "Maine Rule," id., which established HHC to protect the Sustenance Fishing Designated Use. Following that notice and comment rulemaking, EPA is not free to here ignore the record that supported both its prior disapproval of Maine HHC and the voluminous record supporting the existing HHC that EPA promulgated for Maine. Although a necessity determination is the only way by which EPA may unilaterally act to amend a state's WQS, EPA has quite tellingly not made a necessity determination to support the current proposed action. Nor could such a determination support EPA's proposed action to roll back to less protective WQS than what the agency has already determined do not meet the requirements of the Act. See 40 C.F.R. § 131.21 (e) (indicating a "State or authorized Tribe's applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard"). EPA's proposed roll back makes even less sense where EPA has already approved Maine's sustenance fishing designated use subcategory on November 6, 2019, and EPA already said in 2016 that more protective HHC are necessary to protect that use than what Maine previously submitted. Given these realities, not to mention the administrative record supporting them, it is unlawful, arbitrary and capricious for EPA to here propose reversal of its 2015 disapproval of Maine's HHC, or to try to interpret Maine's "fishing" designated use in the absence of acting on any specific HHC. It also makes no sense to reverse those disapprovals without any submission of new HHC that would or could replace them.

EPA Response:
EPA disagrees with both commenters' assertions that the CWA's procedural requirements for promulgating federal WQS preclude the Agency from reversing its 2015 interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use and associated disapprovals of Maine's HHC.

EPA has inherent authority to change decisions it previously made.[1] EPA is not revising the State's WQS but rather is revising EPA's 2015 incorrect decisions: interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use; the approval of certain MIA provisions as a sustenance fishing designated use; and the disapprovals of HHC that were based on EPA's use decisions that are now being withdrawn and revised. By these actions, EPA is not promulgating any new or revised federal WQS for Maine, and EPA's 2017 federal criteria remain the applicable criteria for CWA purposes unless withdrawn. *See* 33 U.S.C. §

[1] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[W]e fully recognize that 'regulatory agencies do not establish rules of conduct to last forever,' . . . and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"); *FCC v. Fox Television Studios*, 556 U.S. 502 ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."); *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993) ("Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.").

1313(c)(3)-(4) (Setting forth two scenarios in which EPA may promulgate new or revised water quality standards); 40 C.F.R. § 131.21(c); Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466 (Dec. 19, 2016) (hereinafter, "the federal rule"). EPA disagrees that *Ivy Sport Med., LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014) is applicable here, where the CWA does not prescribe a procedure for EPA's reconsideration of a prior approval or disapproval of state-submitted WQS.

EPA disagrees that its decision to approve Maine's recently adopted SFDU subcategory moots the need for EPA to act on Maine's fishing designated use for the waters covered by the new subcategory. Maine's legislature clearly identified the sustenance fishing use as a subcategory of the general fishing use. It remains both necessary and appropriate for EPA to act on the general fishing designated use for all waters in Indian lands, including those covered by the new subcategory.

The Agency also disagrees that it should wait to act on the State's general fishing designated use until it acts on the corresponding HHC that support the use. While, as a general matter, EPA expects that when states adopt a designated use for their specific waters that there are also associated criteria to protect the designated use, the situation here is unusual. Maine's fishing designated use has been in place and approved for all waters outside of Indian lands since 1986, and applicable criteria for such waters were adopted in 2006 and 2013. By withdrawing its 2015 interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use, EPA is now acting to approve the fishing designated use in tribal waters consistent with the state's original intent rather than the federal interpretation that EPA now concludes was incorrect and inconsistent with state law and the CWA's carefully struck balance between the federal government and the states. As noted above, is not prudent for EPA to review and act on the State's 2006 and 2013 HHC for these waters in light of the State's February 2020 adoption of updated HHC to protect the general fishing designated use, including the SFDU subcategory. As both the Tribes and the State acknowledged in the context of the adoption of the 2020 HHC, even the 2020 criteria based on a FCR of 32.4 g/day and a CRL of 10^{-6} (which would apply to waters not subject to the SFDU subcategory) would be adequate to protect sustenance fishers that consume fish at a level of 200 g/day. Taking these facts into consideration, EPA concludes that it need not wait to act on the State's recently submitted 2020 HHC before EPA revises its 2015 designated use approvals and HHC disapprovals.

EPA also disagrees that a CWA Section 303(c)(4) determination is required to revise EPA's 2015 interpretation and approval of Maine's general fishing designated use as a sustenance fishing designated use and HHC disapprovals. CWA Section 303(c)(4) sets forth two situations where the Administrator "shall" publish proposed federal regulations setting forth new or revised WQS: "(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act," or (B) "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act." Contrary to the commenter's assertion, the CWA's provision for promulgation of federal standards following either EPA's disapproval of those standards or where the Agency determines that such federal standards are necessary does not preclude the Agency from revising its prior disapproval and approval decisions.

Finally, regarding EPA's 2016 Administrator's Determination, once EPA finalizes its withdrawal of the 2015 sustenance fishing designated use approvals, the Administrator's Determination will be inoperative since it was specifically linked to waters covered by those approvals and relied entirely on EPA's unilateral interpretation and recharacterization of the State's fishing designated use to be a sustenance fishing designated use as well as EPA's approval of certain MIA provisions as a sustenance fishing designated use. Should EPA approve Maine's recently submitted revised HHC, EPA will propose to withdraw the Determination when it proposes to withdraw the federal HHC that it promulgated for waters in Indian lands in 2017.

Houlton Band:
EPA does not discuss the administrative record, or the authorities cited therein, in the Proposed Withdrawal, nor does it contain any new evidence, data, studies, arguments, or case law that would support a 180-degree turn. In stark contrast to the careful attention with which EPA assembled its record and the basis for its decisions in 2015, EPA's current Proposed Withdrawal relies on the conclusory assertion that the agency "exceeded its statutory authority."…Third, it is unclear how a term—"fishing"—which EPA previously considered "ambiguous" has suddenly become "unambiguous" in the agency's view. Compare Maine Rule Response to Comments at 51 with Proposed Withdrawal at 9.

EPA completely ignores the oversight role that Congress established for the agency. Notwithstanding EPA's newfound objection to "unilateral" agency action, that is exactly what Section 303(c)(4)(A) requires, as supported by the cases cited above, supra at Sections A, B.1, when a recalcitrant state chooses not to protect uses of water.

Nation:
Because EPA lacks any new evidence, studies, data, circumstances, or arguments upon which the agency could base a rational change in course from its thoroughly-reasoned decisions on this issue over the last several years, the proposed reversal of its decisions would be arbitrary and capricious.

Under the CWA, WQS must include HHC, wherein human health is the touchstone of any agency tasked with promulgating the WQS. Fish and water dwelling animals are the primary route of human exposure to a host of toxic chemicals that are harmful to human health. Pursuant to EPA guidance, health-based water quality standards are set to ensure that humans can safely consume fish and other organisms, without also being exposed to contaminants in harmful amounts. Quantitative risk assessment methods are employed to set standards for both threshold and non-threshold contaminants. For threshold contaminants, standards are set so that contaminants do not exceed levels that are safe for humans. For non-threshold contaminants, including carcinogens, exposure to any non-zero amount has the potential to cause cancer, so standards are set such that contaminants do not exceed a risk level determined to be "acceptable." In either case, a risk assessment equation is used to "solve" for the concentration of each chemical that will be permitted in the waters that support fish. The toxicity of each contaminant is considered together with human characteristics and practices that expose people to the contaminant in their environment: how much direct contact with water containing the toxin will people have; how much of the toxin will accumulate in the tissue of fish or other

animals to be consumed; how much fish and water dwelling animals will people eat, over how long a period. Under the CWA, this analysis must take into account the particular effect on the general population of the Nation's members and be sufficiently protective of the human health of the Nation's members. This type of analysis can only occur upon submission of specific HHC.

Moreover, the Penobscot Nation is a federally recognized Indian tribe, and the Settlement Acts preclude the State and the EPA from engaging in actions that would result in an acculturation of the Nation or the other federally recognized tribes in Maine. Any decision that fails to treat the Penobscot Nation as the general population within its own Territory is an act of acculturation. In no other part of the country does the EPA ever fail to treat a federally recognized Indian Tribe as the target general population for WQS within that Tribe's Indian Territory. EPA cannot, and should not, do so here.

EPA cannot simply reverse its decisions on political whim. Instead, a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009); see also id. at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."). Nothing in EPA's proposed reconsideration rests on new circumstances or scientific evidence that could support a permissible reconsideration of prior decisions.

Likewise, EPA has previously concluded that a "fishing" designated use is ambiguous. The newfound abstract policy differences between the 2020 EPA and the 2015 EPA cannot now cause this term—"fishing"—which EPA previously considered "ambiguous" to suddenly become "unambiguous" in the current agency's view. Compare Maine Rule Response to Comments at 51 with Proposed Reversal at 9.

Because EPA is not taking any action to compare specific HHC to the State's "fishing" designated use, there is no context in which to discuss its "interpretation" of that use. . . .[T]he meaning of that designated use—and whether HHC are protective of it, has meaning only when EPA is taking action on specific HHC or some other action requiring EPA to "interpret" (or not) that "fishing" designated use. In the absence of such context, EPA cannot and should not make abstract announcements in a vacuum about its "interpretation" of such use. This is particularly true when all parties to the pending litigation—including Maine—are asking EPA not to take that proposed action.

EPA Response:
As to EPA's 2015 approvals of a sustenance fishing designated use for waters in Indian lands, EPA has concluded that the Agency erred as a matter of law. The CWA provides for the States in the first instance to determine the uses that are appropriate for waters in the State. EPA's decision now is not a technical matter, but rather the result of a reasoned assessment of the applicable law and recognition of the authority given to States under the CWA to determine designated uses. Indeed, as EPA explained in the Technical Support Document issued with its public notice proposing to withdraw its 2015 decisions, EPA has concluded that its 2015 designated use approval was inconsistent with the State's unambiguous fishing designated use and exceeded EPA's CWA authority by recharacterizing that use. The State's recent creation of a

sustenance fishing subcategory through its legislative process underscores that EPA's interpretation and approval of Maine's "fishing" designated use was incorrect and inconsistent with state law.

Pursuant to the CWA and EPA's regulations at 40 C.F.R. § 131.10(a), states are responsible for specifying appropriate designated uses to be achieved and protected. But in its 2015 approval decision, EPA unilaterally interpreted and recharacterized the State's "fishing" designated use to be a "sustenance fishing" designated use for waters where the State has jurisdiction to set WQS and federal law provides for sustenance fishing by Tribes in those waters, regardless of how the State had promulgated or interpreted its designated use. In fact, Maine had not defined, nor did it interpret, its fishing use to mean sustenance fishing in any waters. Indeed, Maine recently launched its own process to address sustenance fishing in its WQS and legislatively created a new sustenance fishing subcategory, within the fishing use, that applies only in specific legislatively determined waterways. EPA approved that new subcategory and attendant provisions on November 6, 2019. EPA's prior interpretation of the CWA that would allow for it to interpret and recharacterize a state's designated use is inconsistent with the CWA's carefully struck balance between the federal government and the states. *See, e.g., Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) ("[T]he specification of a waterway as one for fishing, swimming, or public water supply is closely tied to the zoning power Congress wanted left to the states."). In its 2015 approval decision, EPA stated that it was "bound to attend to and comply with both statutory frameworks [the CWA and the Settlement Acts] to the extent EPA is able to reconcile how they apply to the Agency's review of Maine's WQS in Indian waters," and then concluded that "[i]t 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." *See* Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (Feb. 2, 2015), Attachment A at 32. EPA has determined that it lacked statutory authority to recharacterize the State's general fishing designated use to mean sustenance fishing.

Even if EPA had this authority—which EPA has concluded that it did not—it was inappropriate and unnecessary for EPA to reinterpret the State's fishing use to mean sustenance fishing in an attempt to "harmonize" the Settlement Acts and the CWA. Contrary to EPA's 2015 statement that it "must interpret the fishing use to include sustenance fishing," the Settlement Acts do not expand EPA's CWA authority, nor do they require Maine to designate a general fishing use with a sustenance component or EPA to recharacterize a designated use to mean sustenance fishing. The Settlement Acts similarly do not limit or prohibit EPA from taking an otherwise lawful action under the CWA, such as approval of Maine's fishing designated use that does not mean sustenance fishing. EPA has concluded that reinterpreting and recharacterizing the State's designated use of fishing with no express intent in State law to be considered a designated use, went beyond EPA's CWA authority.

Furthermore, EPA has concluded that MIA is not a new or revised WQS and that in reaching its earlier decision, EPA erred in interpreting MIA to represent a sustenance fishing designated use for reservation waters. When MIA was passed in 1980, Maine already had in place a fishing designated use that it had adopted for all waters in the State, and that designated use was

recodified in 1986. MIA's reference to the right to take fish for individual sustenance in reservation waters does not address or reference designated uses or water quality criteria, nor does it express or establish the desired condition or use goal of the waters to which the provisions apply. Rather, MIA refers to a type of fishing/consumption that can occur in certain waters, and it can be protected under the State's fishing designated use. EPA's longstanding view, consistent with the 2000 Methodology, is that populations engaged in sustenance fishing, including tribes, can be protected under a fishing designated use. *See* USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, Page 1-12. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA–822–B–00–004. EPA has concluded that while MIA's provision of sustenance fishing rights in the Southern Tribes' reservations may be a clear recognition of where sustenance fishing can occur, it does not constitute the establishment of a new or different water quality goal use that EPA must review under the CWA. The State's recent legislation did not alter, amend, or even reference MIA allowing a further inference that the State did not consider the provisions in MIA to be WQS.

When EPA reviews the State's 2020 HHC to support the applicable designated uses, EPA will evaluate Maine's record demonstrating how those criteria support these uses. But that is not the action EPA is taking now.

4. A use attainability analysis (UAA) would be required to reverse EPA's prior decision that interpreted the State's general fishing designated use to mean sustenance fishing for waters in Indian lands

***Houlton Band**:*
To the extent EPA may argue that its Proposed Withdrawal is necessary to reach "gap waters,"[3] nothing in the State's submission of its SFDU for approval provides a basis for EPA to withdraw its 2015 approval as to those waters either. In order to downgrade an approved designated use, the Clean Water Act and its implementing regulations provide a specific procedure for reclassification. See generally 40 C.F.R. § 131.10(g). Maine's submission under Section 303(c)(3) did not seek to downgrade any designated uses in Maine. Moreover, even if it had, neither the State nor EPA has completed the requisite use attainability analysis that would form the basis for a decision—which would need to be submitted to EPA for review and approval under Section 303(c)(3)—to remove a designated use, which is only possible where that use is not an existing use and is not attainable.

***Nation**:*
Moreover, EPA's attempt to construe those provisions of the Act as indicating merely "where sustenance fishing can occur" rather than where sustenance fishing must be protected, see Proposed Reversal at 10, fails to take into account to the agency's obligation to protect existing uses that are occurring. The Penobscot's actual use of the Penobscot River and other waters in Penobscot Indian Territory for its sustenance practices, including sustenance fishing, has been well documented as a factual matter before the EPA and in multiple other fora. EPA cannot here ignore that fact. Neither the State nor EPA has completed the requisite use attainability analysis—which would need to be submitted to EPA for review and approval under Section 303(c)(3)— that would form the basis for a decision to remove the existing use of tribal

sustenance fishing in tribal waters as a designated use. 40 C.F.R. § 131.10(h)(1)-(2).

EPA Response:
A UAA is not applicable in this context. A UAA is necessary, pursuant to 40 C.F.R. § 131.10(g), if a State wishes to remove a designated use that is specified in section 101(a)(2) of the CWA, or to designate a subcategory of that use that requires less stringent criteria, as long as existing uses are protected. Here, the State has long maintained that its fishing designated use does not, and never did, mean sustenance fishing. This position was most recently evidenced by the State's explicit adoption of a sustenance fishing designated use *subcategory* under the fishing designated use, applicable to certain specified waters. EPA is not removing a designated use but rather is now correcting its prior approval, which contained an incorrect interpretation of the State's designated use. The designated use as adopted and interpreted by the State remains in place. EPA's approval of a fishing designated use without the erroneous interpretation does not preclude the State's protection of sustenance fishers as a goal use or to protect an existing sustenance fishing use, either through the specific adoption of a sustenance fishing subcategory as the State has done for certain waters, or the adoption of HHC at a reasonable level of risk consistent with EPA's 2000 Methodology.[2] Indeed, as both the Nation and the Houlton Band have observed and Maine DEP has confirmed, the State's new or revised HHC values for the non-SFDU subcategory waters that are based on a 32.4 g/day FCR and 10^{-6} cancer risk level (CRL) would protect sustenance fishers in non-SFDU subcategory waters at an effective CRL of approximately $7x10^{-6}$, assuming a sustenance level FCR of 200 grams per day.[3] This level of protection is well within the range identified in EPA's 2000 Human Health Methodology as being protective.

5. Sustenance Fishing and Existing Use Requirements

Houlton Band:
An 'existing use' can be established by demonstrating that: fishing, swimming, or other uses have actually occurred since November 28, 1975." EPA, Water Quality Standard Handbook § 4.4; see also 40 C.F.R. § 131.3(e)….

In 2015, EPA interpreted Maine's "fishing" designated use in waters in Indian lands to include the "sustenance fishing" designated use, as it must. As described above, the Houlton Band of Maliseet Indians' members have used their ancestral waters, including the waters in Indian lands covered by EPA's 2015 decisions, for sustenance fishing since time immemorial, including on and after November 28, 1975. Even if the State of Maine clearly had interpreted its "fishing" designated use to exclude sustenance fishing, which it had not, the existing use of sustenance fishing must still be protected under the Clean Water Act. EPA acknowledged as much in its response to comments on the Maine Rule.

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[2] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, Page 1-12. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA–822–B–00–004. http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf

[3] *See*, December 6, 2019 comment letter from the HBMI to Maine DEP at pp. 10-11; December 6, 2019 comment letter from counsel for the PN to Maine DEP at pp. 11-12; and Maine DEP's Chapter 584 Basis Statement and Response to Comments on pp. 3-4.

In addition to the need to protect the designated use of sustenance fishing, EPA agrees with one commenter's observation that EPA's HHC must protect the existing use of sustenance fishing in waters in Indian lands pursuant to the CWA and 40 CFR § 131.12(a)(1). 'Existing uses' are defined at 40 CFR § 131.3(e) as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."
Maine v. Wheeler, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-5 (Exhibit 1.D - Maine Rule, EPA Response to Comments at 49 n.47 (ECF Page #4083))….

EPA has the power—and indeed the duty—to translate Maine's "fishing" use as including the more sensitive sustenance fishing use in light of the existing use of sustenance fishing in waters in Indian lands in Maine, the purposes for which land was set aside for Indians in Maine, and provisions in the Maine Implementing Act.

Nation:
Maine's new sustenance fishing designated use subcategory is a legislative acknowledgement that sustenance fishing by tribal members is an existing use in Maine waters. Of course, this was true long before Maine acknowledged this use in its 2019 legislative action. EPA acknowledged as much in its response to comments on the Maine Rule:

> *In addition to the need to protect the designated use of sustenance fishing, EPA agrees with one commenter's observation that EPA's HHC must protect the existing use of sustenance fishing in waters in Indian lands pursuant to the CWA and 40 CFR § 131.12(a)(1). 'Existing uses' are defined at 40 CFR § 131.3(e) as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."*

Maine Rule, Response to Comments at 49 n.47.

When Congress reserves homelands for the use of a tribe, it necessarily reserves water of sufficient quality to ensure the tribe may use the homelands as intended. EPA correctly recognized this in its previous actions on water quality standards in Maine. Elsewhere, EPA has long "interpret[ed] 'fishable' uses under section 101(a) of the CWA to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish," which is an "interpretation [that] also satisfies the section 303(c)(2)(A) requirement that water quality standards protect public health." Geoffrey H. Grubbs and Robert H. Wayland, EPA Memorandum, at 2 (2000), available at https://www.epa.gov/sites/production/files/2015-01/documents/standards-shellfish.pdf. In its own words, the agency "views 'fishable' to mean that not only can fish and shellfish thrive in a waterbody, but when caught, can also be safely eaten by humans." Id.

….

Thus, EPA's proposed reversals arbitrarily and unlawfully ignore the existing use of tribal sustenance practices within Indian Territory in Maine. (pp.20-23).

EPA Response:
As the commenters noted, existing uses (as defined in 40 C.F.R. § 131.3(e)) and water quality necessary to protect existing uses must be maintained and protected, pursuant to the federal

antidegradation policy at 40 C.F.R. § 131.12(a)(1). EPA also agrees, as it did in the response to comments on its proposed Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23,239 (Apr. 20, 2016), that criteria must be adequate to protect existing uses. This decision is not about setting criteria but approving designated uses. EPA's prior statement does not preclude it from now revising its approval of Maine's fishing designated use to eliminate the incorrect interpretation that "fishing" means "sustenance fishing" in all waters in Indian lands. *See supra* EPA's responses to comments regarding EPA's authority to reconsider prior decisions. To the extent that sustenance fishing is an existing use in any given waterbody, such use can be protected through adoption of HHC that protect the sustenance fishing use consistent with EPA's 2000 Human Health Methodology. The State has recently established a SFDU subcategory under the fishing designated use and adopted HHC based on sustenance levels of fish consumption (200 grams per day) for waters that the State, in coordination with the Tribes, identified as being important to the Tribes' sustenance fishing practices. Further, as noted above, the Tribes and the State have observed that the State's recently updated HHC applicable to the non-SFDU subcategory waters would protect sustenance fishers in such waters at an effective CRL of approximately $7x10^{-6}$, assuming an FCR of 200 grams per day. This level of protection is well within the range identified in the 2000 Methodology as being protective.

6. Harmonization of the CWA and the Settlement Acts [4]

Houlton Band:
Moreover, where another statute implicates water quality standards, it must be harmonized with the Clean Water Act where the agency has discretion to do so. See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 664-65 (2007) ("[T]he ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so…."); see also United States v. Borden Co., 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.")

….

No matter what Maine submitted in its water quality standards for EPA's approval, and no matter what Maine might have included in other provisions of state law, the Clean Water Act requires the protection of existing uses of water, such that EPA's prior conclusion that Maine's "fishing" use must, by necessity, include the more sensitive "sustenance fishing" use in waters in Indian lands was not optional. Likewise, while discussed in more detail below, federal Indian law required that EPA interpret Maine's "fishing" designated use to include "sustenance fishing" because when Congress reserves homelands for the use of a tribe, it necessarily reserves water of sufficient quantity and quality to ensure the tribe may use the homelands as intended.

….

[4] Although EPA provides only the following excerpts from the Tribes' comments, it recognizes that both Tribes raise the issues contained in these excerpts in other areas of their comment letter as well.

The Houlton Band's federally-protected water and fishing rights include the right to water of sufficient quantity and quality to support tribal fishing activities and other uses. See United States v. Adair, 723 F.2d 1394, 1408-11 (9th Cir. 1983). The leading federal Indian law treatise explains:

> *To meet federal purposes, Indian reserved water rights should be protected against . . . impairments of water quality, as well as against diminutions in quantity . . . . Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . The quality of the water necessary for [tribal] uses may vary from the high quality needed for human consumption to a lesser quality for fish and wildlife habitat to an even lower quality for irrigation. Each use, however, requires water that is appropriate quality to support that use.*

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

To summarize, it is well-established that when the United States sets aside lands in trust for an Indian tribe, it impliedly reserves water and fishing rights necessary to fulfill the purposes of the set aside, regardless of whether the treaty, statute, or executive order expressly refers to such rights. See, e.g., United States v. Aanerud, 893 F.2d 956, 958 (8th Cir. 1990) (holding that tribal members have federally-protected right to harvest natural resources on tribal lands notwithstanding silence in treaty setting aside lands for tribe). Second, MICSA and the Maine Implementing Act contemplate these rights, defining the "lands or natural resources" held in trust for the Houlton Band to include "any interest in or right involving any real property or natural resources, including . . . water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b); Me. Rev. Stat. tit. 30, § 6203(3). Third, Congress confirmed in MICSA that Maliseet trust lands would be treated in the same manner as any other Indian reservation, see 25 U.S.C. § 1725(i), and the Department of the Interior has confirmed that Maliseet trust lands are an Indian reservation for purposes of federal law. [1]

To the extent EPA sees any ambiguity in MICSA or in the foregoing discussion of the Band's federally-protected water and fishing rights, that ambiguity must be resolved in the Band's favor. Federal statutes relating to Indian tribes must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985), and Congressional acts diminishing sovereign tribal rights must be strictly construed, with ambiguous provisions again interpreted to the tribe's benefit, Penobscot Nation v.Fellencer,164 F.3d 706, 709 (1stCir. 1999). It is settled law that these Indian canons apply to Indian claim settlement acts, including MICSA. Id. at 708-09; see also, e.g., Parravano v. Babbitt, 70 F.3d at 546; Connecticut ex rel. Blumenthal v. U.S. Dept. of Interior, 228 F.3d 82, 92 (2d Cir. 2000).

Furthermore, the United States, including its agencies, owes a trust responsibility to federally recognized tribes. United States v. Kagama, 118 U.S.375, 383-84 (1886). Federal agencies must follow "the most exacting fiduciary standards" in dealing with the tribes. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) ("[T]he Government is something more than a mere contracting party . . . . [I]t has charged itself with moral obligations of the highest

responsibility and trust."). EPA has long recognized these duties. See, e.g., EPA, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), available at http://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf; EPA Policy on Consultation and Coordination with Indian Tribes at 3 (May 4, 2011), available at http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf [hereinafter EPA Consultation Policy] ("EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law."). In fact, in commemorating and reaffirming the 30th Anniversary of its 1984 Indian Policy, EPA stated, "EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so." EPA Administrator McCarthy, Memorandum Commemorating the 30th Anniversary of EPA's Indian Policy at1 (Dec. 1, 2014), available at http://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreaty rightsmemo2014.pdf.

EPA's role as trustee carries with it the duty and power to protect Indian tribes and tribal members from the negative effects of water pollution on their health, culture, subsistence, and economies. EPA itself has described its "fundamental objective in carrying out its responsibilities in Indian country" as "to protect human health and the environment." EPA Consultation Policy at 3. And it has affirmed that reserved rights carry with them an implicit right to a certain level of environmental quality. For example, in the treaty fishing rights context, EPA wrote:

> *Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to 'hunt,' 'fish,' or 'gather' a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.*

EPA, EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights at 3.

> *[Comment footnote 1: "Indeed, MICSA expressly provides that the same principles of federal law apply to the Houlton Band as apply to other federally-recognized Indian tribes. See 25 U.S.C. § 1725(h); see also 25 C.F.R. § 83.12(a)(providing that upon federal recognition, a tribe "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States")."]*

Nation:
EPA has previously, and correctly, concluded that the Settlement Acts cabin its discretion under the Clean Water Act such that it lacks discretion to conclude the sustenance fishing is not a designated use of tribal waters protected by the acts.

*As EPA explained in its February 2, 2015 decision, the agency's authority and duty to evaluate the tribal sustenance fishing designated use does not depend on what WQS the State submits for review and is not limited to a single section of a state code. Analysis Supporting EPA's February 2, 2015 Decision ("EPA Analysis") at 31 n.18; see also Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1089 (11th Cir. 2004); Natural Res. Def. Council v. Wheeler, No. 16-CV-02184-JST, 2017 WL 491147, at *12-22 (N.D. Cal. Feb. 7, 2017); Miss. Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1277-78 (5th Cir. 1980) (upholding EPA's disapproval—based on a provision in state law requiring protection of a diversified fish population—of dissolved oxygen criterion because it would not protect the most sensitive species of fish); Miccosukee Tribe of Indians v. EPA, 105 F.3d 599, 602 (11th Cir. 1997) ("Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards."); Friends of Merrymeeting Bay v. Olsen, 839 F. Supp. 2d 366, 375 (D. Me. 2012) ("The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review."); Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1089-90 (11th Cir. 2004) (holding that in order to determine whether a state law constitutes a WQS, a district court must "look beyond the [state's] characterization of [the law]" and "determine[] whether the practical impact of the [law] was to revise [the state's WQS]"); Pine Creek Valley Watershed Ass'n v. United States, 137 F. Supp. 3d 767, 776 (E.D. Pa. 2015) (deferring to EPA's determination on whether or not a state law constitutes a WQS); Natural Res. Def. Council v. McCarthy, 231 F. Supp. 3d 491, 500-02 (N.D. Cal. 2017) ("Yet that is precisely Plaintiffs' position—that the EPA must determine whether the State's TUCP orders are, in effect, revised water quality standards. Applying that standard here, the question is whether Defendants have demonstrated as a matter of law that the TUCP orders do not revise California's water quality standards. They have not.").*

EPA's proposal to turn a blind eye to the Settlement Act sustenance fishing provisions exhibits a new-found ignorance of the importance of sustenance fishing to the Penobscot People and Congress's promise that the Settlement Acts secured to them a viable subsistence economy that EPA has previously—and properly—protected consistent with its role as federal trustee of these rights.

Despite EPA's determination that the Settlement Acts give Maine jurisdiction that no other State in the country has, WQS for the waters at issue in this rulemaking continue to uniquely impact the rights, resources and health and well-being of the Penobscot Nation and its members, as well as those of the other tribes in the State. In fact, when waters used by tribal members and waters that support fish and other animals consumed by tribal members are allowed to be contaminated, the Nation's interests are profoundly affected and the Nation's people are disproportionately among the most exposed and impacted. This context is significant because it constrains, in important ways, the rulemaking authority of any agency that is promulgating WQS for these waters. Among other things, the adequacy of WQS for these waters must be considered in view of legal protections for the Nation's fishing and hunting rights, including the Nation's sustenance fishing rights, which, as explained below, are time immemorial aboriginal rights confirmed by Congress in the Settlement Acts. Faithful interpretations of the Settlement Acts can lead to no conclusion other than that, for purposes of WQS promulgation under the CWA, the Nation must be treated as its own general population in the waters within its territories and in

which it has a sustenance fishing right, regardless of which agency has authority to promulgate WQS. Moreover, EPA's attempt to construe those provisions of the Act as indicating merely "where sustenance fishing can occur" rather than where sustenance fishing must be protected, see Proposed Reversal at 10, fails to take into account to the agency's obligation to protect existing uses that are occurring. The Penobscot's actual use of the Penobscot River and other waters in Penobscot Indian Territory for its sustenance practices, including sustenance fishing, has been well documented as a factual matter before the EPA and in multiple other fora. EPA cannot here ignore that fact. Neither the State nor EPA has completed the requisite use attainability analysis—which would need to be submitted to EPA for review and approval under Section 303(c)(3)— that would form the basis for a decision to remove the existing use of tribal sustenance fishing in tribal waters as a designated use. 40 C.F.R. § 131.10(h)(1)-(2).

In short, EPA lacks discretion to conclude that tribal sustenance fishing is not an existing or designated use of the Penobscot River, or any other waters in Indian territory. Rather than reverse the decision as EPA proposes to do, it should instead embrace the newly enacted State law protections as consistent with, and in addition to, its previous determination regarding federal protection of those uses.

EPA Response:
Both Tribes comment that EPA must "harmonize" the Settlement Acts and the CWA, as it purported to do in 2015 by reinterpreting the State's general "fishing" use to mean "sustenance fishing." EPA disagrees for two reasons.

First, EPA has determined that the CWA does not provide the Agency with statutory authority to recharacterize the State's general fishing use beyond the meaning intended by the State. EPA has concluded that reinterpreting and recharacterizing the State's designated use of fishing with no express intent in State law to be considered a designated use, went beyond EPA's CWA authority. Under the CWA, the designated use defines the limit of a state's obligations in establishing criteria. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1). It exceeded EPA's statutory authority to reinterpret and recharacterize the State's designated use as meaning sustenance fishing when it approved the use for waters in Indian lands.

Second, such "harmonization" is unnecessary. This is because the Settlement Acts themselves do not address or reference designated uses, water quality criteria, or the desired condition or use goal of the waters covered by the sustenance fishing provisions. Rather, MIA refers to a type of fishing/consumption that can occur in certain waters, and that consumption can be protected under the State's fishing designated use. EPA's longstanding view, consistent with EPA's 2000 Human Health Methodology, is that populations engaged in sustenance fishing, including tribes, can be protected under a fishing designated use. EPA has concluded that while MIA's provision of sustenance fishing rights in the Southern Tribes' reservations may be a clear recognition of where sustenance fishing can occur, it does not constitute the establishment of a new or different water quality goal use that EPA must review under the CWA. The State's recent legislation did not alter, amend, or even reference MIA, allowing a further inference that the State did not consider the provisions in MIA to be WQS.

For additional discussion of these issues, see *supra* EPA's responses to comments regarding EPA's authority to reconsider prior decisions.

Regarding the federal trust responsibility to the federally recognized Indian tribes in Maine, EPA has been clear that it acts consistent with the trust responsibility where it acts in compliance with the legal requirements generally applicable to this situation under federal law. *See Proposal of Certain Federal Water Quality Standards for Maine, Response to Public Comments* (December 2016); *Analysis Supporting EPA's February 2, 2015 Attachment A* (Feb. 2, 2015); *see also, e.g., Gros Ventre Tribe v. United States,* 469 F.3d 801, 810 (9th Cir. 2006); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998)*; Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995); *Sierra Club v. McCarthy,* Case No. 11-CV-1759-BJR, Memorandum Order (U.S. District Court, W.D. WA, March 16, 2015). The Agency has determined that its prior action was not authorized under the CWA and that this action, as explained above, is so authorized. The trust responsibility does not create an independent enforceable mandate or specific trust requirement beyond this compliance with the CWA, as applied here. The trust responsibility does not expand or augment any of the applicable legal authority or requirements. As with its prior actions, EPA is not relying on the trust responsibility as a separate legal basis for this action. However, EPA's action, which follows on meaningful consultation and consideration of tribal views, is taken to ensure compliance with CWA authorities and requirements and is entirely consistent with the federal trust responsibility to the federally recognized Tribes in Maine.

Regarding the Department of the Interior (DOI), EPA's action is entirely consistent with the analysis DOI provided on this matter in its most recent letter dated April 27, 2018 (2018 DOI Letter). See Letter from Daniel H. Jorjani, Principal Deputy Solicitor, to Matthew Z. Leopold, General Counsel, Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes (April 27, 2018). Most notably, DOI's letter did not mention that EPA must take any specific action under the CWA in light of any Tribal fishing rights. Rather, it stated the fishing rights of the Passamaquoddy Tribe and Penobscot Nation "by necessity include some subsidiary rights to water quality, and that EPA could take into account such rights when evaluating the adequacy of WQS in Maine." 2018 DOI Letter at 1-2. Notably, DOI does not opine that EPA must take action beyond what it is statutorily authorized to do under the CWA as a result of such fishing rights.

With regard to the Tribes' comments on fishing rights, as explained above, EPA has concluded that any reserved rights that address where sustenance fishing can occur do not themselves establish a new or different water quality goal use that EPA must review under the CWA. Accordingly, such rights do not themselves create or establish a stand-alone "sustenance fishing" designated use. Rather, such sustenance fishing can be adequately protected under the State's general "fishing" designated use, which the State had already adopted at the time of MIA's passage.[5]

[5] EPA recognizes the "preserved" issues the Nation addressed "to the extent any party places [such] issues in controversy." Penobscot Nation Comments at 12-13. Because these comments do not directly address EPA's proposal or the basis for this action, EPA need not respond to them.

7. EPA's Authority and Duty to Act on Provisions of State Law as WQS

Houlton Band:
This EPA argues that in 2015, it improperly interpreted a designated use that was not consistent with the State's own interpretation, thereby exceeding the agency's statutory authority. Proposed Withdrawal at 9-10. But it is neither here nor there that Maine "did not submit these provisions of MIA to EPA for review as new or revised WQS," that "Maine had not defined, nor did it interpret, its fishing use to mean sustenance fishing in any waters," that EPA acted "unilaterally" to interpret the "fishing" use in this manner, or that there is "no express intent in State law to be considered a designated use." Proposed Withdrawal at 8, 9, 10.

…EPA has the power—and indeed the duty—to translate Maine's "fishing" use as including the more sensitive sustenance fishing use in light of the existing use of sustenance fishing in waters in Indian lands in Maine, the purposes for which land was set aside for Indians in Maine, and provisions in the Maine Implementing Act.

EPA has full authority to disapprove state-submitted WQS where those standards do not protect a more sensitive use, as well as to determine whether some other aspect of law (not formally submitted by a state) constitutes a water quality standard. Indeed, the case law is replete with instances in which courts have deferred to EPA when it has done just these things. E.g., Miss. Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1277-78 (5th Cir. 1980) (upholding EPA's disapproval—based on a provision in state law requiring protection of a diversified fish population—of dissolved oxygen criterion because it would not protect the most sensitive species of fish); Miccosukee Tribe of Indians v. EPA, 105 F.3d 599, 602 (11th Cir. 1997) ("Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards."); Friends of Merrymeeting Bay v. Olsen, 839 F. Supp. 2d 366, 375 (D. Me. 2012) ("The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review."); Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1089-90 (11th Cir. 2004) (holding that in order to determine whether a state law constitutes a WQS, a district court must "look beyond the [state's] characterization of [the law]" and "determine[] whether the practical impact of the [law] was to revise [the state's WQS]"); Pine Creek Valley Watershed Ass'n v. United States, 137 F. Supp. 3d 767, 776 (E.D. Pa. 2015) (deferring to EPA's determination on whether or not a state law constitutes a WQS); Natural Res. Def. Council v. McCarthy, 231 F. Supp. 3d 491, 500-02 (N.D. Cal. 2017) ("Yet that is precisely Plaintiffs' position—that the EPA must determine whether the State's TUCP orders are, in effect, revised water quality standards. Applying that standard here, the question is whether Defendants have demonstrated as a matter of law that the TUCP orders do not revise California's water quality standards. They have not.").

EPA Response:
In its proposal, EPA addressed the reasons to withdraw two separate designated use approvals. The first was EPA's approval and interpretation of Maine's fishing designated use as a sustenance fishing designated use in waters in Indian lands. The second was EPA's approval and interpretation of specific MIA provisions as a sustenance fishing designated use for inland reservation waters. EPA is responding to the Houlton Band's comments as they relate to each

approval, since EPA's rationale for withdrawal is slightly different for each approval.

The Houlton Band objects to EPA's withdrawal of the approval of Maine's fishing designated use as a sustenance fishing designated use in waters in Indian lands, arguing that EPA had the duty to approve the fishing use as a sustenance fishing designated use in order to protect the most sensitive use, which is also an existing use, in waters in Indian lands. However, nothing in the CWA or implementing regulations requires a state to narrowly define a designated use to mean the most sensitive type of such use that does or may occur. Rather, where designated uses are broad, questions of whether the most sensitive use is protected may be addressed through evaluation of the corresponding criteria that the state adopts. For example, a state with a designated use of "recreation in and on the water" may protect swimming at bathing beaches through the adoption of adequate bacteria criteria. It need not specifically designate a use of "swimming" in order to protect the health of swimmers. So too here, the State may designate "fishing" to protect human health for the consumption of fish, but it need not specify a specific level of consumption – such as sustenance fishing – as the designated use. Rather, the State has the discretion to adopt criteria to protect human health at levels reflective of the State's risk management choices so long as sustenance fishers are protected at a risk level consistent with EPA's 2000 Human Health Methodology. In this instance, EPA has concluded that the State's general fishing designated use was unambiguous and did not mean sustenance fishing—a position that the State has taken consistently and is further supported by the State's recent creation of a sustenance fishing subcategory of its general fishing use through its legislative process.

With respect to EPA's proposed withdrawal of its approval of certain provisions in MIA as a SFDU in inland reservation waters, the Houlton Band asserts that EPA has the authority and duty to determine that a state law constitutes a water quality standard even if the state does not submit it for approval. But EPA did not base its decision to withdraw its approval of MIA provisions as a SFDU because of a lack of authority to determine whether a law is a water quality standard. Rather, after reconsideration, EPA determined that the MIA provisions do not establish a new or revised water quality standard. As explained in the proposal, EPA recognizes that the MIA provisions refer to sustenance fishing in certain waters but has concluded that, consistent with EPA's 2000 Human Health Methodology, populations engaged in sustenance fishing, including tribes, can be protected under a general fishing designated use. In other words, Maine's fishing designated use can protect sustenance fishers through adoption of HHC consistent with EPA's 2000 Human Health Methodology, and MIA's reference to sustenance fishing does not constitute an intent to establish a new and different designated use.

8. EPA's proposed reversal is unlawful and arbitrary and capricious

***Houlton Band**:*
Those criteria predate EPA's most recent update to the 304(a) Guidance in 2015, and are, in large part, not based on the latest science. At the very least, in order to withdraw EPA's prior disapproval, EPA would need to determine which of Maine's previously submitted criteria are based on sound science in light of that update, and which are not. Because Maine will be submitting revised human health criteria shortly, as EPA acknowledges, it does not make sense for EPA to undertake that exercise now.

Third, EPA indicates that the agency previously disapproved Maine's HHC merely "because they were based on a fish consumption rate that did not reflect a sustenance level of fish consumption." Proposed Withdrawal at 11. The criteria EPA is referring to were based on a fish consumption rate of 32.4 g/day. Maine v. Wheeler, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-6 (Exhibit 1-E - EPA, February 2, 2015 Letter to Maine, Attachment A, at 37 (ECF Page #4362)). In L.D. 1775 (38 M.R.S.A. § 466(10-A)), Maine requires human health criteria for sustenance fishing waters to be based on a fish consumption rate of 200 g/day. On that basis alone, EPA's proposed withdrawal of the 2015 disapproval is unlawful. Thus, under the plain language of L.D. 1775, Maine law is clear that the criteria submitted in 2006 and 2013 cannot be approved in Indian waters. Accordingly, there is no basis for EPA to withdraw its prior disapproval pending Maine's submission of revised WQS to protect the SFDU.

Nation:
EPA proposes to reverse its prior approval of Maine's "fishing" designated use with a sustenance fishing interpretation and to approve Maine's fishing designated use without EPA's interpretation that it means sustenance fishing. However, unlike in February of 2015, EPA does not here propose to act on specific HHC submitted for approval, and accordingly it is premature for EPA to determine how it will interpret Maine's "fishing" designated use in the absence of any specific circumstances requiring an "interpretation" of such use. EPA cannot, and should not, purport to revisit its interpretation of the fishing designated use in a vacuum. For that reason alone, EPA cannot take the actions it proposes regarding an abstract "interpretation" of Maine's "fishing" designated use. EPA's discussion of this ill-conceived proposed action includes a confusing discussion of Maine's use of a Fish Consumption Rate (FCR) of 32.4 g/day in the calculation of certain WQS for which EPA is not here taking any action. But an FCR is a component of the calculation used to derive in-stream HHC. It is not an independent element of a designated use. Indeed, Maine's fishing designated use is also protected by HHC that use a fish consumption rate of 138 g/day to calculate some pollutants such as arsenic, and Maine's new sustenance fishing designated use sub-category of its "fishing" use specifically requires that Maine use a minimum FCR of at least 200 g/day. EPA fails to mention or discuss the 138 g/day or 200 g/day component of Maine's fishing designated use, gives only passing reference to its recent actions approving Maine's new sub-category, and does not adequately explain why it mentions the 32.4 g/day rate in this context. A specific component used to calculate HHC, like FCR, cannot somehow itself become a designated use—nor can it define a designated use. FCR can—and must— change based on the best available science and data. It is not a component of a designated use, and it is reversible error for EPA to base its rationale on approving Maine's fishing designated use as having some relationship to a fish consumption rate that Maine use for some—but not all—calculations of instream criteria. The "use" of the water is the taking of fish for sustenance—i.e. fishing for human consumption. In those waters that have been set aside by the Settlement Acts for sustenance practices by the Maine tribes, there can be no interpretation but that "fishing" includes these practices.

EPA Response:
In early 2020 Maine updated its HHC to protect the fishing designated use for all state waters and the sustenance fishing designated use subcategory in selected waters in the State. This update reflects the latest science, in accordance with EPA's 2015 Clean Water Act section 304(a)

national recommended HHC. These updated HHC supersede the State's 2006 and 2013 submissions of HHC for waters in Indian lands. Therefore, as described in section V of EPA's proposed revisions, EPA agrees with commenters that it is not appropriate for EPA to act on Maine's 2006 and 2013 HHC as they apply to waters in Indian lands. EPA is not taking action on Maine's 2006 or 2013 HHC submissions for waters in Indian lands.

The Nation also commented that EPA cannot interpret or reinterpret Maine's fishing designated use without simultaneously acting on corresponding HHC to protect that use. Please see EPA's response to #3 above on this topic.

The Houlton Band asserted that EPA's proposal to withdraw its 2015 disapproval of Maine's HHC is arbitrary and capricious because Maine's legislation that EPA approved on November 6, 2019 (L.D. 1775) requires HHC for sustenance fishing waters to be based on a fish consumption rate of 200 g/day. However, Maine's legislation only requires HHC to be based on a fish consumption rate of 200 g/day for the specific waters identified in the legislation to which the sustenance fishing designated use subcategory applies. In waters where the sustenance fishing designated use subcategory does not apply, Maine law requires that HHC for most pollutants be calculated based on a fish consumption rate of 32.4 g/day.

The Nation further asserts that EPA's proposal appears to imply that the FCR defines the designated use. EPA did not intend that implication and agrees with the Nation that the designated use reflects the goal for a waterbody and that there are several input variables for calculating HHC. EPA also agrees that Maine's recently adopted HHC use several fish consumption rates, depending on the water body and pollutant at issue. In each instance EPA will evaluate whether the resulting criteria are protective of the designated use (or subcategory) when it takes action on Maine's 2020 HHC.

9. EPA should not finalize the reversal of its 2015 decisions because all parties to *Maine v. Wheeler* publicly stated their intent to resolve the litigation in a manner that will allow them to maintain their long-standing legal positions

Houlton Band:
While the Band will continue to work with the State to resolve their disputes in a way that will allow the parties to step away from the litigation, if EPA chooses to finalize this proposal, it will be detrimental to that effort. In any event, L.D. 1775 contains a provision regarding statutory construction, 38 M.R.S. § 466-A(3), as well as the bill summary discussed above, which were included so as to allow all parties to Maine v. Wheeler to preserve their legal positions and to ensure that any administrative action taken by EPA or DEP in connection with the SFDU would be without prejudice to those positions…. The Band requests that EPA abandon the Proposed Withdrawal, and work with the State of Maine, the Penobscot Nation, and the Houlton Band to find a mutually agreeable solution that will allow all parties to settle Maine v. Wheeler.

EPA Response:
EPA applauded the State in enacting L.D. 1775 and for working collaboratively with the Tribes. *See* Letter from Deborah A. Szaro, Acting Regional Administrator, to Senator Brownie Carson and Representative Ralph Tucker (May 24, 2019). The provisions of L.D. 1775 are enshrined in

state law as a new sustenance fishing designated use subcategory and will remain in place as a WQS regardless of EPA's actions on the 2015 decisions. While the parties may have hoped to avoid any further litigation when they began discussions of potential state legislation, as the scope of L.D. 1775 emerged, it became clear that it does not address all waters covered by the 2015 decisions. Accordingly, L.D. 1775 does not alone resolve the issues in *Maine v. Wheeler*.

10. If EPA "declines to reconcile" Settlement Acts with the CWA, then it must revisit its jurisdictional determination and determine the State does not have authority to set WQS in tribal waters

Nation:
EPA purports to abandon its previously announced policy of "reconciling" the Settlement Acts with the CWA. If EPA declines to reconcile the Settlement Acts with the CWA, EPA would then be required to treat the Penobscot Nation as other federally recognized tribes are treated under the CWA: not subject to any state jurisdiction. Once EPA takes the step of looking at the Settlement Acts to find Maine's jurisdiction, it cannot then ignore the ways in which the Settlement Acts simultaneously constrain the exercise of that jurisdiction.

EPA Response:
EPA's proposal did not address its 2015 decision that the State of Maine has jurisdiction to establish WQS for waters in Indian lands. Correspondingly, EPA disagrees with the implication of the comment that its action requires the Agency to revisit its 2015 jurisdictional decision. EPA notes for informational purposes that this 2015 decision was not contingent or provisional. Whether the State has such authority, which EPA determined it does through a separate and distinct administrative process, has no bearing, legally or scientifically, on what the appropriate designated uses or water quality criteria for waters in Indian lands are. The latter questions are addressed only after the jurisdictional determination has been made.

EPA's Analysis supporting its 2015 decision stated, in connection with the jurisdictional determination, that "EPA has authority under the CWA to ensure that the Tribes' fishing right is protected." *Attachment A* at 12. This statement refers to EPA's authority to review and approve or disapprove the State's submitted WQS. It did not imply, as the Nation seems to understand, that the Agency would ensure protection of fishing rights through revocation of its jurisdictional determination. EPA's determination that sustenance fishing rights provided under the Settlement Acts do not establish a designated use separate from the State's fishing use does not undermine the Agency's 2015 statement that it can ensure such rights are protected. Rather, the Agency has determined that such rights refer to the type of fishing/consumption that can occur in certain waters, which can be protected under the State's fishing designated use.

11. Comments Outside the Scope of EPA's Proposed Decisions

AF&PA:
Similarly, EPA should undertake a rulemaking to withdraw the federal standards it imposed on the state in its December 2016 rulemaking. Along with the federal sustenance fishing designated uses and criteria, the rule contained a few other provisions that the agency imposed on Maine unrelated to those uses (e.g., mixing zone bans for certain substances).

Pierce Atwood:
We also urge EPA to expand its withdrawal to include its subsequent decisions concerning Maine's WQS, issued via letters dated March 16, 2015, and June 5, 2015, or to undertake a rulemaking withdrawing the federal standards it imposed on the State in EPA's December 19, 2016 rulemaking.

Among other decisions in those letters, EPA imposed a ban on mixing zones for waters in Indian lands for bioaccumulative pollutants. EPA also requested that Maine revise its WQS to address the issues identified in the disapprovals. After Maine failed to revise its WQS within the 90-day timeframe required by the CWA (see CWA §§ 303(c)(3) and (c)(4)(A)), EPA promulgated federal WQS.

We also urge EPA to withdraw its decisions in its March 16 and June 5, 2015 letters. EPA's decisions in those letters included provisions unrelated to the SFDU, such as a ban on mixing zones in Indian waters that applies to bioaccumulative pollutants, among other provisions. EPA has no scientific or legal basis to impose such a ban on mixing zones, and Maine's new legislation and associated rulemaking address the reasons EPA imposed federal WQS in the first place—to create an SFDU that applies to certain specified waterways and to protect that designated use subcategory through the adoption of new HHC. It is therefore appropriate for the EPA to withdraw its other decision letters as well.

Woodland Pulp:
Woodland Pulp supports the partial withdrawal of the agency's action dated February 2015 and respectfully requests the agency to withdraw its decisions dated March 16 and June 5, 2015. We remain particularly concerned with the proposed banning of mixing zones. In response to previously filed comments on the EPA proposal, Woodland Pulp has attempted to correct the agency's response that Woodland Pulp has an "unlimited mixing zone" when that is simply not the case. The thermal mixing zone has a defined termination point four miles from the end of the zone of initial dilution.

EPA Response:
Two commenters requested that EPA revise its 2015 disapprovals of WQS provisions that are not related to sustenance fishing, in particular related to mixing zones. Two commenters requested that EPA withdraw the subsequent federal rule in its entirety. These comments are outside of the scope of this proceeding. EPA did not solicit comment on revising decisions unrelated to sustenance fishing and EPA has not proposed to withdraw any portions of the federal rule. EPA will continue to work with Maine DEP on revisions to Maine's WQS that could address EPA's 2015 decisions and associated federal rulemaking unrelated to sustenance fishing.