TRIBAL CHIEF
Clarissa Sabattis
TRIBAL COUNCIL
Beth Aucoin
Suzanne Desiderio
John Flewelling
Catherine St. John
Mary Tomah
Crystal Tucker

HOULTON BAND OF MALISEET INDIANS

88 BELL ROAD
LITTLETON, ME 04730
www.maliseets.com

Administration
(207) 532-4273
In-State
1-800-564-8524
Out-of-State
1-800-545-8524
Fax
(207) 532-2660

September 13, 2021

Deborah Nagle
Director, Office of Science and Technology
Environmental Protection Agency
Office of Water, Mail Code 4301M
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: EPA's Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Director Nagle,

The Houlton Band of Maliseet Indians ("HBMI" or "the Band") writes in response to EPA's Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights ("Notification Letter"). The notification provides notice of EPA's potential change to the federal water quality standard (WQS) regulations at 40 C.F.R. Part 131 "to explicitly and sustainably protect tribal reserved rights in state waters, consistent with existing legal obligations." EPA states that it "is examining how it could revise the federal [WQS] regulations to explain how applicable tribal reserved rights are to be considered when states or EPA are establishing and revising WQS." HBMI supports the concept of EPA's proposed rule.

As EPA indicated in its notice, "[m]any tribes, through treaties and equivalent agreements with the U.S. government, hold reserved rights to aquatic and aquatic-dependent resources in waters outside the boundaries of federal Indian reservations, or in areas otherwise subject to state and federal jurisdiction." As you are aware, HBMI is one such tribe. Through the Maine Indian Claims Settlement Act (MICSA), P.L. 96-420, and the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986, P.L. 99-566, Congress provided for the acquisition of lands in trust for the benefit of the Houlton Band to provide the landless Maliseet Indians a home where they could preserve their riverine culture and engage in traditional fishing, hunting, gathering, ceremonial, and other activities. *See* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation . . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."). As a matter of federal Indian law, in reserving these lands, Congress concurrently reserved water and fishing rights for the Tribe—the purpose of the reservation would have been defeated otherwise. The Band has provided detailed explanations of its reserved rights and applicable federal Indian law doctrines to EPA on multiple occasions, including multiple comment letters submitted in response to EPA's many proposed actions related to the human health criteria in Maine between 2015 and 2020. We direct the agency's attention to those letters at docket EPA-HQ-OW-2016-0804, some of which are attached here.

The Band believes that EPA should codify—through the amendment of regulatory provisions at 40 C.F.R. Part 131—the legal responsibilities it recognized with respect to tribal reserved rights in the analyses supporting its approval and disapproval decisions with respect to Maine-submitted HHC rules in 2015 and in promulgating human health criteria in 2016. EPA's reversal of these decisions in response to state and industry pressure during the last administration was simply not in accord with the Clean Water Act, federal Indian law, or the trust responsibility. Moreover, it was disruptive to the regulated community and wasteful of agency and tribal

resources. EPA should take steps now to ensure the future protection of HBMI's and other tribes' reserved rights when the agency reviews and approves—or, where necessary, promulgates—water quality standards.

I. EPA's proposed rule would effectuate EPA's and states' existing obligations with respect to tribal reserved rights, as required under federal Indian law, the federal trust responsibility, and the Clean Water Act.

The legal support for regulatory amendments codifying protection of tribal reserved rights in the water quality standard context is overwhelming and familiar to EPA. Codification of these obligations is also consistent with many existing EPA guidance documents and past agency actions.

The Department of Interior has provided guidance to EPA regarding its obligation to ensure that water quality is sufficient to protect tribal reserved rights when exercising authority under the Clean Water Act in Maine. In 2015, the Solicitor of the Department of the Interior (DOI) sent a legal opinion detailing federal Indian case law that requires EPA to protect tribal reserved rights in Maine and throughout the United States. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Avi Garbow, General Counsel, EPA, at 7-10 (Jan. 30, 2015) (attached). DOI's letter concluded as follows:

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

Id. at 10. In 2015, in disapproving certain Maine-submitted WQS, EPA relied on the same cases cited by DOI in concluding that "the Tribes' ability to take fish for their sustenance . . . would be rendered meaningless if it were not supported by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance." EPA Region 1, Analysis Supporting EPA's February 2, 2015 Decision to Approve, Disapprove, and Make No Decision on, Various Maine Water Quality Standards, Including Those Applied to Waters of Indian Lands in Maine, at 27-28 (Feb. 2, 2015); *see also* Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417, 85,423-24 n.39 (describing federal Indian law principles addressing subsidiary treaty rights). EPA should review these documents and the cases cited therein as it prepares the public notice for the proposed tribal reserved rights rule.[1]

Beyond the specific decisions related to the HHC in Maine and Washington, EPA has long acknowledged the importance to tribes of clean water sufficient to support tribal resources and uses, consistent with the case law.

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[1] See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted) ("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. The quality and quantity of water may be directly related. This interrelationship is most evident in the case of a reserved right to water for fisheries preservation. The right reserved is that amount of water necessary to maintain the fishery. The fishery consists not only of the fish themselves, but also of the conditions necessary to their survival. Thus, habitat protection is an integral component of the reserved right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.").

> Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons . . . In short, clean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.

EPA, Memorandum in Support of Motion for Summary Judgment at 16, *Montana v. U.S. Envtl. Protection Agency*, 941 F. Supp. 945 (D. Mont. 1996). EPA has described the special relationship tribes have with the natural environment and the importance to many tribes of leading pollution prevention efforts themselves as follows:

> Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.

Environmental Protection Agency, *EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 2 (July 1991). EPA has described its own "fundamental objective in carrying out its responsibilities in Indian country" as "to protect human health and the environment." *EPA Policy on Consultation and Coordination with Indian Tribes* at 3 (May 4, 2011), *available at* https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf [hereinafter *EPA Consultation Policy*]; EPA, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* at 2, *available at* https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf (acknowledging "implied right to sufficient water quantity or water quality to ensure that fishing is possible" attendant to reserved rights). EPA's prior statements and Indian policies are important existing support for the tribal reserved rights rule that EPA now proposes.

Further, the federal trust responsibility requires EPA to protect tribal reserved rights when it promulgates or approves WQS. The trust responsibility imposes upon the United States and all its agencies the obligation to follow "the most exacting fiduciary standards" in dealing with the tribes, including in the protection of tribal rights and property. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Parravano v. Babbitt,* 70 F.3d 539, 546 (9th Cir. 1995) (recognizing the United States' trust obligation to protect impliedly reserved fishing rights). 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 Consultation Policy* at 3 ("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 2014, EPA reaffirmed its 1984 Indian Policy, indicating that EPA should use its authority to protect tribal rights and resources when it is within its discretion to do so. https://www.epa.gov/sites/default/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf.

EPA has explained that the trust responsibility applies in Maine, as it does throughout the United States. 68 Fed. Reg. at 65,067. Additionally, a 2000 Solicitor's Opinion written in regard to Maine's initial application for the delegation of National Pollutant Discharge Elimination System (NPDES) authority in Indian waters in Maine discusses the interplay of the trust responsibility and EPA's duty to protect water quality for the benefit of tribes. The Solicitor wrote, "[E]ven if EPA approves the state's application to administer the NPDES program anywhere within Indian Country in Maine, including the lands of the Houlton Band of Maliseet Indians . . . , EPA must ensure, through its maintained Clean Water Act authorities and its federal trust obligations, that a state-administered NPDES program within those lands fully protects the Tribal lands, waters and other resources." Solicitor's Opinion attached to Letter from Edward B. Cohen, Office of the Solicitor, Dep't of Interior to Gary S. Guzy, Office of General Counsel, Envtl. Protection Agency, at 1 (May 16, 2000) (citations omitted). The Solicitor explained that this means:

> EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect

> Maliseet . . . tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the Maliseets . . . make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets . . . even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

Id. at 2 (citations omitted); 68 Fed. Reg. at 65,059 ("[T]he Department [of Interior] is the federal government's expert agency on Indian law and is charged with administering MICSA. The Supreme Court has made it clear that an advisory legal opinion such as DOI's May 16, 2000 letter is owed respect to the extent it is persuasive."). The trust responsibility principles animating these conclusions with regard to the tribes in Maine are of equal import wherever EPA approves or promulgates WQS where tribes have reserved rights.

Finally, the Clean Water Act itself demands that Tribal reserved rights be protected. Water quality standards are the foundation of the Clean Water Act's water quality-based control program. They define goals for a water body by designating the uses that water body supports or should support ("designated uses"); set water quality criteria designed to protect those uses and measure progress made ("criteria"); and establish anti-degradation policies, so that uses and water quality necessary to support those uses are protected and so that bodies with very high quality water do not become impaired. All "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected," 40 C.F.R. § 131.12(a)(1), and "existing uses" are defined 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."[2] *Id*. § 131.3(e); EPA, Water Quality Standard Handbook § 4.4 ("An 'existing use' can be established by demonstrating that: fishing, swimming, or other uses have actually occurred since November 28, 1975."). Consequently, at a minimum, the Clean Water Act demands that tribal reserved rights exercised at any time after November 28, 1975, be afforded some level of protection under the Act, separate and apart from federal Indian law and the trust responsibility. *See*, *e.g.*, EPA Water Quality Standard Handbook § 4.4.2 ("No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards."); *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1081 (D. Idaho 2000). "Designated uses" are defined as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). A water body's designated uses must fully protect existing uses, but the most effective manner in which EPA can ensure that tribal reserved rights receive the full measure of protection possible under the Act is to specifically list them as designated uses. Despite tribal reserved rights clearly constituting existing uses that require protection under the Clean Water Act, few states have actually incorporated tribal reserved rights into their list of designated uses, which can lead to inconsistent and inadequate protection of such rights, particularly where those reserved rights may not have been exercised to their full extent due to water quality impairment. The proposed tribal reserved rights rule can correct this failure.

To conclude, in order to effectuate the requirements of federal Indian law, the trust responsibility, and the Clean Water Act, the Band believes that EPA should move with all deliberate speed to promulgate regulations at 40 C.F.R. Part 131 to provide sustainable protection of tribal reserved rights, and to provide clarity and transparency about how states and EPA must protect tribal reserved rights when establishing and revising water quality standards. How EPA exercises its oversight authority over WQS under the Clean Water Act, including its approvals of state-submitted WQS and promulgation of federal WQS when necessary, directly affects tribal reserved rights and resources, and, in turn, tribal members' health, fishing opportunity, and ability to pass their culture on from one generation to the next. EPA's proposed rule will help ensure that tribal reserved rights and natural resources are protected in Maine and nationwide, and will help ensure the United States fulfills the solemn and perpetual trust obligation owed to tribes.

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[2] States "may" adopt sub-categories of use, but the failure to delineate such sub-categories does not mean that sub-category of use need not be protected. *See* 40 C.F.R. § 131.10(c). Moreover, removal of a designated use that is also an existing use is prohibited (even if that existing use has not been made explicit in the statute or regulations) unless a use requiring more stringent criteria is added. *Id*. § 131.10(h)(1).

II. The Band supports the basic aspects of EPA's proposal, as described in the notification.

The Band supports the conceptual framework and purpose of the proposed tribal reserved rights rule, and encourages the agency to complete the rule within the timeframe it has suggested in the webinars the agency has provided to tribes. All actors, including EPA, tribes, states, and the regulated community, would benefit from the tribal reserved rights requirements being set out in regulations, as opposed to merely in guidance, final rule preamble, or decision document language. Furthermore, regulatory requirements would provide durable protection of tribal reserved rights, as well as clarity and transparency about how states and EPA must protect tribal reserved rights when establishing and revising WQS.

The Band also believes the scope of the proposed rule is appropriate, as EPA has described it. It is essential to ensure that tribal reserved rights are protected *wherever they exist*, including any place where a state or EPA has jurisdiction to set WQS. Although we continue to disagree with EPA's determination that Maine has jurisdiction to set WQS in Maliseet waters, including the waters in and adjacent to the Band's reservation, as long as that interpretation is in place, the rule must apply to those tribal waters in the same way that it applies to off-reservation waters, in Washington, for example, where tribes have treaty-reserved fishing rights.

In its notification letter, EPA proposes the following broad concepts for its amendments to the WQS regulations at 40 C.F.R. Part 131, which the Band has numbered in order to facilitate our comments below:

1. The requirement that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS.
2. The requirement that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.
3. Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).
4. Providing options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected:
    a. Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.
    b. Criteria that protect tribal reserved rights in waters where those rights apply.
    c. Assignment of Tier 3 antidegradation protection (i.e., requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

Notification Letter at 3-4. With respect to #1, the Band agrees that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS, and that the requirement should be clearly stated in regulations. Please see the preceding section for a summary of some of the authorities establishing not only EPA's authority to do so, but also the legal mandates that EPA ensure that tribal reserved rights are not impaired when it reviews and approves, or itself promulgates, WQS.

With respect to #2, in concept we agree "that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection." Specifically, the Band agrees that water quality must be sufficiently protected as to protect tribal reserved rights. However, the Band has concerns regarding potential burdens that EPA may place on tribes to implement the rule. For instance, it will be important for EPA not to establish overly burdensome processes and standards of scientific proof as prerequisite to protecting tribal reserved rights. Further, tribes themselves should not be required to carry out research in order to ensure there is "available data" in relation to what level of water quality protection is necessary to protect their reserved rights. To the extent that surveys, studies, or other research may be necessary to meet whatever threshold EPA establishes, the federal government should ensure that tribes are provided the funding and resources to complete those studies. And if a particular tribe is not equipped to carry out research sufficient to meet EPA's threshold, the agency itself must complete that research.

With respect to #3, the Band strongly agrees with the concept that "the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe." One of the difficulties the

Band has experienced in dealing with EPA across administrations is the inconsistency in approaches to government-to-government consultation, including the level of respect afforded tribes and the willingness to incorporate tribal feedback into proposals that will affect tribes and their rights. We believe that the proposed regulation should clearly state the agency's consultation obligations (e.g., appropriate scheduling timelines and procedures), as well as how information provided by a tribe must be incorporated into EPA's WQS decisions related to that tribe's rights. For instance, the proposed rule should include language along the following lines:

1. EPA shall offer to consult with an Indian tribe regarding any water quality standards that have been submitted for approval by a state or proposed by EPA that may affect the Indian tribe, the Indian tribe's members, or the Indian tribe's reserved rights.

2. EPA shall use its best efforts to complete consultation with the affected Indian tribe prior to undertaking a proposed agency action.

3. The consultation required by this section shall be in addition to any processes available to members of the general public and shall include, at a minimum:

A. Written notice and outreach via telephone by the agency to the affected Indian tribe at the earliest opportunity describing the proposed agency action and requesting government-to-government consultation;

B. If an affected Indian tribe does not respond to the request within 30 days, the agency may conclude that the tribe has declined consultation on the agency action;

C. If an affected Indian tribe elects to engage in consultation, the agency's sharing of information regarding the proposed action and a meaningful and timely discourse involving agency officials or employees who have a direct role in the proposed action and agency decision-making process;

D. A meaningful opportunity for the affected Indian tribe to provide detailed feedback on the proposed action, including but not limited to the opportunity to provide written comment and to engage in one or more government-to-government consultation meetings that have been scheduled at times at which the Indian tribe's representatives have indicated they are available to meet; and

E. The agency's careful consideration of the input provided by affected tribes.

With respect to #4, the Band believes that EPA has laid out appropriate regulatory approaches, in that each aspect of the WQS must be evaluated and set for its ability to protect tribal reserved rights. However, we want to be clear that inclusion of tribal reserved rights in the list of designated uses for water bodies in which such rights exist should not merely be one of a slate of options for protection of those resources, but rather a mandatory component of the WQS for those water bodies. As described above, tribal reserved rights that have been exercised at any time on or after November 28, 1975, are existing uses already subject to protection,[3] but their inclusion as designated uses will ensure the full protections of the Act. That is the most straightforward way for the other protections of the CWA to follow because it would often establish the most sensitive use of water and require, for example, criteria commensurate with that use.

It is also, of course, important that EPA establish some basic requirements as to what constitutes protection of the tribal reserved rights designated use in the establishment of criteria and anti-degradation policies. For instance, with respect to human health criteria, where tribal reserved fishing rights exist, the regulations should make clear that an appropriate fish consumption rate must be applied, including, where appropriate, unsuppressed consumption levels. Likewise, in such a case, a one in one million cancer risk rate should be used to calculate human health criteria for these waters. Establishing such minimum requirements for some of the HHC inputs will ensure that the health of tribal members exercising their rights is protected from

[3] *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)) ("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).

toxics. The criteria for other non-toxic pollutants may also require specific requirements. For instance, the agency will want to make clear that the criteria for pollutants that degrade fish habitat (e.g., temperature, nutrients)—and therefore the quantity of fish available for harvest under a tribe's reserved rights—are set at protective enough levels as to avoid declines in fish populations. Likewise, as indicated in EPA's notification, another important component would be establishing that Tier 3 antidegradation protection must be afforded to water bodies where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

. . .

To conclude, the Band supports EPA moving forward with the proposed tribal reserved rights rule. The Band appreciates the opportunity to engage in government-to-government consultation and to provide written feedback on this important proposal, and we look forward to continued outreach from EPA regarding the proposal as it develops. Given the potential effect of this proposed rule on tribal reserved rights, we request that EPA provide an opportunity for further government-to-government consultation prior to publication of a proposed rule in the Federal Register for public comment.

Sincerely,

Clarissa Sabattis

Clarissa Sabattis
Chief of the Houlton Band of Maliseet Indians

cc Jennifer Brundage

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 30 2015

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

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

Dear Mr. Garbow:

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

1. Overview of Tribal Fishing Rights in Maine Indian Waters

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

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

[2] 30 M.R.S. §§ 6201 *et seq.*

[3] 30 M.R.S. §§ 7201 *et seq.*

[4] 25 U.S.C. §§ 1721 *et seq.*

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

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

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

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

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

[7] Notably, several standalone provisions in Maine law recognize and arguably encourage the continuing centrality of fishing to the traditions and health of Maine tribes. First, the State of Maine recognizes and facilitates fishing as a central part of tribal culture by issuing permits to tribal members to fish in Maine waters at no cost. 12 M.R.S. § 10853(8). Second, the State has enacted legislation providing for special treatment of tribal members engaged in fishing for marine organisms, exempting them from many state permitting requirements and providing a broad exemption for many tribal sustenance and ceremonial uses. 12 M.R.S. § 6302-A. Concerns of the tribes with the process by which this language was adopted and objections to the definition of sustenance are explained in a recent report by the Maine Tribal-State Commission. Me. Indian Tribal-State Comm'n, *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* (June 17, 2014), *available at* http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf ("Commission Saltwater Fisheries Report").

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

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

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

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

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

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

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

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

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

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6 [providing for the State to limit tribal fishing if necessary to protect the stock of fish].

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

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

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

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

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

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

[14] 30 M.R.S. § 6207(1).

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

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

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

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

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

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

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

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

[20] This statutory provision establishing a right of the State to regulate in limited situations of conservation necessity is consistent with the federal common law rule. *See United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1990) (describing findings that court must make in order to uphold regulation of treaty rights to take fish, including that "States must consider the protection of the treaty right to take fish . . . as an objective co-equal with the conservation of the fish runs for other uses"); *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) ("Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Conclusion

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

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

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

Sincerely,

Hilary C. Tompkins
Solicitor

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

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

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

January 21, 2020

Sent via email to mainewqscomments@epa.gov

Dennis Deziel
Regional Administrator
Environmental Protection Agency Region 1
EPA New England Headquarters
5 Post Office Square - Suite 100
Boston, MA 02109-3912

RE: Comments on the Environmental Protection Agency's Proposals to Withdraw February 2, 2015 Approvals of Designated Uses and Disapprovals of Human Health Criteria in Maine, and to Approve Maine's "Fishing" Designated Use for All Waters in Indian Land Without the Interpretation that for Such Waters the Use Means "Sustenance Fishing"

Dear Regional Administrator Deziel,

These comments are submitted on behalf of the Houlton Band of Maliseet Indians ("HBMI," "Houlton Band," "Band," or "Maliseet") in response to the November 6, 2019 "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," *available at* https://www.epa.gov/sites/production/files/2019-11/documents/public-notice-maine-cwa-2019.pdf [hereinafter "Proposed Withdrawal"]. The Band strongly opposes EPA's proposal for the reasons discussed in detail below. The Band will not stand by as EPA flouts its obligations under the Clean Water Act ("Act" or "CWA"), basic tenets of federal Indian law, and its trust responsibility to Indian Tribes. The Band accordingly requests that EPA immediately withdraw its proposed action.

I. The Houlton Band of Maliseet Indians Is a Riverine People That Relies On Sustenance Fishing and Other Water-Dependent Activities in the Wolastoq (the St. John Watershed) For Its Health, Spirituality, and Culture.

The Band will first briefly discuss some background regarding the sustenance fishing use in Maliseet waters, so as to be clear as to what the water quality standards in Indian waters in Maine must

protect and why it is important to the Band, both for health and cultural reasons. The Houlton Band of Maliseet Indians is a fishing tribe. As river people, the Maliseets have fished, trapped, hunted, gathered aquatic and wetland plants, and used water for ceremonial purposes from the rivers and streams of our ancestral territory—Wolastoq (the St. John watershed)—since time immemorial. Wolastoqewiyik, the name we call ourselves, means "People of the Beautiful, Flowing River." Sustenance fishing and other water-dependent uses of natural resources are central to the Maliseet diet, culture, traditions, spirituality, and health and welfare.

A critical Band priority, and the HBMI Natural Resources Department's mission, is to maintain the natural environment, including water quality, that supports the fish, animals, and plants on our lands and territories in order to preserve and protect our culture, traditions, and common welfare of the Band. Band members want to continue traditional activities such as sustenance fishing, gathering fiddleheads and medicines, and making baskets sustainably and without fear of contamination. Environmental protection for the Maliseet equates to cultural survival. Our language, history, legends, tradition, and culture are deeply rooted in nature. We believe that all of creation is important, nature must be in balance, and that we all suffer when we disturb that balance. Tribal culture and tradition require the Band to manage, protect, and enhance the environment, so that the web of life will continue to support future generations.

Unlike most of the inhabitants of Maine, the Maliseet are tied to the environment for our very existence. The foods and traditional practices of our ancestors still sustain our community today. It is not simply that sustenance fishing, hunting, and gathering is an inexpensive way to feed our families, as some people would believe. Physically, our bodies thrive on native foods such as fiddleheads (*emerging ostrich fern*), berries, fish, and game, not the refined foods to which society at large has become accustomed. Pollutants and a degraded environment make these foods scarce and/or contaminated, thereby driving some in our community to abandon traditional diets for more processed foods. This has led to an increase in diabetes and other health issues, resulting in shorter life expectancies for the tribal community than the general population. Many of our members continue to fish to feed themselves and their families, as well as to share food with elders and others who can no longer fish. Our members fish throughout the fishing season, including ice fishing in the winter. Despite fish consumption advisories established by the State of Maine, Maliseet families continue to eat large amounts of fish from the rivers and streams of our ancestral territory for their daily sustenance and risk exposure to high levels of environmental contaminants. Gathering aquatic plants remains an important cultural tradition, as well. For instance, the tribal government sets aside a day every year for fiddleheading. On this day, staff is encouraged to gather fiddleheads on the nearby riverbanks of the Meduxnekeag to prepare and freeze for the many traditional feasts hosted throughout the year. Further, every summer our youth group spends time fishing, canoeing, and picking medicines, all the time learning about their ties to the natural world to ensure these traditions carry forward. *See also Maine v. Wheeler*, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-12 (Exhibit 1.K - HBMI Comments on Maine's Proposed WQS and Attachments, Sept. 13, 2013), ECF 154-13 (Exhibit 1.L - HBMI Supplemental Comments on Maine's Proposed WQS and Attachments, Dec. 17, 2013), ECF 154-14 (Exhibit 1.M - HBMI Comments on EPA Proposed Rule to Promulgate Certain Federal Water Quality Standards Applicable to Maine and Attachments, June 20, 2016).[1]

[1] For convenience, despite the fact that all of these materials are already before EPA, the Houlton Band is attaching, and incorporating by reference, the entirety of the "Declaration of Jane G. Steadman in Support of Defendant-Intervenor Houlton Band of Maliseet Indians' Response to EPA's Motion for Voluntary Remand and Incorporated Memorandum of Law" (ECF 154-1), which was filed in *Maine v. Wheeler*, No. 1:14-cv-00264-JDL (D. Me.), on September 28, 2018. When these comments refer to "Exhibit" numbers, it is in reference to the exhibits attached to that declaration.

Not only are the Maliseet diet and traditions tied directly to the water, Maliseet language and spirituality is intrinsically linked to it as well. The gift of water is one of the essential teachings of the Maliseet. Sweat lodges are held to heal and honor the spirit, and they use all the elements and gifts of creation. Willow or birch trees are used to build the frame, cedar is used to cover the floor, river stones are heated in a fire, and water from the river is poured on the hot rocks to generate steam and to carry prayers and offerings to all of creation. In the Maliseet language, water – *samaqan* is a living entity. Therefore, *Peskotomuhkati Wolasoqewi Latuwewakon*, a Passamaquoddy-Maliseet Dictionary, lists 55 different words for water. Our language has words to describe various states of water: *ososqopekot* (it is muddy water); *cinitomehson* (it is very shallow water); and *nolomopeq* (the water upriver). We are a people who have lived in our homeland since the beginning of creation. We believe that all creation—the animals, plants, rocks, and elements—have spirits and are our relations. We refer to the land as Mother Earth and refer to the rocks and stones as our ancestors, those who have been here since the dawn of creation.

Many of our stories reflect these beliefs. For example, the significance of our waterways to our culture is reflected in the tales of Gluskap, our culture-hero. One Maliseet tale recounts an episode in the life of Gluskap when he frees the waters of the Wolastoq from the dams of beavers who in that long ago time were much larger than they are today. Gluskap also created many of the outcroppings, islands, and stream outlets along the Wolastoq. In another tale, Gluskap helps a band of Indians whose water had become fouled by the serpent Akwulabemu. Gluskap kills Akwulabemu and "straight away the springs and brooks filled with water that was clean and pure." In another Gluskap tale, Wind Bird, Chief Raven's band has not hunted or fished in many days because it is so windy they cannot get near any game and do not dare launch a canoe. Gluskap advises Chief Raven to send the Caribou boys up the mountain where the Wind Bird lives to tie his wings. But when they do so, no wind blows at all. All the waters become stagnant and too warm for there was no cooling breeze. After consulting with Gluskap, Chief Raven sends the Caribou boys to untie one of the Wind Bird's wings and let him loose, and everything returned to normal.

We have been fighting to retain, rebuild, and protect our ancestral ways for over 400 years. When contamination and habitat degradation make it impossible to fish, hunt, or gather plants and medicines in accordance with our traditions, we cannot pick up our trust lands and move them away from the sources of pollution. When a natural resource is adversely impacted or damaged by influences beyond the Band's control, a vital part of our cultural link is forever broken. Accordingly, preservation and protection of natural resources is preservation and protection of our Tribal culture. In view of this reality, for the past 25 years, HBMI has been working diligently on its own and in partnership with others to improve water quality in our watershed. However, despite our best efforts, our way of life is threatened by non-tribal polluters. The rivers of Wolastoq are subject to fish advisories that warn people not to eat, or to severely limit ingestion of, the fish they catch lest they risk cancer and other diseases. The pollution endangers the health of tribal members who continue to engage in traditional levels of sustenance fishing, and it deters others from participating fully in this time-honored way of life. In short, clean water is essential to support sustenance fishing and other traditional lifeways. EPA's proposals, unlike the agency actions it seeks to undo and the administrative record supporting those actions, do not take into account these realities.

II. EPA's Proposed Withdrawal Violates the Clean Water Act, Federal Indian Law, and the Administrative Procedure Act

EPA's Proposed Withdrawal violates the Clean Water Act, both procedurally and substantively. EPA lacks the authority to withdraw its 2015 decisions, and even if it were acting within the procedural constraints of the Act, the agency's stated basis for withdrawal is antithetical to the oversight role that Congress entrusted to EPA and a large body of case law in which courts upheld exactly the type of

actions EPA took in 2015. Further, EPA's Proposed Withdrawal independently violates federal Indian law, as well as the agency's trust responsibility to the Band. Finally, the Proposed Withdrawal is arbitrary, capricious, and not in accordance with law.

A. Congress Established Only Two Processes in the Clean Water Act Through Which a State's WQS May Be Amended, and EPA Is Adhering to Neither

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.[2]

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. 40 C.F.R. § 131.10(h)(1)-(2). While none of the so-called "gap waters" include Maliseet waters, as all Maliseet waters were covered in L.D. 1775, the Band directs EPA's attention to the sections below for guidance as to why a use attainability analysis could not lead to a downgrading of a sustenance fishing designated use in Indian waters in Maine in any event.

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.[4] Although a necessity

[2] EPA did not seek comment on its November 6, 2019 "Review and Approval of Maine's [SFDU] Subcategory and the Assignment of that Subcategory to the Waters Identified." While the Band supports Maine's adoption and EPA's approval of the SFDU established in L.D. 1775, the Band notes that EPA's approval document contained numerous legal and technical flaws, which these comments do not address, and which the Band is under no obligation to address, in the comment period on the Proposed Withdrawal.

[3] "Gap waters" refers to the small set of waters for which EPA previously approved a sustenance fishing designated use in 2015, but which were not included in the L.D. 1775 SFDU. None of the "gap waters" include Maliseet waters.

[4] To be clear, EPA is not proposing to approve Maine's state law criteria, as those criteria were before EPA in February 2015, as being sufficiently protective of tribal sustenance fishing. That is, while EPA is proposing to *withdraw its disapproval*, it is *not* proposing to *approve* in Indian waters Maine's HHC as they stood in 2015. Rather, because DEP is in the process of adopting HHC to address that use, "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 applicable fishing designated use or sustenance fishing use subcategory, rather than the 2006 and 2013 criteria that it previously analyzed." Proposed Withdrawal at 12 (footnote omitted). On December 2, 2019, counsel for EPA further clarified EPA's action, explaining to U.S. District Judge Jon Levy: "The proposal that EPA came out with in November was to withdraw that disapproval. . . . But not to approve. EPA didn't say it was going to approve, and that was on purpose because EPA wants -- does want to wait to get the new state standards. . . . It means that . . . the old standards . . . are still before EPA, but EPA has not acted on them. Haven't approved them, haven't disapproved them. Presumably, the state will submit new criteria in 2020 and those will supersede the old ones and the EPA will act on that." Transcript at 49-50; *see infra* n.11. Counsel for EPA also stated that the following summary by the Court was correct: "EPA's position is that the

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) (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" (emphasis added)). As discussed below, the Proposed Withdrawal is even more infirm in light of the fact that EPA *already* approved Maine's SFDU 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.

B. EPA's Proposed Withdrawal Is Arbitrary, Capricious, and Not In Accordance with the Clean Water Act, Federal Indian Law, or the Administrative Procedure Act

Federal agencies are not permitted to act any way they want any time they want and for whatever reason they want. They are instead constrained by the statutes Congress enacts and charges those agencies with enforcing, by federal common law (including, in this case, federal Indian law), and by administrative law. EPA seems to have forgotten these basic constraints on its authority in issuing its Proposed Withdrawal.

1. The Clean Water Act Precludes EPA's Proposed Withdrawal of Approvals of a Sustenance Fishing Designated Use and of Disapprovals of Human Health Criteria, As Well As Its Proposed Approval of the "Fishing" Designated Use Without Its 2015 Interpretation

The overarching commitment of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). To that end, Congress set national goals to eliminate all discharges of pollutants by 1985, to obtain water quality which provides for the protection and propagation of fish and shellfish by 1983, and to set a national policy to prohibit toxic pollutants in toxic amounts." *Id*. The Act is designed to ratchet down the level of pollution over time to allow for ever safer use of the water until all existing and designated uses are protected and remain protected.

Water quality standards are the foundation of the Clean Water Act's water quality-based control program. They define goals for a water body by designating the uses that water body supports or should support ("designated uses"); set water quality criteria designed to protect those uses and measure progress made ("criteria"); and establish anti-degradation policies, so that existing uses and water quality necessary to support those uses are protected and so that bodies with very high quality water do not become impaired. In order to ensure the purposes of the Clean Water Act are fulfilled, all "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." [5] 40 C.F.R. § 131.12(a)(1); Water Quality Standard Handbook § 4.2 ("Section 131.12(a)(l), or

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2006 and 2013 criteria are not approved as of this time and will not be affirmatively approved . . . . EPA now proposes to essentially withdraw the disapproval, but it does so not intending to approve those criteria and not intending those criteria to take effect." Transcript at 51-52. Thus, EPA's statement in "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," regarding Maine's discretionary "adoption, in 2006, of HHC using an FCR [fish consumption rate] of 32.4 g/day," cannot be read as EPA's proposed approval or endorsement of those HHC or that fish consumption rate in Indian waters. Any such proposal would be in clear violation of Maine law, which mandates an FCR of 200 grams/day in calculating HHC to protect the SFDU approved by EPA.

[5] States "may" adopt sub-categories of use, but the failure to delineate such sub-categories does not mean that sub-category of use need not be protected. *See* 40 C.F.R. § 131.10(c). Moreover, removal of a designated use that is also

'Tier 1,' protecting 'existing uses,' provides the absolute floor of water quality in all waters of the United States. This paragraph applies a minimum level of protection to all waters.").

"Designated uses" are defined as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). "Existing uses" are defined 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." *Id*. § 131.3(e). Not every existing use needs to be listed individually as a designated use, but all existing uses must be protected through the designated uses specified. EPA Water Quality Standard Handbook § 4.4.2 ("No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards."). As one court explained,

> The CWA does not impose upon states the obligation to designate any particular use(s) for water bodies. *At a minimum, however, states must revise their water quality standards to reflect existing uses, i.e. those uses which are actually being attained*. 40 C.F.R. § 131.10(i); 40 C.F.R. § 131(e). Furthermore, fishable/swimmable uses are favored. Section 101(a)(2), 33 U.S.C. § 1251(a)(2).

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 1081 (D. Idaho 2000) (emphasis added). Consequently, a water body's designated uses must fully protect existing uses. *See*, *e.g.*, 40 C.F.R. § 131.10(a), (i), (j)(1). "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).

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.").

In order to attain the Act's goals and to protect the uses of water, the Act imposes an obligation on states, with EPA acting in a strong oversight role, to develop water quality standards comprised of narrative or numeric water quality criteria sufficient to protect uses such as fishing. 33 U.S.C. § 1313(a)-(b). While States have the first shot at promulgating protective, science-based water quality standards, EPA is obligated under the Act to review and to disapprove a state's efforts if they fall short of meeting the requirements of the Act. *Id*. § 1313(a)-(c). Furthermore, as discussed above, EPA has independent authority to ensure that a state's standards are up to date and adequate to meet the Act's requirements. *Id*. § 1313(c)(4)(B). Thus, where a state fails to act in accordance with the statute, EPA is obligated to fulfill the state's role of issuing standards that comply with the Act.

EPA's Proposed Withdrawal completely loses sight of the agency's oversight role, and its excessive deference to the State is simply not how the Clean Water Act works. *See* Proposed Withdrawal at 9-12. Throughout its Proposed Withdrawal, EPA suggests that it must always defer to what a state proffers as its designated uses, and that it somehow lacks statutory authority to recognize and approve a use of water that must be protected under the Clean Water Act, no matter what the State may proffer. Proposed Withdrawal at 4, 6-7, 9. This is not at all the case, and, quite the contrary, it is the agency's

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an existing use is prohibited (even if that existing use has not been made explicit in the statute or regulations) unless a use requiring more stringent criteria is added. *Id*. § 131.10(h)(1).

duty in its oversight capacity to recognize actual uses of water and act to protect them accordingly, *especially* if a state chooses not to.

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.

> 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)). 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.

This approach to the approval or disapproval of state water quality standards, unlike EPA's Proposed Withdrawal, is consistent with case law. Section 303 provides as follows:

> Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1) ("For waters with multiple use designations, the criteria shall support the most sensitive use."). EPA has discretion to "translate these broad statutory guidelines and goals into specifics that could be used to evaluate a state's standard." *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980).[6] And EPA has long "interpret[ed] 'fishable'

[6] The sole citation to case law in the Proposed Withdrawal (page 9) is to this case, in which the court ultimately held that EPA neither exceeded its statutory authority nor acted arbitrarily and capriciously when it disapproved a state's water quality standards. *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1275–77 (5th Cir. 1980). It is also notable that the court described, in detail, EPA's mandatory oversight obligations. *Id*. at 1275 ("As noted above, the legislative history reflects congressional concern that the Act not place in the hands of a federal administrator absolute power over zoning watershed areas. The varied topographies and climates in the country call for varied water quality solutions. *Despite this primary allocation of power, the states are not given unreviewable discretion to set water quality standards. All water quality standards must be submitted to the federal Administrator. 33 U.S.C. §*

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*.

Contrary to EPA's suggestion in its Proposed Withdrawal, it is hardly novel for EPA to take steps to protect the most sensitive use associated with the "fishable" designated use in the Section 303 process. 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.").

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. As described above, 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. In all aspects of its 2015 decisions, EPA acted consistent with the Clean Water Act, case law, and the agency's decades-long practice. Consequently, EPA's proposal to withdraw its 2015 approvals and disapprovals is unlawful.

2. Federal Indian Law Precludes EPA's Proposed Withdrawal of Approvals of a Sustenance Fishing Designated Use and of Disapprovals of

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1313(c)(2). . . . The state must review its standards at least once every three years and make the results of the review available to the Administrator. Id. § 1313(c)(1). EPA is given the final voice on the standard's adequacy . . . ." (emphasis added)).

Human Health Criteria, As Well As Its Proposed Approval of the "Fishing" Designated Use Without Its 2015 Interpretation

EPA's proposed withdrawal of its prior approvals and disapprovals, as well as its proposed approval of Maine's "fishing" use without EPA's 2015 interpretation that it means "sustenance fishing" in waters in Indian lands, contravenes basic tenets of federal Indian law, EPA policy regarding the protection of water quality in Indian waters, and the agency's trust responsibility to the Indian tribes in Maine. As discussed above, the fact of the Band's existing use of waters for sustenance fishing required EPA in 2015 to protect that use, even though Maine did not want to do so at the time. However, as EPA recognized previously, federal Indian law independently requires that EPA ensure water quality sufficient to allow for safe sustenance fishing in Indian lands.

As discussed in Section I, the "Wolastoqewiyik", or Maliseet Indians, are river people who have fished, hunted, trapped, and gathered natural resources in the "Wolastoq," or St. John watershed, for thousands of years. These resources are central to the Maliseet diet, culture, traditions, spirituality, and health and welfare. Congress recognized the Maliseet way of life in the Maine Indian Claims Settlement Act (MICSA). *See*, *e.g.*, S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."). MICSA and the Maine Implementing Act accordingly provided for a homeland for the Houlton Band by authorizing the acquisition and setting aside of "land or natural resources" in trust for the Band. *See* 25 U.S.C. § 1724(d); Note, Public Law No. 99-566, 1 A § 4(a) (Oct. 27, 1986). Congress explained that these trust resources would substitute and were in exchange for the Houlton Band's aboriginal lands and natural resources. S. Rep. No. 96-957 at 24 (explaining that "[t]he land . . . is intended to constitute satisfaction of the Band's legal claims" and that Congress seeks "to settle all Indian land claims in Maine fairly"); *see also* 25 U.S.C. § 1721 (findings and purpose), §1723 (relinquishing lands and natural resources). The Department confirmed on January 15, 1993, that Maliseet trust lands acquired under MICSA located on both banks of the Meduxnekeag River, a tributary of the St. John, are an Indian reservation for purposes of federal law. *Maine v. Wheeler*, No. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-13 (Exhibit 1.L, Attachment at 2 (ECF Page #4816)) ("The Houlton Band unquestionably meets the *Potawatomi* test because [MICSA] clearly states that land purchased by the Houlton Band with federal funds set aside by Congress for that purpose shall be taken into trust by the United States. Therefore, the Houlton Band of Maliseets has an Indian reservation for the purposes of federal law, subject only to the limitations contained in [MICSA] that apply to all federal Indian reservations in Maine").

As a matter of federal law, the lands and natural resources held in trust by the United States for the benefit of the Houlton Band include water and fishing rights. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe or individual Indians, as it did for the Houlton Band, Congress impliedly reserves water and fishing rights where necessary to effectuate the purposes of the set aside. *See*, *e.g.*, *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-06 (1968) (holding that lands acquired for a tribe in exchange for the relinquishment of other lands include implied hunting and fishing rights); *Arizona v. California*, 373 U.S. 546, 599 (1963) (finding implied water rights where "water from the River would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"); *Winters v. United States,* 207 U.S. 564, 577 (1908) (holding that tribe impliedly reserved water rights to support beneficial use of its lands). This reservation of federal rights occurs regardless of whether the lands are set aside by treaty, executive order, or statute. *See*, *e.g.*, *United States v. Dion,* 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implied hunting rights as those created by treaty."). For example, in *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 86-88 (1918), the Supreme Court held that where Congress set aside lands for the landless Metlakahtla Indians, it impliedly reserved fishing rights in adjacent waters. The Indians were historically fishers and hunters, and the lands

were chosen to provide them access to the fishing grounds. *Id.* at 88-89. Similarly, in *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 48 (9th Cir. 1981), the court held that Congress impliedly reserved water rights to support the tribal fishery on tribal trust lands where "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."

Through MICSA, Congress acquired lands in trust for the benefit of the Houlton Band to provide the landless Maliseet Indians a home where they could preserve their riverine culture and engage in traditional fishing, hunting, and gathering activities. *See* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation . . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."); *id.* at 24 ("The Houlton Band is impoverished, it is small in number, it has no trust fund to look to, and it is questionable whether the land to be acquired for it will be utilized in an income-producing fashion in the foreseeable future."). As the Department of the Interior expected, the Tribe's reservation is located in eastern Aroostook County on the Meduxnekeag River, adjacent to one of the river's best fishing holes. *See* H.R. Rep. No. 96-1353 (Report of the Department of the Interior, Aug. 25, 1980). Accordingly, in reserving these lands Congress concurrently reserved water and fishing rights for the Tribe—the purpose of the reservation would have been defeated otherwise.

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.
>
> The quality and quantity of water may be directly related. This interrelationship is most evident in the case of a reserved right to water for fisheries preservation. The right reserved is that amount of water necessary to maintain the fishery. The fishery consists not only of the fish themselves, but also of the conditions necessary to their survival. Thus, habitat protection is an integral component of the reserved right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

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

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.[7]

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 (1st Cir. 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* at 1 (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.

[7] 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").

EPA, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* at 3, *available at* https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf. These same types of implied rights, and EPA's duty to protect them, apply in the context of reserved rights associated with the reservation of tribal homelands.

EPA accordingly has a trust obligation to protect the quality of Maliseet waters, which are the lifeblood of the Maliseet people and which support the fish, animals, and plants at the core of their diet and culture. *See*, *e.g., Parravano v. Babbitt,* 70 F.3d 539, 546-47 (9th Cir. 1995) (recognizing the United States' trust obligation to protect impliedly reserved fishing rights); *see also generally,* State Program Requirements: Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program*,* 68 Fed. Reg. 65,052, 65,056 (Nov. 18, 2003) ("Clearly, the physical setting of the . . . tribes in such close proximity to important rivers makes surface water quality important to them and their riverine culture."). As the Solicitor concluded in regard to Maine's initial application for NPDES authority in Indian country:

> EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet and Micmac tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the Maliseets and Micmacs make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets and Micmacs even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

Maine v. Wheeler, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-8 (Exhibit 1-G: May 16, 2000 Interior Letter at 2 (ECF Page #4435)) (citations omitted)). The same is true with regard to EPA's evaluation and setting of water quality standards, as recognized in the Department of Interior's January 30, 2015 Letter to EPA.[8] *Maine v. Wheeler*, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-7 (Exhibit 1-F: Jan. 30, 2015 Interior Letter at 6-7 (ECF Page #4427-28)).

In sum, when the Houlton Band and its members use Maliseet waters, including for sustenance fishing in the Meduxnekeag River and other Maliseet waters, they exercise rights vindicated and protected by federal law. These rights define and lie at the heart of EPA's trust responsibility to the Band,

[8] EPA suggests that "the State has jurisdiction to set WQS" in Indian waters in Maine. Proposed Withdrawal at 9. The Houlton Band continues to dispute EPA's February 2015 determination that "MICSA granted the state authority to set WQS in waters in Indian lands." 81 Fed. Reg. 23,239, 23,241 (April 20, 2016) (describing decision). As in our comments on the draft Maine Rule, ECF 154-14-Exhibit 1.M at 1 n.1, we direct your attention to comments the Houlton Band submitted to EPA Region 1 on September 13, 2013 explaining our position. *Maine v. Wheeler*, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-12 (Exhibit 1.K (ECF Page # 4597, 4615-16)). To the extent, EPA's prior analysis that MICSA allows Maine to set water quality standards in Indian country—unlike any other state in the country—stands, then EPA cannot ignore the constraints that MICSA and other aspects of federal Indian law place on that unique authority.

including in the setting of water quality standards. EPA is not permitted to ignore these rights or its obligations to the Band, and may not take the actions contemplated in its Proposed Withdrawal.[9]

3. EPA's Proposal to Withdraw its 2015 Disapproval of Maine's Human Health Criteria (HHC) Is Unlawful and Arbitrary and Capricious

When developing human health criteria for toxic pollutants, states are required to "adopt those water quality criteria that protect the designated use." 40 C.F.R. § 131.11(a)(1). As explained above, this necessarily means that the HHC must protect any "existing use," as well. Those "criteria must be based on *sound scientific rationale* and must contain *sufficient parameters or constituents to protect the designated use*." *Id*. (emphasis added). For toxic pollutants, the regulations require:

> Toxic pollutants. States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130).

Id. § 131.11(a)(2). In establishing numerical criteria, states must base such criteria on EPA's 304(a) Guidance, 304(a) Guidance modified to reflect site-specific conditions, or other scientifically defensible methods. *Id*. § 131.11(b)(1).

Under Maine DEP's regulations regarding numerical statewide criteria, "levels of toxic pollutants in surface waters must not exceed federal water quality criteria as established by USEPA, pursuant to Section 304(a) of the Clean Water Act, or alternative criteria established below." 06-096 C.M.R. ch. 584, § 3(A)(1). Consistent with 40 C.F.R. § 131.11(a)(1), "Alternative statewide criteria must be based on *sound scientific rationale* and *be as protective as EPA's water quality criteria*. Such criteria *must also be protective of the most sensitive designated and existing uses of the water body*, including, but not limited to, habitat for fish and other aquatic life, *human consumption of fish* and drinking water supply after

[9] In requesting a voluntary remand from the United States District Court for the District of Maine in *Maine v. Wheeler*, No. 1:14-cv-00264-JDL (D. Me.), EPA cited a letter it received from Daniel H. Jorjani, Principal Deputy Solicitor, in the Department of Interior's Office of the Solicitor on April 27, 2018, regarding "Maine's Water Quality Standards and [the] Tribal Fishing Rights of Maine's Tribes," as a primary reason for EPA's need for the remand. *See*, *e.g.*, *Maine v. Wheeler*, No. 1:14-cv-00264-JDL (D. Me.), ECF 190 (Order), at 4 ("In its motion, EPA represented that it intended to make substantive changes to the original agency decision at the heart of this case, and it identified several intervening events, including the replacement of three key EPA officials; a letter from the Department of the Interior revising its earlier letter upon which EPA's February 2015 decision was partially based; and the substance of Maine's opening brief for judgment on the administrative record, which EPA claimed helped 'crystalize[] the issues.' See ECF 162 at 4–5 (citing ECF 139 at 2–3; ECF 157 at 13)"). The Houlton Band of Maliseet Indians sent a letter to the Department of Interior, copying EPA, explaining the multitude of reasons that the letter's contents were legally incorrect on May 8, 2018. *Maine v. Wheeler*, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-23 (Exhibit 2 – May 8, 2018 HBMI Letter to Interior). EPA does not discuss either letter in its Proposed Withdrawal, and, in fact, based on Freedom of Information Act (FOIA) requests submitted by the Penobscot Nation and the Houlton Band, it appears that EPA Headquarters played a critical role in the drafting of the April 27, 2018 letter. *See* Attachment-FOIA Documents Re April 27, 2018 Interior Letter. This is highly unusual given that EPA cited the letter as an external intervening event supporting a federal court remand.

treatment." *Id*. § 3(A)(2) (emphasis added); *see also id*. § 3(B) (similar requirements for site-specific criteria for toxic substances adopted by DEP in waste discharge license proceeding).

Consequently, the benchmarks against which DEP's proposed HHC must be judged under the Clean Water Act and Maine state law are whether the criteria are "based on sound scientific rationale," whether they are "as protective as EPA's water quality criteria," and whether they are "protective of the most sensitive designated and existing uses of the water body." 40 C.F.R. § 131.11(a)(1); 06-096 C.M.R. ch. 584, § 3(A)(1). This means that any HHC considered by EPA must protect the sustenance fishing designated use that EPA approved in 2015 (for the reasons described above) *and* Maine's new SFDU that EPA approved on November 6, 2019. 38 M.R.S. §§ 466(10)(A), 467(15)(E). EPA's Proposed Withdrawal fails to discuss these fundamental benchmarks (beyond citing generally to the C.F.R.), let alone provide a reasoned rationale for its proposal to withdraw its prior disapproval of Maine's HHC.[10]

First, EPA made a necessity determination in 2016 under Section 303(c)(4) that the HHC that Maine previously submitted were not adequate to meet a sustenance fishing designated use. Consequently, even if EPA were correct that it could avoid interpreting Maine's "fishing" designated use as a "sustenance fishing" designated use in Indian waters (which it cannot), now that it has actually approved Maine's submitted SFDU in the vast majority of those same waters, it would be arbitrary and capricious for EPA to now withdraw that prior disapproval.

Second, as indicated in both EPA and DEP regulations, the HHC must be based on "sound scientific rationale." But the criteria Maine submitted in 2006 and 2013 are not. 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.

Because EPA has not proposed to approve Maine's old HHC, the Band will not detail the myriad problems with the individual criteria Maine previously proposed. The Band has separately submitted comments to Maine DEP regarding the draft HHC that it is in the process of finalizing.

4. EPA's Proposal Does Not Meet Minimum Requirements of Administrative Law to Reverse Prior Agency Action

[10] The fact that EPA proposes only to withdraw the prior disapproval, but not to actually approve Maine's previously submitted HHC, does not make EPA's proposed withdrawal any more lawful for the reasons discussed in this section.

Beyond not meeting the substantive requirements of the Clean Water Act or federal Indian law, EPA's justification for the Proposed Withdrawal does not meet the minimum requirements of the Administrative Procedure Act. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When a "new policy rests upon factual findings that contradict those which underlay the prior policy," an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations*, *Inc.*, 556 U.S. 502, 515-16 (2009); *State Farm*, 463 U.S. at 42 (requiring a "reasoned analysis for the change"). A "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*, 556 U.S. at 516; *see also id*. at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."). And, of course, the agency's discretion is cabined, as always, by what is permissible under applicable law. *See FCC*, 556 U.S. at 515. EPA is far from meeting these basic requirements.

EPA is not working on a blank slate with its November 6, 2019 Proposed Withdrawal. The agency's February 2015 decisions were supported by a voluminous record. Notably, the "Analysis Supporting EPA's February 2, 2015 Decision to Approve, Disapprove, and Make No Decision on, Various Maine Water Quality Standards, Including Those Applied to Waters of Indian Lands in Maine" was a 51-page explanation of why the Clean Water Act and federal Indian law necessitated EPA's actions in regard to its approval and disapproval of certain WQS in Maine, containing detailed analyses and numerous citations to case law and statutory provisions to support EPA's conclusions. Beyond that analysis, in *Maine v. Wheeler*, EPA lodged with the United States District Court for the District of Maine the administrative record supporting the agency's 2015 decisions; it includes over 5,000 pages of material. Since then, the information supporting EPA's 2015 action—all of which must be part of the administrative record for this proposed withdrawal because it is related information currently before the agency—has only ballooned. EPA now has before it the exceptional record supporting the Maine Rule, much but not all of which (over 400 documents) is available online at Docket No. EPA-HQ-OW-2015-0804, https://www.regulations.gov/docket?D=EPA-HQ-OW-2015-0804. The Response to Comments on the Maine Rule is a 231-page document that addresses in detail many of the issues raised in the Proposed Withdrawal. *See Maine v. Wheeler*, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-5 (Exhibit 1.D).

For example, with regard to the issue of whether EPA exceeded its CWA authority when it approved certain provisions in the Maine Implementing Act as a designated use of sustenance fishing in Penobscot and Passamaquoddy reservation waters despite Maine not having formally submitted that as a use, EPA previously concluded:

> **a. EPA's Approval of Certain Provisions in MIA as a Designated Use of Sustenance Fishing in Reservation Waters**
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> Several commenters asserted that EPA's approval of certain provisions in MIA as a designated use applicable to inland waters of the Southern Tribes' reservations was improper because, among other reasons, Maine had never adopted such a use into its water quality standards. However, state laws can operate as WQS when they affect, create or provide for, among other things, a use in particular waters, even when the state has not specifically identified that law as a WQS.[43] EPA has the authority and duty to review and approve or disapprove such a state law as a WQS for CWA purposes, even if the state has not submitted the law to EPA for approval. Indeed, EPA has previously

identified and disapproved a Maine law as a "de facto" WQS despite the fact that Maine did not label or present it as such.[44]

The MIA is binding law in the state, and sections 6207(4) and (9) in that law clearly establish a right of sustenance fishing in the inland reservation waters of the Southern Tribes. In other words, the state law provides for a particular use in particular waters. It was therefore appropriate for EPA to recognize that state law as a water quality standard, and more specifically, as a designated use. EPA's approval of these MIA provisions as a designated use of sustenance fishing does not create a new federal designated use of tribal "sustenance fishing," but rather gives effect to a water quality standard in state law for CWA purposes in the same manner as other state WQS. Furthermore, contrary to commenters' assertions, EPA did not fail to abide by any required procedures before approving the MIA provisions as a designated use. They were a "new" WQS for the purpose of EPA review, because EPA had never previously acted on them. When EPA acts on any state's new or revised WQS, there are no procedures necessary for EPA to undertake prior to approval.45 The Maine state legislature, which has the authority to adopt designated uses, held extensive hearings reviewing the provisions of the MIA, including those regarding sustenance fishing.

Footnote 43: *See* EPA, What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions, October 2012. *See also, 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."); *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.").

Footnote 44: Letter from Stephen S. Perkins, Director of Office of Ecosystem Protection, EPA, to William J. Schneider, Maine Attorney General (July 9, 2012) (disapproving as a WQS a state law that required prevention of river herring passage on St. Croix River); *see Friends of Merrymeeting Bay*, 839 F. Supp. 2d at 375 (indicating EPA must consider whether such state law has the effect of changing a WQS).

Maine v. Wheeler, NO. 1:14-cv-0026-JDL, ECF 154-1: ECF 154-5 (Exhibit 1.D, Response to Comments at 48-49 (ECF Page # 4082-83)). With respect to EPA's interpretation of Maine's "fishing" designated use to include "sustenance fishing" in Indian waters, EPA previously concluded:

EPA disagrees with comments that asserted that EPA could not approve the "fishing" designated use as meaning "sustenance fishing" for waters in Indian lands unless EPA first made a determination under CWA section 303(c)(4)(B) that the "fishing" designated use was inconsistent with the CWA. Because EPA had not previously approved the "fishing" designated use for waters in Indian lands, EPA had the duty and authority to act on that use in its February 2015 decision, and was not required to make a determination under CWA section 303(c)(4)(B) before it could interpret and approve the use for waters in Indian lands. Additionally, because the term "fishing" is ambiguous in Maine's WQS, even if EPA had previously approved it for all waters in the state, it is reasonable for EPA to explicitly interpret the use to include sustenance fishing for the waters in Indian lands in light of the Indian settlement acts.[51] This is consistent with EPA's recent actions and positions regarding tribal fishing rights and water quality standards in the State of Washington.[52]

In acting on the "fishing" designated use for waters in Indian lands for the first time, it was reasonable and appropriate for EPA to explicitly interpret and approve the use to include sustenance fishing for the waters in Indian lands. This interpretation harmonized two applicable laws: the provision for sustenance fishing contained in the Indian settlement acts, as explained above in Topic 3.1, and the CWA. Indeed, where an action required of EPA under the CWA implicates another federal statute, such as MICSA, EPA must harmonize the two statutes to the extent possible.[53] This is consistent with circumstances where federal Indian laws are implicated and the Indian canons of statutory construction apply.[54] Because the Indian settlement acts provide for sustenance fishing in waters in Indian lands, and EPA has authority to reasonably interpret state WQS when taking action on them, EPA necessarily interpreted the "fishing" use as "sustenance fishing" for these waters, lest its CWA approval action contradict and, as a practical matter, effectively limit or abrogate the Indian settlement acts (a power that would be beyond EPA's authority).[55] Accordingly, EPA's interpretation of Maine's "fishing" designated use reasonably and appropriately harmonized the intersecting provisions of the CWA and the Indian settlement acts.

. . .

Footnote 53 *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (acknowledging EPA's duty to harmonize CWA and Endangered Species Act to give effect to both statutes where the 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.").

Footnote 54 *See Penobscot Nation v. Mills*, 151 F. Supp. 3d at 213-214 (applying the Indian canons of statutory construction to MIA and MICSA); *see also Penobscot Nation v. Fellencer,* 164, F.3d 706, 709 (1st Cir. 1999) (applying Indian cannon to MICSA and citing to *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit")).

. . .

Some commenters asserted that EPA does not have discretion to look beyond the CWA to the settlement acts, citing to the *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) case. There, the Supreme Court held that EPA could not alter its proposed approval action on Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) program based on considerations under the Endangered Species Act (ESA), because the relevant statutory decision factors in CWA section 402 were written in such a way that EPA had no discretion to do so. The Supreme Court, however, also indicated approval of EPA harmonizing the CWA with the ESA whenever it has discretion to do so.[61]

. . .

Footnote 61 *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (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….").

> Section 303 of the CWA is not written as narrowly as section 402 and thus provides EPA discretion to consider and ensure that its WQS action is consistent with other applicable laws, such as the settlement acts. Specifically, CWA section 303(c)(2)(A) provides that criteria must be "based upon" applicable uses, and that WQS must "protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA." CWA section 101(a)(2) states that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." These are often referred to as "101(a)(2) uses" or "fishable/swimmable uses," meaning that waters should be clean enough such that aquatic life can survive and thrive, humans can safely eat fish and shellfish from the waters, and humans can safely recreate in and on the waters. EPA also has promulgated WQS regulations at 40 CFR part 131, specifically 40 CFR § 131.11, to implement these provisions of the CWA. Both the CWA provisions and EPA's implementing regulations are written broadly enough to allow EPA to consider other laws when taking actions with respect to WQS. Thus, this situation is distinguishable from the scenario in the case described above, and it is necessary and appropriate for EPA to ensure that its actions here are consistent with other applicable laws, namely the settlement acts' provision of sustenance fishing for the tribes in waters in Indian lands in Maine.

Id. (Response to Comments at 51-53 (ECF #4085-87)); *see also* 81 Fed. Reg. at 92,478 n.43 ("*See Florida Pub. Interest Grp 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]'' irrespective of the state's ''decision not to describe its own regulations as new or revised [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)"). Likewise, in association with its original February 2015 decision, the agency wrote:

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

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 2 (ECF Page #4327)); *see also id*. at 17-32 (#4342-4357). 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."

On page 9, in regard to EPA's proposed "Withdrawal of EPA's Interpretation and Approval of Maine's Fishing Designated Use as a Sustenance Fishing Designated Use in Waters in Indian Lands," EPA asserts that the basis for its proposed withdrawal is "because the approval was inconsistent with the State's unambiguous fishing designated use and exceeded EPA's CWA authority by recharacterizing that use." EPA asserts that Maine's recent promulgation of the SFDU supports its opinion. Proposed Withdrawal at 9. But this is incorrect. First, L.D. 1775 precludes the SFDU from being construed in that manner—the bill summary specifically provides that "No part of this bill as amended is intended to relate to or affect in any way any claims or disputes regarding any definition of Indian country, territory, lands, waters, reservations or rights of any kind under any other provision of state or federal law. No part of this bill as amended is intended to create or limit any right or protection under any other state or federal law, including the federal Clean Water Act, except as described in this summary, or any state or federal Indian settlement law or act, or create in any way a right to any particular quantity or quality of fish." L.D. 1775 Bill Summary, *Maine v. Wheeler*, Case No. 1:14-cv-00264-JDL, ECF 182-1 (ECF Page # 6213-14).[11] EPA cannot infer legislative intent where the Maine Legislature disavowed that intent.

Second, the Clean Water Act, and indeed EPA's own invitations in the process of promulgating HHC for Maine, encouraged Maine to adopt the SFDU, in which case EPA indicated it would honor that action to come into compliance with the Act. *See*, *e.g.*, 33 U.S.C. § 1313(c)(3), (4)(A) (describing process for state to correct action after disapproval and EPA's obligations when state does not); 81 Fed. Reg. at 92,468 ("Although EPA is finalizing WQS to address the standards that it disapproved or for which it has made a determination, Maine continues to have the option to adopt and submit to EPA new or revised WQS that remedy the issues identified in the disapprovals and determination, consistent with CWA section 303(c) and EPA's implementing regulations at 40 CFR part 131.").

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.

While EPA argues that states are responsible in the first instance for designating uses for waters under the Clean Water Act (Proposed Withdrawal at 9), which is true, 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. EPA's statutory responsibility to act as the backstop against state inaction, which role EPA has fulfilled in Maine in the past, is essential to ensuring sufficiently protective water quality standards under the Act. *See supra* at Section B.1.

EPA's arguments regarding whether it could or must "harmonize" the Settlement Acts and the CWA are in direct opposition to EPA's prior analysis. *See supra* at 18-20. Suffice it to say, EPA clearly has this authority, *see supra* at Section II.B.1, and exercising that well-established authority does not "expand EPA's CWA authority."

[11] The "Declaration of Cory J. Albright in Support of Defendant-Intervenors Houlton Band of Maliseet Indians' and Penobscot Nation's Motion to Stay Order of Remand and Incorporated Memorandum of Law" and the attachments thereto are attached to these comments, along with the referenced Motion/Memorandum of Law, Reply Brief Supporting the Motion, and Transcript of Oral Argument.

EPA's Proposed Withdrawal also fails to contend with the substance and prior analyses of EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. EPA, Office of Water, Washington, D.C. EPA-822-B-00-004, *available at* https://www.epa.gov/sites/production/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf. EPA states in the Proposed Withdrawal that "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." Proposed Withdrawal at 10. Notably, however, in 2015, EPA wrote:

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

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 35 (ECF Page #4360)). Further, it should be noted that the 2000 Methodology is merely guidance for establishing HHC, which does not supersede law, whether that law be the Clean Water Act or basic tenets of federal Indian law. As described above, protecting sustenance fishing in Indian waters is not optional under either body of law. The criteria must protect designated and existing uses in order to be approved, and it is backwards to look to the 2000 Methodology to support a conclusion that a fishing designated use necessarily protects a sustenance fishing designated use.

Beyond failing to explain its proposed divergence from the considered analysis supporting EPA's prior decision to approve a sustenance fishing designated use in Indian waters, EPA fails to explain how the agency can take the actions it proposes to take in light of the fact that EPA already approved a SFDU in Maine on November 6, 2019.[12] For instance, EPA cannot "propose[] to approve Maine's fishing designated use for waters in Indian lands without the sustenance fishing interpretation" when, on the very same day, the agency approved Maine's SFDU for most of those very same waters, including all of the Band's waters. Proposed Withdrawal at 11, 11 n.21. Moreover, having approved Maine's SFDU, EPA cannot now propose the withdrawal of its disapprovals of Maine's previously submitted HHC, which were disapproved *because* they did not protect a sustenance fishing designated use.

III. The Administrative Record Must Contain All Materials Before the Agency with Regard to Maine's Water Quality Standards from the Date of Maine's Original Submissions of Water Quality Standards at Issue in the February 2015 Decision Through The Present

In addition to all comments (and their attachments) submitted in response to the EPA's notice of its Proposed Withdrawal, EPA must consider documents related to this proposed rulemaking that are already before the agency, including all documents related to the Maine water quality standards since the original submissions by Maine. At a minimum, the administrative record before EPA for the Proposed

[12] EPA's Proposed Withdrawal also does not consider important impacts from the proposal, including its effects on children and marginalized communities. Specifically, EPA's Proposed Withdrawal does not discuss whether it satisfies Executive Order 13045 (Protection of Children From Environmental Health and Safety Risks) and Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), despite the fact that the environmental health and safety risks that could result from EPA's proposed action present a disproportionate risk to children, as well as disproportionately high and adverse human health and environmental effects on minority populations, low income populations, and indigenous peoples.

Withdrawal includes, and the Houlton Band incorporates by reference, the following materials: the administrative record for the February 2, 2015 approvals and disapprovals (i.e., the administrative record lodged in *Maine v. Wheeler*, No. 1:14-cv-264 JDL (D. Me.)); all other filings in *Maine v. Wheeler*, including but not limited to all filings since EPA's July 27, 2018 Motion for Voluntary Remand (Docket ECF Entries 139 through 192); the entire administrative record for the Maine Rule; the entire administrative record for EPA's denial of the State of Maine's and industry groups' February 2017 petitions; all documents within EPA associated in any way with the April 27, 2018 Interior Letter discussed above, including but not limited to those documents produced, or to be produced, in response to Penobscot Nation and Houlton Band of Maliseet Indians FOIA requests (FOIA Request #s: EPA-R 1-2018-010414, EPA-R1-2018-010417, and EPA-R1-2018-010428 , EPA-R1-2019-002096, EPA-R1-2019-002099, EPA-R1-2019-002101); all documents associated with EPA's and Maine's attempted settlement of *Maine v. Wheeler* in 2018; and all documents associated with EPA's request for the voluntary remand made in *Maine v. Wheeler* and the entire administrative record for the remand itself. The Houlton Band resubmits some of the comments and attachments it provided in these various processes, but the agency is responsible for compiling the massive record associated with the agency's prior steps and actions related to the Proposed Withdrawal. This is consistent with similar processes, such as EPA's proposed actions with regard to the human health criteria in the State of Washington, as well as other EPA processes. *E.g.*, Dec. 3, 2018 Memorandum to Administrative Record for Mercury and Air Toxics Standards Rule and Supplemental Finding (EPA DOCKET NO. EPA-HQ-OAR- 2009-0234) (incorporating the entire administrative record for its prior actions by reference).

IV. The Houlton Band's Opposition to the Proposed Withdrawal Is Consistent with Its Support for the Sustenance Fishing Designated Use Recognized by L.D. 1775

The Houlton Band has consistently opposed the action on remand that EPA proposes here. When EPA moved in July 2018 for a voluntary remand of its 2015 decisions in *Maine v. Wheeler*, No. 1:14-cv-00264-JDL (D. Me.), the Band opposed the motion. While the court granted EPA's motion, it conditioned the remand on EPA "continuing the Maine rule in effect during the remand period" and not taking "any action that would terminate or undermine the effectiveness of the Maine Rule without prior Court approval." ECF 162 at 5. The court retained continuing jurisdiction over the remand. *Id.* at 7. In early 2019, the State of Maine, the Houlton Band, the Penobscot Nation and other Maine Tribes negotiated a framework for the protection of tribal sustenance fishing under the Clean Water Act—L.D. 1775, An Act to Protect Sustenance Fishing—including recognition of the SFDU, a requirement that a fish consumption rate of 200 grams/day and a cancer risk level of one in a million (1×10^{-6}) be used in calculating the human health criteria intended to protect that designated use, and the identification of specific waters subject to the SFDU. EPA actively supported and advocated for passage of L.D. 1775, including specifically the bill summary discussed above.

If DEP promulgates HHC to protect the SFDU consistent with the requirements of L.D. 1775 and the Clean Water Act, and if EPA approves those HHC (and EPA is optimistic that it would do so), then this new framework and approved revised state WQS would moot and enable the ministerial withdrawal (as EPA has done in other states in analogous circumstances) of the framework disputed in *Maine v. Wheeler*.[13] That is, for the reasons discussed in these comments and in the Band's written and oral

[13] The Tribes accordingly moved for an order staying the court's order of remand, which the court denied on January 16, 2020. ECF 190. The court emphasized, however, that "the water quality standards promulgated by EPA in 2017—which implemented the protection of sustenance fishing rights the Tribes then sought—will remain in effect at least until EPA has completed its notice-and-comment process. In the December 3, 2018 remand order, I required EPA to seek Court approval should it desire to take any action that would terminate or undermine the effectiveness of those standards. That injunction remains in effect and, at the hearing on the Tribes' motion for a stay, all of the

arguments in district court, the Proposed Withdrawal is not the appropriate administrative process for EPA to implement the SFDU and revised state WQS, and to take corresponding action with respect to EPA's relevant prior actions. Given EPA's decision to unilaterally move forward with withdrawal of the 2015 approvals and disapprovals, notwithstanding all parties to *Maine v. Wheeler* publicly stating their intent to resolve the litigation in a manner that will allow them to maintain their long-standing legal positions, the Band must oppose EPA's proposal and explain the ways in which EPA's proposed actions are illegal. 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.

V. Conclusion

To conclude, EPA's Proposed Withdrawal is unlawful, and we urge the agency to abandon this process and not issue a final decision. Withdrawal of EPA's prior approvals and disapprovals would violate EPA's trust obligations to the Band, as well as violate the Clean Water Act, basic tenets of federal Indian law, and the Administrative Procedure Act. Accordingly, 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.* Thank you for the opportunity to comment, and we welcome the opportunity to respond to any questions you might have.

Sincerely,

/s Clarissa Sabattis

Clarissa Sabattis
Chief, Houlton Band of Maliseet Indians

cc:

Commissioner Gerald Reid, Maine Department of Environmental Protection
Scott Boak, Office of the Maine Attorney General
Tim Williamson, EPA Region 1
Mike Knapp, EPA Region 1
Kanji & Katzen, P.L.L.C.
Drummond Woodsum

(Without attachments)

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parties affirmed their understanding that the 2017 water quality standards remain in effect during the pendency of EPA's effort to withdraw its 2015 decisions and, most importantly, until further order of the Court."

HOULTON BAND OF MALISEET INDIANS

Tribal Chief
Brenda Commander
Tribal Council
Crystal Tucker
Mary Tomah
Linda Raymond
John Flewelling
Clarissa Sabattis
Suzanne Desiderio

88 Bell Road
Littleton, ME 04730

Administration
Telephone:
(207) 532-4273
In State:
1-800-564-8524
Out-of-State:
1-800-545-8524
Fax:
(207) 532-2660

June 20, 2016

Gina McCarthy
Administrator, Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code: 1101A
Washington, DC 20460

RE: Comments on Environmental Protection Agency Docket ID No. EPA-HQ-OW-2015-0804 -- Proposal of Certain Federal Water Quality Standards Applicable to Maine

Dear Administrator McCarthy,

The Houlton Band of Maliseet Indians (HBMI) submits these comments in support of the federal Clean Water Act (CWA) water quality standards (WQSs) proposed by the Environmental Protection Agency (EPA) for certain waters within the state of Maine, including those within ancestral Maliseet lands and territories.[1] EPA properly dismissed Maine's proposed standards because they failed to protect tribal sustenance fishing and meet other goals of the Act. Following disapproval, Maine indicated no intention of submitting revised standards to EPA, and EPA is statutorily obligated to promulgate replacement standards in such circumstances. We encourage the agency to finalize the replacement WQSs it has proposed with all deliberate haste so that the standards come into effect and can be enforced as quickly as possible. On balance, we believe these federal replacement standards will protect the Houlton Band's rights and resources at levels commensurate with the CWA's requirements and the federal trust responsibility to Indian tribes.

I. The Houlton Band of Maliseet Indians is a riverine people that relies on sustenance fishing and other water-dependent activities in the Meduxnekeag River and its tributaries for its health, spirituality, and culture.

The Maliseets are riverine people who continue to traditionally fish, trap, hunt, and gather in our ancestral waters. We are the Wolastoqewiyik, or "People of the Beautiful, Flowing River." Our unique

[1] The Houlton Band continues to dispute EPA's February 2015 determination that "MICSA granted the state authority to set WQS in waters in Indian lands." 81 Fed. Reg. 23,239, 23,241 (April 20, 2016) (describing decision). We direct your attention to comments the Houlton Band submitted to EPA Region 1 on September 13, 2013 explaining our position.

tribal culture and traditions are entwined with our environment. A clean environment is essential to support our cultural ways. The "Wolastoq," the river of our name, is now called the St. John, and its watershed is now bisected by an international boundary. We, the Houlton Band of Maliseet Indians, are a federally recognized Indian tribe on the United States side of that border, while many Maliseets live on First Nation Reserves in Canada. Since federal recognition in 1980, our Band has been purchasing trust lands in Aroostook County, Maine, including substantial trust holdings on both banks of the Meduxnekeag River, a tributary of the St. John.[2] We call our Band "Metahksoniqewiyik" or People of the Meduxnekeag River. Meduxnekeag is derived from a Maliseet word that translates loosely as "rocky at its mouth."

The Maliseet are renowned birch bark canoe builders. Our homelands, filled with productive soils that now grow potatoes, once grew the biggest and best canoe birches. With these light, flexible, sturdy craft, we traveled the rivers and streams of the Wolastoq watershed to reach our hunting grounds and portaged to streams and rivers in other watersheds, a tradition that continues today. Our people have camped, fished, and gathered ash for baskets and fiddleheads for food, as well as traditional medicines, along the Meduxnekeag (including those stretches along which the Band now owns property) for generations. Evidence of prehistoric activities at least as old as 8,000 years exists in fields along the Meduxnekeag. The Band has focused on purchasing lands along the Meduxnekeag to ensure that the tribal community can continue these same traditional activities now and into the future.

The link to our ancestors is so strong and the land so important to us that we have fought to rebuild our community and revitalize our culture here despite pushback from the State of Maine and a local municipality. We have re-established our community adjacent to the Meduxnekeag to provide greater access to the best fishing holes and the abundance of brown ash and fiddlehead ferns in the River's floodplains. Harvesting fiddlehead ferns in the spring for food and as a spring tonic continues to be a very important traditional practice.[3] And making beautiful, sturdy woven baskets from brown ash is a strong and vital part of our enduring culture. With these and other traditional practices in mind, the mission of the tribe's Natural Resources Department is to sustain and manage HBMI's natural resources for the continuing benefit of Maliseet human, cultural, and ecosystem health.

In the mid-1980s, when we first began purchasing trust land along the Meduxnekeag, the river was routinely choked with prolific algal blooms, including long filaments of algae during the dry summer season. The river would often turn brown with sediments after a rainfall and was contaminated with high levels of bacteria. Unfortunately, these types of water quality problems continue. *See* Attachment D. As we instituted an environmental program in the 1990s with a strong emphasis on water resources management and water quality, we also learned that fish in the River were contaminated with mercury and DDT. Regarding the Attainment Status for 6 miles of the Meduxnekeag River in Houlton, in 1995, the Maine Department of Environmental Protection noted that the "water quality model indicates that this water body segment may not be meeting the Class B . . . dissolved oxygen standard. The causes of non-attainment are the discharge of municipal wastewater and agricultural activities within the watershed." State of Maine 1994 Water Quality Assessment Appendix. Maine DEP also listed this section as a "priority" in the Table of Water Quality-Limited Rivers and Streams in Maine.

All tribal trust lands bordering the Meduxnekeag fall within this 6-mile stretch and are located

[2] As discussed in greater detail below, these trust lands are a reservation for purposes of federal law.

[3] For instance, please see the September 2015 Skitkomeq Nutacomit Newsletter describing fiddlehead gathering and some of the other water dependent traditional activities Maliseets continue to engage in and pass on to younger generations. Attachment A (series of HBMI newsletters describing some of the contemporary traditional uses of water).

downstream of the vast majority of activities that impact water quality in the watershed. Early on, the tribe's environmental department determined that its water quality problems originate off tribal lands. Currently, we have no facilities that discharge effluent into any water body, and we have no plans for any. However, we are directly impacted by two facilities upstream from Tribal lands, a starch factory and a wastewater treatment plant that discharge effluent into the Meduxnekeag.

A critical Tribal priority, and the Natural Resources Department's mission, is to maintain the natural environment that supports the fish, animals, and plants on our lands and territories in order to preserve and protect our culture and traditions or "common welfare" of the Tribe. Band members want to continue traditional activities such as sustenance fishing, gathering fiddleheads and medicines, and making baskets sustainably and without fear of contamination. Environmental protection for the Maliseet equates to cultural survival. Our language, history, legends, tradition, and culture are deeply rooted in nature. We believe that all of creation is important, nature must be in balance, and that we all suffer when we disturb that balance. Tribal culture and tradition require the Band to manage, protect and enhance the environment so that the web of life will continue to support future generations.

Unlike most of the inhabitants of Maine, the Maliseet are tied to the environment for our very existence. The foods and traditional practices of our ancestors still sustain the community today. It is not simply a matter of economics that hunting, fishing and sustenance gathering of foods is "free," as some people would believe. Our biology is designed to thrive on foods such as fiddleheads (*emerging ostrich fern*), berries, fish, and game, not the refined foods to which society at large has become accustomed. Pollutants and a degraded environment make these foods scarce and/or contaminated, thereby driving some in our community to abandon traditional diets for more processed foods. This has led to an increase in diabetes and other health issues, resulting in shorter life expectancies for the tribal community than the general population. Despite fish consumption advisories established by the State of Maine, other Maliseet families continue to eat large amounts of fish from the river for their daily sustenance and risk exposure to higher levels of environmental contaminants than most of the general population.

In 2000, HBMI conducted a survey of its membership regarding their values of natural resources focusing on future land acquisition; fishing and fishing sites ranked very high. Attachment B (survey report); Attachment C (tables displaying survey results). Many of our members fish to feed themselves and their families, and to share with elders and others who can no longer fish. Our membership fish throughout the fishing season, including ice fishing in the winter. Gathering aquatic plants remains an important cultural tradition, as well. For instance, the tribal government sets aside a day every year for fiddleheading. On this day, staff is encouraged to gather fiddleheads on the nearby riverbanks of the Meduxnekeag to prepare and freeze for the many traditional feasts hosted throughout the year. The River is also essential for certain ceremonial activities, including the water ceremony and sweat lodge. Attachment D (photographs of sweat lodge and water ceremony). Sweat lodges are held to heal and honor the spirit, and they use all the elements and gifts of creation. Willow or birch trees are used to build the frame, cedar is used to cover the floor, river stones are heated in a fire, and water from the river is poured on the hot rocks to generate steam and to carry prayers and offerings to all of creation. Every summer our youth group spends time fishing, canoeing, picking medicines and walking the natural trail, all the time learning about their ties to the natural world to ensure these traditions carry forward. Attachment D (photographs of youth engaged in these activities).

Not only are the Maliseet diet and traditions tied directly to the environment, Maliseet language and spirituality is intrinsically linked to it as well. The gift of water is one of the essential teachings of the Maliseet. Water not only signifies a crucial component of all life, it also honors the spirt. In the Maliseet language, water – *samaqan* is a living entity. Therefore, *Peskotomuhkati Wolasoqewi Latuwewakon*, a Passamaquoddy-Maliseet Dictionary, lists 55 different words for water. Our language has words to describe various states of water: *ososqopekot* - it is muddy water; *cinitomehson* - it is very shallow water;

and *nolomopeq* – the water upriver; and so on. We are a people who have lived in our homeland since the beginning of creation. We believe that all creation, the animals, plants, rocks, and elements have spirits and are our relations. We refer to the land as Mother Earth and refer to the rocks and stones as our ancestors, those who have been here since the dawn of creation. Many of our stories reflect this belief. Our tradition tells us we were created from the brown ash tree. Several years ago, Fred Tomah, tribal elder and basket maker, related a Maliseet tale during an EPA Tribal Training session that describes the adventures of a journeying Indian. We learn at the end the story of the Indian is the dream of a partridge sleeping in a tree. Many tales speak of animals turning into humans and humans turning into animals. Noxious insects come into being when the troublesome shaman Poktcinskwes, upon dying, turns herself into bees, hornets, flies and mosquitos.

The significance of the River in our culture is reflected in the tales of Gluskap, our culture-hero. One Maliseet tale recounts an episode in the life of Gluskap when he frees the waters of the Wolastoq from the dams of beavers who in that long ago time were much larger than they are today. Gluskap also created many of the outcroppings, islands, and stream outlets along the Wolastoq. In another tale, Gluskap helps a band of Indians whose water had become fouled by the serpent Akwulabemu. Gluskap kills Akwulabemu and "straight away the springs and brooks filled with water that was clean and pure." In another Gluskap tale, Wind Bird, Chief Raven's band has not hunted or fished in many days because it so windy they cannot get near any game and do not dare launch a canoe. Gluskap advises Chief Raven to send the Caribou boys up the mountain where the Wind Bird lives to tie his wings. But when they do so no wind blows at all. All the waters become stagnant and too warm for there was no cooling breeze. After consulting with Gluskap, Chief Raven sends the Caribou boys to untie one of the Wind Bird's wings and let him loose. Since then everything has gone well.

We have been fighting to retain, rebuild, and protect our ancestral ways for over 400 years. Unlike other ethnic peoples, we have no other homeland to return to in order to learn about our cultural heritage. We are the last bastions of the unique language, history, traditions, stories, ceremonies, and spiritual beliefs that make up our culture. When contamination and habitat degradation make it impossible to hunt, fish, or gather plants and medicines in accordance with our traditions, we cannot pick up our trust lands and move them away from the sources of pollution. When a natural resource is adversely impacted or damaged by influences beyond the Tribe's control, a vital part of our cultural link is forever broken. Accordingly, preservation and protection of natural resources is preservation and protection of Tribal culture.

When we asked our membership to answer questions about trust lands and natural resources they wanted to purchase and how they want to use them, we also asked them to tell us anything else they wanted at the end of the survey. *See* Attachment B at 77-78. These are some of their responses:

- "Culture and genealogy are very important - my grandfather hiked and trapped here, my great grandma use to gather wood here. I desire that the old ways be embedded in the young generations."
- "I think that land that would sustain life would be the best to purchase."
- "I think if we purchase land we should leave it in its original habitat and state. It would keep all the animals in the area for hunting and fishing."
- "I would love to see pristine nature made available."
- "I think that buying tribal lands is really great. It gives people a chance to explore the wilderness and to get to know themselves."
- "If possible it would be nice to purchase both land to be developed and land to be preserved."
- "I like anything we have. I like nature and animals that god brought to this earth."
- "I believe that our past is just as important; because our people have lost a big part of our past,

we should rebuild our past in order to make an honest future for our children and grandchildren; you see our ways someday will be back. We need to teach our young people now for the future."

- "Remember our Future, the Children."

In view of our membership's needs and goals, for the past 25 years, HBMI has been working diligently on its own and in partnership with others to improve water quality in the Meduxnekeag Watershed. In 1995, HBMI established its water quality monitoring program to assess the health of the Meduxnekeag and the progress being made to address water quality impacts. To model good land management in the watershed, HBMI has implemented numerous best management practices on its trust lands to prevent soil and polluted storm water from entering the Meduxnekeag, including taking highly erodible land out of production, sediment basins, a nutrient and sediment control structure, and extensive riparian buffer plantings. HBMI continues to monitor potential sources of nonpoint pollution from its current landholdings and address issues on new land purchases.

Examples of partnership projects include a demonstration project with a local farmer to keep livestock from entering a small tributary, storm water management implementation with the Town of Houlton, and a large multi-partner project promoting the use of agricultural soil conservation practices. Other activities include joint watershed assessment, planning, data sharing (HBMI monitors ambient water quality with continuous data collectors at approximately 36 sites within the Meduxnekeag River and its tributaries) and clean up (from trash to legacy oil and pesticide contamination). Our goal always is to preserve and protect our people and culture by preserving, protecting and enhancing our limited and precious natural resources on our trust lands forever, including the waters that flow through the heart of our community.

II. EPA's determination that its proposed human health criteria (HHC) must protect the existing sustenance fishing use in Maliseet waters is consistent with the Clean Water Act.

The Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress established a national policy that "the discharge of toxic pollutants in toxic amounts be prohibited" and directed that water quality be sufficient to protect and allow the propagation of fish, shellfish, and wildlife safe for human consumption by July 1, 1983. *See id*. § 1251(a)(2), (3). The Act is designed to ratchet down the level of pollution over time to allow for ever safer use of the water until all existing and designated uses are protected and remain protected. While the date for accomplishing these goals has long since passed, EPA's efforts through this proposed rule help to ensure the Act's polices are finally fulfilled in Indian waters in Maine.

Water quality standards are the foundation of the Clean Water Act's water quality-based control program. They define goals for a water body by designating the uses that water body supports or should support ("designated uses"); set water quality criteria designed to protect those uses and measure progress made ("criteria"); and establish anti-degradation policies, so that existing uses and water quality necessary to support those uses are protected and so that bodies with very high quality water do not become impaired. In order to ensure the purposes of the Clean Water Act are fulfilled, all "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1); Water Quality Standard Handbook § 4.2 ("Section 131.12(a)(l), or 'Tier 1,' protecting 'existing uses,' provides the absolute floor of water quality in all waters of the United States. This paragraph applies a minimum level of protection to all waters.").

Not every existing use needs to be listed individually as a designated use, but all existing uses

must be protected through the designated uses specified.[4] EPA Water Quality Standard Handbook § 4.4.2 ("No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards."). As one court explained,

> The CWA does not impose upon states the obligation to designate any particular use(s) for water bodies. At a minimum, however, states must revise their water quality standards to reflect existing uses, i.e. those uses which are actually being attained. 40 C.F.R. § 131.10(i); 40 C.F.R. § 131(e). Furthermore, fishable/swimmable uses are favored. Section 101(a)(2), 33 U.S.C. § 1251(a)(2).

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 1081 (D. Idaho 2000). Consequently, a water body's designated uses must fully protect existing uses, including fishing, or else be subject to revision. *See*, *e.g.*, 40 C.F.R. § 131.10(a), (i), (j)(1). So, for example, if a water body is used (or was used on or after November 28, 1975) for both sport and sustenance fishing, a designated use of "fishing" would incorporate both existing uses, but the criteria must be set at protective enough levels to protect the more sensitive existing use of sustenance fishing. States "may" adopt sub-categories of use, but the failure to delineate such sub-categories does not mean each sub-category need not be protected. *See id.* § 131.10(c). Moreover, removal of a designated use that is also an existing use is prohibited (even if that existing use has not been made explicit in the statute or regulations) unless a use requiring more stringent criteria is added. *Id.* § 131.10(h)(1).

"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). By this test, there can be no question that sustenance fishing, gathering of water-dependent plants, boating, and water-based ceremonies, among other traditional Maliseet activities, are "existing uses" of the Meduxnekeag River and other Indian waters in Maine that are intrinsically dependent on clean waters.[5] *See supra* Section I.A; Attachment D (showing Maliseet members engaged in fishing, boating, and participating in the water ceremony and sweat lodge, aquatic plant restoration, and other activities); Attachment A (newsletters describing fiddlehead fern gathering, fishing, and other traditional activities). Not only then is water that is clean enough to support these activities necessary to sustain the Maliseets' culture, health, religion, and identity, it is also required in order to protect existing uses of the water under the Clean Water Act without reference to, or reliance upon, any principles of federal Indian law. Accordingly, in order to ensure CWA compliance, any action by EPA to approve or disapprove water quality standards within Maliseet water—or to promulgate replacement standards for those waters, as is the case here—must look to whether the sustenance fishing use is protected by the standards. We therefore whole-heartedly support EPA's proposal of human health criteria "to protect the sustenance fishing use in those waters in Indian lands . . . based on a fish consumption rate that represents an unsuppressed level of fish consumption by the four federally recognized tribes." 81 Fed. Reg. at 23,239.

As indicated in the Federal Register notice announcing the proposed water quality standards, no WQS had previously been approved for Maliseet waters until EPA's series of approvals and disapprovals

[4] "Designated uses" are defined as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). "Existing uses" are defined 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." *Id*. § 131.3(e).

[5] As this proposed rule relates primarily to the human health criteria, we can assume for purposes of these comments that the most sensitive of these uses is sustenance fishing, so this is the existing use to which the remainder of these comments will refer. Other uses may be the most sensitive use to be protected with regard to other criteria.

in 2015. 81 Fed. Reg. at 23,241-42. Still, portions of the Meduxnekeag River outside of Maliseet waters have long had a designated use of "fishing" and criteria for toxics have long needed to protect for "human consumption of fish." Me. Rev. Stat. Ann. tit. 38, §§ 420, 465(3)(A), 467(15)(E); 06-096-584 Me. Code R. § (3)(A)(2), (B) (alternative statewide and site-specific criteria must "be protective of the most sensitive designated and existing uses of the water body, including, but not limited to, . . . human consumption of fish"). EPA's interpretation of "the state's 'fishing' designated use, as applied to waters in Indian lands, to mean 'sustenance fishing'" is not at odds with these provisions of state law. 81 Fed. Reg. at 23,242. However, even if Maine had narrowly defined the "fishing" designated use by statute to include just recreational fishing (which it did not), the more sensitive sustenance fishing *existing* use would still control how protective the criteria must be.[6]

Furthermore, in a case like this where the State has refused to revise WQSs that EPA disapproved, it is hardly novel for EPA to take steps to protect the most sensitive use associated with the "fishable" designated use. As indicated above, Section 303(c)(2) requires water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this Act," and the WQSs must be "established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.11(a)(1) ("For waters with multiple use designations, the criteria shall support the most sensitive use."). EPA has discretion to "translate these broad statutory guidelines and goals into specifics that could be used to evaluate a state's standard." *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980). And 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 other words, 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*. (noting also that this interpretation was not new as, for example, it is intrinsic to the 1992 National Toxics Rule); *see also* 81 Fed. Reg. at 23,240 (citing same); EPA, Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions, at 1 (2013), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf (same) [hereinafter "2013 FCR FAQ"]. In short, EPA's actions to protect the sustenance fishing existing use in Maliseet and other Indian waters in Maine are perfectly consistent with EPA's past interpretation and enforcement of the Act.

What EPA has done here is very similar to what happened in other cases where EPA reviewed and disapproved a state's water quality standards. For instance, in *Mississippi Commission on Natural Resources v. Costle*, 625 F.2d 1269, 1278 (5th Cir. 1980), the Fifth Circuit upheld EPA's disapproval of

[6] After all, "[w]here existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained." 40 C.F.R. § 131.10(i). This could occur, as here, where the State had the opportunity to revise disapproved standards, or else through the triennial review or a determination by EPA that revised standards are necessary to meet the CWA's requirements. These processes are designed to ensure the standards align with current science and the uses of specific water bodies by people and aquatic life, and provides a process through which EPA can ensure that states to which the CWA program has been delegated are meeting these requirements. *See Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980) ("Triennial review of state standards is a means of evolving and upgrading water quality standards. In addition, the Act authorizes EPA to set standards whenever the Administrator determines that a revised standard is necessary to meet the FWPCA's requirements. 33 U.S.C. § 1313(c)(4)(B) (1976). If EPA were bound by its prior approvals, this power would be meaningless.").

Mississippi's dissolved oxygen criterion because it would not protect the most sensitive species of fish, recognizing the agency's obligation to protect for the more sensitive use. EPA looked to state law to determine that Mississippi intended to protect a diversified fish population, some of which required greater dissolved oxygen levels to survive. *Id*. at 1277. While 85% of the fish species might have been protected by Mississippi's proposed criterion, the remaining higher oxygen demanding gamefish would not have been. *Id.* at 1278; s*ee also Browner*, 90 F. Supp. 2d at 1089 ("The 'protection' of fish, shellfish, and recreation necessarily includes ensuring that fish are not so contaminated that they are unhealthful for human consumption. Nonetheless, [Arizona] had failed to include designated uses that would protect such aquatic life for purposes of human consumption, or to perform a UAA demonstrating that this use was not attainable. EPA . . . therefore appropriately concluded that the State's standards were not 'consistent with' the goals of the CWA." (quoting 61 Fed. Reg. 20686, 20688 (May 7, 1996)). The court deferred to EPA's scientific judgment that the more protective replacement standard EPA promulgated was "needed to support a balanced and diverse fish population." *Miss. Comm'n on Natural Res.*, 625 F.2d at 1278.

Parallels can easily be drawn here where EPA recognized that Maine's designated use of "fishing" included a more sensitive type of fishing activity (sustenance fishing) than the average consumer's use, and likewise, determined that Maine's proposed standards, while perhaps sufficient to protect the average recreational fisher, were not protective enough to safeguard the more sensitive fishing activity. As the administrator of, and expert on, the Act, EPA was well within its discretion to translate the goals of the Act in evaluating Maine's human health criteria for protection of sustenance fishing, just as it was in disapproving and promulgating a replacement for Mississippi's dissolved oxygen standard to ensure protection of sensitive fish. In short, EPA's interpretation of "fishing" to mean "sustenance fishing" in Maliseet and other Indian waters is not only consistent with, but commanded by, the Clean Water Act.

III. Consistent with federal Indian Law, the Maliseet's Fishing and Other Traditional Practices Are Entitled to Protection Because the Band's Lands Were Set Aside to Preserve Its Fishing Way of Life.

While the Clean Water Act mandates EPA's protection of sustenance fishing in Maliseet and other Indian waters in Maine and is sufficient basis for EPA's decision, principles of federal Indian law demand the same actions from the agency. EPA is correct that "a key purpose of the settlement acts was to confirm and expand the Tribes' land base, in the form of both reservations and trust lands, so that the Tribes may preserve their culture and sustenance practices, including sustenance fishing." 81 Fed. Reg. at 23,241. As the agency indicates, Congress "intended to ensure the tribes' continuing ability to practice their traditional sustenance lifeways, including fishing, from their trust lands." *Id.* Therefore, in accordance with federal Indian common law and the trust responsibility, EPA "must effectuate the CWA requirement that WQS must protect applicable designated uses and be based on sound science in consideration of the fundamental purpose for which land was set aside for the tribes under the Indian settlement acts in Maine," including the ability to practice traditional sustenance fishing practices. 81 Fed. Reg. at 23,241-42; *see also id.* at 23,245 ("These waters are at the core of the resource base provided for under the settlement acts to support these tribes as sustenance cultures."). In interpreting the various laws, any ambiguities must be construed in favor of the Band and resort to state settlement act provisions, while supportive, is unnecessary justification for EPA's actions.

A. Federal Indian common law requires protection of the sustenance fishing use because Maliseet trust lands were set aside to allow the Band to continue its traditional way of life.

As discussed in detail above, the Maliseets are river people who have fished, hunted, trapped, and gathered natural resources in the "Wolastoq" or St. John watershed for thousands of years and continue to

engage in the traditional activities central to our diet, culture, traditions, spirituality, and health and welfare. EPA is correct that a key purpose of the Maine Indian Claims Settlement Act (MICSA). *See, e.g.,* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."). MICSA and the Maine Implementing Act accordingly provided a homeland for the Houlton Band by setting aside "land or natural resources" in trust for the Band. *See* 25 U.S.C. § 1724(d); 25 U.S.C. § 1724(d), Note, Public Law No. 99-566, § 4(a) (Oct. 27, 1986). Congress explained that these trust resources would substitute, and were in exchange, for the Band's aboriginal lands and natural resources. S. Rep. No. 96-957 at 24 (explaining that "[t]he land . . . is intended to constitute satisfaction of the Band's legal claims" and that Congress seeks "to settle all Indian land claims in Maine fairly"); *see also* 25 U.S.C. §§ 1721 (findings and purpose), 1723 (relinquishing lands and natural resources). The United States Department of the Interior confirmed on January 15, 1993 that Maliseet trust lands acquired under MICSA—located on both banks of the Meduxnekeag River, a tributary of the St. John—are an Indian reservation for purposes of federal law. *See* Attachment E.

As a matter of federal Indian law, the lands and natural resources held in trust by the United States for the benefit of the Houlton Band include water and fishing rights. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe or individual Indians, as it did for the Houlton Band, Congress impliedly reserves water and fishing rights on those lands. *See*, *e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-06 (1968) (holding that lands acquired for a tribe in exchange for the relinquishment of other lands include implied hunting and fishing rights); *Arizona v. California*, 373 U.S. 546, 599 (1963) (finding implied water rights where "water from the River would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"); *Winters v. United States*, 207 U.S. 564, 577 (1908) (holding that tribe impliedly reserved water rights to support beneficial use of its lands). This reservation of federal rights occurs regardless of whether the lands are set aside by treaty, executive order, or statute. *See*, *e.g.*, *United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implied hunting rights as those created by treaty."); *see also* Fishing Rights of the Yurok and Hoopa Valley Tribes, Op. of Solicitor [Solicitor's Opinion], 1993 DEP SO LEXIS 9, at *30 (Oct. 4, 1993). For example, in *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 86-88 (1918), the Supreme Court held that where Congress set aside lands for the landless Metlakahtla Indians, it impliedly reserved fishing rights in adjacent waters. The Indians were historically fishers and hunters, and the lands were chosen to provide them access to the fishing grounds. *Id.* at 88-89. Similarly, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981), the Court held that Congress impliedly reserved water rights to support the tribal fishery on tribal trust lands where "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them." *Id.*, *see also* Solicitor's Opinion at *30 ("[A]t the time the reservations were created, the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others.").

As with those tribes, through MICSA, Congress acquired lands in trust for the benefit of the Houlton Band to provide the landless Maliseet Indians a home where we could preserve our riverine culture and engage in traditional fishing, hunting, and gathering activities. *See* S. Rep. No. 96-957 at 11 (recognizing Houlton Band is "riverine in [its] land-ownership orientation"); *id.* at 24 ("The Houlton Band is impoverished, it is small in number, it has no trust fund to look to, and it is questionable whether the land to be acquired for it will be utilized in an income-producing fashion in the foreseeable future."). As the Department of the Interior expected, the Tribe's reservation is located in eastern Aroostook County on the Meduxnekeag River, adjacent to one of the river's best fishing holes. *See* H.R. Rep. No. 96-1353 (Report of the Department of the Interior, Aug. 25, 1980). Federal law is clear that in reserving these lands Congress concurrently reserved water and fishing rights for the Tribe.

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.
>
> The quality and quantity of water may be directly related. This interrelationship is most evident in the case of a reserved right to water for fisheries preservation. The right reserved is that amount of water necessary to maintain the fishery. The fishery consists not only of the fish themselves, but also of the conditions necessary to their survival. Thus, habitat protection is an integral component of the reserved right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

Cohen's Handbook of Federal Indian Law § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted). Just last year, the Solicitor of the Department of the Interior (DOI) sent a legal opinion detailing case law that supports and substantiates these statements, as well as EPA's duty to protect tribal resources. Attachment F (Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to EPA, at 7-10 (Jan. 30, 2015)). DOI's letter concludes as follows:

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

Id. at 10. EPA was correct to rely on the same cases cited by DOI in concluding "the Tribes' ability to take fish for their sustenance . . . would be rendered meaningless if it were not supported by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance." EPA Region 1, Analysis Supporting EPA's February 2, 2015 Decision to Approve, Disapprove, and Make No Decision on, Various Maine Water Quality Standards, Including Those Applied to Waters of Indian Lands in Maine, at 27-28 (Feb. 2, 2015), *available at* http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060g.pdf; *see also* 80 Fed. Reg. at 55,066 ("[M]any tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes, including treaty-reserved rights to fish at all usual and accustomed fishing grounds and stations . . . . Such rights include not only a right to take those fish, but necessarily include an attendant right to not be exposed to unacceptable health risks by consuming those fish.").

Moreover, EPA has long acknowledged the importance to tribes of clean water sufficient to

support tribal resources and uses, consistent with the case law.

> Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons . . . In short, clean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.

EPA, Memorandum in Support of Motion for Summary Judgment at 16, *Montana v. U.S. Envtl. Protection Agency*, 941 F. Supp. 945 (D. Mont. 1996); *State Program Requirements: Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program*, 68 Fed. Reg. 65,052, 65,056 (Nov. 18, 2003) ("Clearly, the physical setting of the southern tribes in such close proximity to important rivers makes surface water quality important to them and their riverine culture."). EPA has described the special relationship tribes have with the natural environment and the importance to many tribes of leading pollution prevention efforts themselves as follows:

> Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.

Environmental Protection Agency, *EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 2 (July 1991), *available at*: http://www.epa.gov/region4/indian/EPAStTri_relations.pdf [hereinafter *EPA, Federal, Tribal and State Roles*]. 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; EPA, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* at 2, *available at* https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf (acknowledging "implied right to sufficient water quantity or water quality to ensure that fishing is possible" attendant to reserved rights).

EPA's prior statements and Indian policies are important in the context of its promulgation of WQSs for Maliseet waters. The Band's trust lands, amounting to less than one-tenth of one percent of the Maine land base, are an extremely limited resource with which to support an entire people. The Band is very concerned that Maliseet waters be protected at the level necessary to sustain the Band's trust resources, including its subsistence-based riverine culture (including sustenance fishing) and the passing on of that culture to future generations. We appreciate that EPA recognizes these resources are entitled to protection under the fundamental principles of federal Indian law discussed in this section, as well as its promulgation of WQSs intended to protect these uses.

B. The federal trust responsibility requires EPA to safeguard Maliseet sustenance fishing.

EPA's role as trustee carries with it the duty and power to protect the Houlton Band's rights and resources. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). The trust responsibility imposes upon the United States and all its agencies the obligation to follow "the most exacting fiduciary standards" in dealing with the tribes, including in the protection of tribal rights and property. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Parravano v. Babbitt,* 70 F.3d 539, 546 (9th Cir. 1995) (recognizing the United States' trust obligation to protect impliedly reserved fishing rights).

Consistent with this relationship of trust, federal courts require that ambiguities in federal laws regarding tribes must be construed in the tribes' favor. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999); 68 Fed. Reg. at 65,055. 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, the agency recently commemorated the 30th Anniversary of, and reaffirmed, its 1984 Indian Policy, indicating that EPA should use its authority to protect tribal rights and resources when it is within its discretion to do so. *See* EPA Administrator McCarthy, *Memorandum Commemorating the 30th Anniversary of EPA's Indian Policy* at 1 (Dec. 1, 2014), *available at* http://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreaty rightsmemo2014.pdf.

EPA has previously concluded, correctly, that the trust responsibility applies in Maine. 68 Fed. Reg. at 65,067. When delegating EPA's Clean Water Act authority over Passamaquody and Penobscot waters to Maine, the agency stated that "the argument that the trust doctrine finds no application in Maine defies the terms of MICSA." *Id*. "MICSA itself establishes trust resources for which the federal government is responsible and identifies tribal governments with which agencies such as EPA should work on a government-to-government basis consistent with that trust responsibility."[7] *Id.* In short, EPA's role as trustee carries with it the duty and power to protect the Houlton Band's members from the negative effects of water-borne toxics to their health, culture, and subsistence.

A 2000 Solicitor's Opinion written in regard to Maine's initial application for the delegation of National Pollutant Discharge Elimination System (NPDES) authority in Indian waters in Maine confirms this conclusion. The Solicitor wrote, "[E]ven if EPA approves the state's application to administer the NPDES program anywhere within Indian Country in Maine, including the lands of the Houlton Band of Maliseet Indians . . . , EPA must ensure, through its maintained Clean Water Act authorities and its federal trust obligations, that a state-administered NPDES program within those lands fully protects the Tribal lands, waters and other resources." Solicitor's Opinion attached to Letter from Edward B. Cohen, Office of the Solicitor, Dep't of Interior to Gary S. Guzy, Office of General Counsel, Envtl. Protection Agency, at 1 (May 16, 2000) (citations omitted).. The Solicitor explained that this means:

> EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet . . . tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the Maliseets . . . make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets . . . even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

[7] The MICSA provisions cited by EPA as support for its conclusions as to the Passamaquoddy Tribe and Penobscot Nation in 2003 apply with equal force to the Houlton Band of Maliseet Indians. *See* 25 U.S.C. §§ 1721(a)(5), 1722(a), 1724, 1726; *see also* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.").

Id. at 2 (citations omitted); 68 Fed. Reg. at 65,059 ("[T]he Department [of Interior] is the federal government's expert agency on Indian law and is charged with administering MICSA. The Supreme Court has made it clear that an advisory legal opinion such as DOI's May 16, 2000 letter is owed respect to the extent it is persuasive."). These conclusions apply with equal weight to both EPA's review of WQSs Maine proposes for Indian Waters in the state, as well as EPA's promulgation of replacement standards where Maine's WQSs are inadequate to protect tribal uses.

EPA thus must use its authority to protect the broad range of resources of traditional, ceremonial, subsistence, commercial, medicinal, and cultural importance to the Band, including land and natural resources. Specifically, the natural resources important here include the water and water-related resources (fish, aquatic habitat, aquatic vegetation, etc.) in those portions of the Meduxnekeag River and other waters used by tribal members for these purposes. MICSA acknowledges these uses, defining "land or natural resources" broadly to include "any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation . . . water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b). How the Clean Water Act is implemented in Maine, including the WQSs promulgated, directly affects Tribal trust resources, and, in turn, Tribal members' health, fishing opportunity, and ability to pass their culture on from one generation to the next. EPA's proposed WQSs will help ensure that tribal rights and natural resources are protected, and will help ensure the United States fulfills the solemn and perpetual trust obligation owed to the Houlton Band. We encourage EPA to expeditiously finalize the proposed WQSs, so that any uncertainty regarding what WQSs apply within Indian waters in Maine may be resolved and the full benefits of the proposed rule may be realized as swiftly as possible. Moreover, in addition to the anti-degradation requirements of the Clean Water Act, the trust obligation similarly imposes an anti-backsliding mandate upon the agency to protect continuously the quality of Maliseet waters, which are the lifeblood of the Maliseet people and which support the fish, animals, and plants at the core of our diet and culture.

C. The Houlton Band's sustenance fishing is entitled to the same level of protection as that of the "Southern Tribes."

The Houlton Band acknowledges that MICSA and the Maine Implementing Act do not speak to their water and fishing rights in precisely the same manner as the legislation speaks to the rights of the Passamaquoddy Tribe and the Penobscot Nation. However, nothing in that distinction or elsewhere in MICSA demonstrates, or even suggests, the absence of federally-protected water and fishing rights for the Maliseets. First, as discussed above, 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, 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, the relevant provisions in the Maine Implementing Act regarding the Passamaquoddy Tribe and the Penobscot Nation are directed at *the State's regulatory authority* over the tribes' exercise of fishing rights on their reservations, not the existence of those rights altogether. *See* Me. Rev. Stat. tit. 30, § 6207(1), (4); S. Rep. No. 96-957 at 16-17, 37; *see also* Me. Rev. Stat. tit. 30, § 6206(1). Fourth, 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.[8] Accordingly, regardless of whether the State may have some regulatory authority over the Houlton Band's exercise of reserved fishing rights in Maliseet waters, 25 U.S.C. § 1725(a), Me. Rev. Stat. tit. 30, § 6204, those rights exist as a matter of federal law.

While it is certainly within EPA's discretion to look to areas of state law beyond those implementing the delegated CWA program to determine their effect on water quality standards and whether those WQSs meet the purposes of the Clean Water Act, *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 375 (D. Me. 2012) (citing *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599 (11th Cir. 1997)), to the extent EPA has relied on 30 M.R.S. 6207 to explain, in part, its protection of the existing use of sustenance fishing in Indian waters, the Houlton Band disagrees that reference to that or any other provision of state law is necessary justification for EPA's actions. The CWA provisions and principles of federal Indian law described above demand that EPA protect the Maliseet's sustenance fishing practices to the same extent as that of the Penobscot and Passamaquody tribes. This is not contingent on provisions of state law that could be amended in ways that would not comport with the purpose of Congress (which has plenary authority in the realm of Indian law) in reserving lands to allow the Houlton Band to maintain its way of life and avoid assimilation forever. To the extent the EPA sees any ambiguity in MICSA or in the foregoing discussion of the Tribe'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 interpreted to their benefit, *Penobscot Nation*, 164 F.3d at 709. 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*, 70 F.3d at 546; *Connecticut ex rel. Blumenthal v. U.S. Dept. of the Interior*, 228 F.3d 82, 92 (2d Cir. 2000).

In sum, when the Houlton Band and its members use Maliseet waters, including for sustenance fishing in the Meduxnekeag River, they exercise rights created and protected by federal law. These rights define and lie at the heart of the EPA's trust responsibility with respect to the authority to set WQSs in Maliseet waters and with respect to the substance of those water quality standards. EPA has a trust obligation to ensure the protection of Maliseet uses through its promulgation of WQSs to replace Maine's disapproved standards. Consequently, both the Clean Water Act and federal Indian law compel EPA to review Maine's WQSs and promulgate replacement WQSs in the absence of State action that are sufficient to protect tribal sustenance fishing and other uses of water within Indian lands in Maine.

IV. The Houlton Band generally believes the criteria EPA proposed are adequate to protect the subsistence fishing use at this time.

The Clean Water Act requires that water quality criteria protect uses made of the water based on sound scientific rationale. 40 C.F.R. § 131.11(a)(1). The Houlton Band supports EPA's conclusion that Maine's HHC for toxic pollutants did "not adequately protect the health of tribal sustenance fishers in waters in Indian lands, because they are not based on the higher fish consumption rates that reflect the tribe's sustenance fishing practices," as well as its conclusion that the cancer risk level chosen for one HHC "was not adequately protective of the sustenance fishing use." 81 Fed. Reg. at 23,242. The Band also supports EPA's determination that certain WQSs approved in other Maine waters many years ago, no

[8] 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").

longer satisfy CWA requirements.[9] *Id.* Finally, the Band supports the manner in which EPA determined the criteria necessary to protect the tribes' unique use of waters in Indian lands, including employing the updated 2015 Human Health Criteria (HHC) recommendations).

A. The Fish Consumption Rate of 286 g/day is appropriate to protect the sustenance fishing use.

The Houlton Band agrees with EPA's determination that new water quality criteria are necessary to protect the sustenance fishing use because Maine's HHC for toxic pollutants were based on a fish consumption rate that does not reflect the tribes' unsuppressed sustenance fishing level of consumption.[10] 81 Fed. Reg. at 23,242-43. Members of the Houlton Band should be able to exercise their traditional fishing practices in a manner that is not limited by health concerns regarding pollution of waterways and food sources. The Houlton Band has previously provided EPA comments outlining its grave concerns regarding Maine's consideration of tribal fish consumption rates (FCR), or lack thereof, in the standards it submitted.[11] The FCR is extremely important because it is used in the formula to determine how much toxic pollution should be tolerated in water bodies used by the Band. If the rate is set too low (i.e., erroneously assuming people eat very little fish), then more toxic pollution will be allowed. In turn, this can expose people dependent on locally caught fish for subsistence to levels of toxins that make them vulnerable to cancer and other diseases, as well as prohibit compliance with the fishing designated use.

We agree with EPA's determination that the FCR must reflect unsuppressed levels of fish consumption in order to protect for sustenance fishing and ensure the goals of the CWA are advanced. 81 Fed. Reg. at 23,244. As EPA indicates, "[d]eriving HHC using an unsuppressed FCR furthers the restoration goals of the CWA, and ensures protection of human health as pollutant levels decrease, fish habitats are restored, and fish availability increases. . . . [W]here sustenance fishing is a designated use of the waters . . . in EPA's scientific and policy judgment, selecting a FCR that reasonably represents current unsuppressed fish consumption based on the best currently available information is necessary and appropriate to ensure that such sustenance fishing use is protected." *Id.* (citing 2013 FCR FAQ). As

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[9] The Houlton Band generally agrees with EPA's analysis of these Maine WQSs and how it has replaced the disapproved standards. However, it notes that even though these 6 WQS (regarding bacteria, ammonia criteria, statutory exception, mixing zone policy, pH, and tidal temperature) may have been approved long ago for waters outside of Indian waters, EPA must ensure that the WQSs are updated to reflect current CWA requirements in the next triennial review. Not only is this the purpose of the triennial review, but it will also ensure that designated and existing uses in Indian waters that are downstream of waters in which the outdated WQSs still apply will be protected from upstream pollution.

[10] The Houlton Band agrees with EPA that its formal determination that Maine's WQS are not protective of the fishing designated use is not technically necessary as Maine's criteria were never in effect in Indian waters in Maine, but appreciates the prudence of taking this additional step to ensure no unnecessary delay in the promulgation of protective standards.

[11] Maine developed the FCR that EPA disapproved based on a 1992 Chemrisk study, which did not adequately account for Native American cultural practices for several reasons. The study was initiated after fish consumption guidelines were already in place, thus potentially showing depressed fish consumption rates due to toxic exposure concerns. Also, the sample size of 43 Native Americans anglers is too low to make any statistically valid conclusions regarding fish consumption in this population. Finally, because the study targeted anglers with Maine State licenses, it completely missed tribal members who obtain their licenses from tribal governments. The FCR thus failed to recognize or protect the fundamentally important cultural practice of fishing to provide food for family and community, which threatens the health and welfare of our Tribe. The inadequacies of the FCR compound already inadequate WQSs, further harming tribal interests.

indicated above, sustenance fishing is an existing use that must be protected in Maliseet waters. It is also incorporated within the "fishing" designated use, meaning that when considering the level of consumption, EPA should not use consumption rates that may be suppressed as a result of adherence to fish consumption advisories or depressed fish populations. Rather, based on the best science available, it should consider the consumption rates of people if they were not fearful of eating contaminated fish and had access to robust fish populations that would come from a clean and restored environment. After all, the point of the CWA is to ratchet down water pollution so that the designated uses can be achieved, even if they are not being achieved in full at present.[12]

As EPA determined, the best available science regarding unsuppressed rates of sustenance fish consumption for tribes in Maine is the *Wabanaki Traditional Cultural Life-ways Exposure Pathway Scenario*. 81 Fed. REg. at 23,246. The Wabanaki study was funded by EPA through a Direct Implementation Tribal Cooperative Agreement, peer-reviewed, and specifically designed for use in reviewing and developing water quality standards. It provides a numerical representation of the environmental contact, diet, and exposure pathways of people fully using natural resources and pursuing traditional cultural lifeways, as members of the Houlton Band continue to do. Wabanaki Study at 7-10; *see also* 81 Fed. Reg. at 23,246 (quoting purpose of study as "to describe the lifestyle that was universal when resources were in better condition and that some tribal members practice today (and many more that are waiting to resume once restoration goals and protective standards are in place)"). The study breaks down consumption levels based on the estimated range of diets that reflect three traditional lifestyle modes reflective of different habitat types, with the highest FCR being 514 g/day. The Houlton Band concurs with EPA selecting the 286 g/day rate for the Inland Non-Anadromous lifestyle as anadromous fish species' populations in Indian waters in Maine are currently still too low from historic environmental degradation to harvest in significant quantities. Moreover, we agree with EPA's assumption that the inland anadromous and coastal lifestyle tribes "would have shifted a substantial percentage of the sustenance fishing diet from formerly widely available but now less available anadromous species (such as salmon) or protected marine mammals to resident fish species, including introduced freshwater species, corresponding to the FCR for the inland non-anadromous lifestyle." 81 Fed. Reg. at 23,247. That said, the Houlton Band reserves the right to advocate for a higher rate in future triennial reviews or petitions to the EPA for a determination should ongoing conservation and restoration efforts allow salmonid populations to rebound, such that tribal members are able to increase the amount of salmon consumed in their diets.

EPA guidance appropriately requires the agency to look to the best local data available in determining fish consumption rates. EPA, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). However, we would also direct the agency's attention to various fish consumption surveys of similarly situated tribes in the Pacific Northwest, which are comparable to the levels of consumption reflected in the Wabanaki study. For instance, the Squaxin Island Tribe's 95th percentile FCR is 318 g/day while the Suquamish Tribe's 95th percentile is 797 g/day. NWIFC Comments at 28 (citing FCR studies, which HBMI can provide to EPA should the team reviewing these comments not have access to them through the administrative record for EPA's promulgation of replacement standards in Washington State). Note, however, that some of these studies also reflect suppressed rates, and as EPA indicated in its promulgation of replacement standards for Washington

[12] We note that EPA Headquarters and Region 10 have recently interpreted the Clean Water Act and its obligations to various fishing tribes of the Pacific Northwest in essentially the same manner as the agency has done here. We direct Headquarters and Region 1 to the detailed comments that the Northwest Indian Fish Commission ("NWIFC Comments") and other Tribes and Tribal Organizations submitted to EPA Headquarters on December 21, 2015 for further information regarding EPA's obligations to ensure sufficient water quality to protect existing sustenance fishing uses at unsuppressed levels, including a number of important studies attached to those comments. Should the agency need copies of these documents, please let us know and we will get copies to you immediately.

State, "[h]istorical or heritage FCRs could be of relevance to establishing unsuppressed CRs for Washington Tribes. 80 Fed. Reg. 55,066 n.18. To conclude, HGMI agrees with the FCR EPA selected and its rationale for it.

B. The one in a million cancer risk rate conforms to EPA policy, but it is the least protective rate the agency should ever consider for HHC in Maliseet waters.

EPA's decision to use the one in a million cancer risk level conforms to general agency policy for setting water quality standards. *See* 81 Fed. Reg. at 23,247. However, the Houlton Band points out that even this relatively small risk of cancer for tribal members is still a non-zero risk that tribal members take on involuntarily when they attempt to maintain their traditional lifeways. As described in detail above, the Maliseet's trust lands have been reserved to provide the Band a permanent homeland in which it can maintain its traditional practices, including sustenance fishing. Because these lands have been set aside specifically for the use and enjoyment of the Houlton Band, the Band agrees with EPA's conclusion that the tribal population exercising the sustenance fishing uses is the general target population for these waters. Therefore, the 10^{-6} cancer risk rate that EPA would normally employ (and which Maine submitted, except with respect to arsenic) should be employed here; we note, however, that even that level of allowable risk constitutes harm to tribal members. In any event, tribal members engaged in traditional fishing practices on lands specifically reserved for this purpose can hardly be viewed as a high-consuming subpopulation for which a less protective cancer risk rate could be assigned. Tribal members should not be faced with the dilemma of either abandoning their traditional fishing practices or engaging in them with the knowledge that they do so at the increased risk of developing cancer.

C. The Houlton Band is generally supportive of the intent and technical direction of the proposed criteria.

The Maliseets are supportive of the intent and technical direction of EPA's proposed Water Quality Standards. As a culture with strong reverence for the environment and as a sustenance fishing community, we support any measures to protect the aquatic ecosystem into the future, for the next seven generations. The fresh water temperature standards as written will provide greater protections for our cold-water fishery, which is critical in the face of climate change. This is a timely and critical standard. Though the Maliseets are not located on the coast, the additional WQS proposed for tidal temperature, pH, and ammonia criteria will benefit our lifeways, as we historically relied on anadromous fish for sustenance. The importance of providing safeguards to the tidal areas that salmon and other anadromous fish rely on for part of their life cycle is of utmost importance. The Maliseets support EPA's proposal to ban mixing zones for bioaccumulative and for bacteria and believes the proposed restrictions on allowable mixing zones are an improvement over Maine's current policy, although a total ban on mixing zones would be preferable. In general, we laud the efforts and time taken to ensure that the most current science and technical guidance has been used to construct the proposed WQS.

V. The Houlton Band requests clarification regarding certain process points described in the Federal Register notice.

While the Houlton Band is supportive of EPA's general analysis and proposed standards, it does have some concerns regarding process points mentioned in the Federal Register notice. First, the Band believes EPA should complete criteria for arsenic, dioxin, and thallium as soon as possible to address the regulatory gap for these pollutants in Indian waters. Second, the Band encourages EPA to finalize this rulemaking as swiftly as possible, regardless of any State actions. Finally, should the State submit new or revised WQSs in the future, EPA should clarify that any such standards must meet or exceed the federal standards EPA has proposed here in order to secure approval.

A. EPA must act expeditiously to finalize replacement criteria for arsenic, dioxin, and thallium for which the agency has delayed proposed standards.

EPA indicates it is reserving its proposal for criteria for arsenic, thallium, and dioxin for waters in Indian lands until additional scientific assessments can be completed. 81 Fed. Reg. 23,243, 23,245. While the Houlton Band appreciates EPA's desire to make its determinations based on complete, up-to-date science, the agency should not forget there is currently a regulatory void as to these pollutants in Indian waters in Maine since none have previously been approved. Moreover, the statutory deadline for promulgating replacement standards in the CWA is mandatory and has long since passed. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. §131.22(a); *Miccosukee Tribe of Indians v. United States*, 706 F. Supp. 2d 1296, 1302 (S.D. Fla. 2010) ("There is nothing optional about these provisions."); *Browner*, 90 F. Supp. 2d at 1084 (explaining it is "EPA's responsibility to 'promptly prepare and publish' replacement standards in accordance with the CWA" where a state fails to do so after disapproval). Therefore, it is imperative that EPA promulgate these standards as soon as these assessments are completed, or if the agency anticipates a prolonged timeframe for the completion of these analyses, in no event should it postpone development of these criteria beyond October 2016 (even if a draft assessment is still unavailable). Further, to the extent Maine will be interpreting the narrative standards for these pollutants in NPDES permits it issues, EPA should take special care to review those aspects of the decision to ensure permit conditions will not impair the sustenance fishing use.[13]

B. Even if Maine submits new or revised WQSs at this point, EPA should not delay finalization of the federal WQSs in order to review those WQSs.

In the Federal Register notice, EPA encourages Maine to expeditiously adopt protective WQSs that address the changes EPA identified in its disapprovals and the determinations described in the Federal Register notice. 81 Fed. Reg. at 23,242. It indicates that should Maine adopt and submit new or revised WQSs and EPA approve them before finalizing this proposed rule, EPA would not proceed with the final rulemaking with respect to those approved WQSs. The Houlton Band would like the agency to clarify that it will not suspend finalization of the rule should Maine submit new or revised WQSs at what is now the eleventh hour. Since EPA's disapprovals in 2015, Maine has indicated no willingness to fix its disapproved WQSs, and the statutory deadline for EPA to promulgate replacement standards has already passed. EPA should therefore not delay finalizing its own rule in favor of starting an entirely new review process for the State. Quite simply, even if there were not an immediate need to fill the void for WQSs in Indian waters in Maine, the Houlton Band has no confidence that the State of Maine is capable of submitting WQSs that address the deficiencies in the state WQSs due to its historic animosity toward the Tribes and protecting traditional tribal uses, such that suspending the federal process to review state standards would likely be a waste of precious time. Consequently, in the unlikely event that Maine does submit WQSs that purport to address the deficiencies EPA has identified before EPA finalizes this rule, the Houlton Band strongly encourages EPA not to turn its attention to those WQSs or delay finalization of the federal replacement standards. As indicated above, expeditiously finalizing this proposed rule is necessary in order to ensure compliance with the CWA and trust responsibility, and any further review of Maine WQSs can come after the agency finalizes this rule.

C. The agency must ensure that any WQS Maine might submit for Indian waters in the future are at least as protective as those EPA has proposed here.

The Federal Register notice also indicates, "[i]f EPA finalizes this proposed rule, and Maine subsequently adopts and submits new or revised WQS that EPA finds meet CWA requirements, EPA

[13] To be clear, however, Maine has not been delegated authority to implement the NPDES program in HBMI waters to date.

proposes that once EPA approves Maine's WQS, they would become effective for CWA purposes, and EPA's corresponding promulgated WQS would no longer apply. EPA would still undertake a rulemaking to withdraw the federal WQS for those pollutants, but any delay in that process would not delay Maine's approved WQS from becoming the sole applicable WQS for CWA purposes." 81 Fed. Reg. at 23,242. EPA specifically requested comment on this approach. While the Houlton Band does not necessarily disagree with EPA's position that it will consider revised standards submitted by Maine even after the federal replacement standards are finalized, the Band requests clarification of that process. First, EPA should specify that in no event will it approve WQSs for Maliseet waters that are less protective than the standards approved through this process. EPA has determined that this level of protection is necessary in order to ensure the requirement of the Clean Water Act to protect the sustenance fishing use is met. It is also necessary to fulfill the agency's trust responsibility to the Band.[14] Second, contrary to what EPA suggests in the Federal Register notice, the agency must evaluate and finalize its decision with regard to its review of any proposed Maine standards prior to those WQSs coming into effect. We can think of no valid reason for those WQSs to come into force prior to EPA formally withdrawing its own replacement standards; rather, it seems these two components should proceed in the course of a single action subject to public notice and comment, as well as government-to-government consultation between EPA and the Tribes. Further, as it is trust resources at stake, the Houlton Band should be afforded a meaningful role where decision making regarding the WQSs that will apply in its waters and affect its members' sustenance fishing rights is at issue.

EPA has enumerated some of the ways in which sovereigns can structure and achieve that cooperation, ways that would lend themselves to developing and sustaining a cooperative relationship between the Maliseets and Maine in the realm of WQS development. For instance, EPA has suggested:

> [C]ooperation can take many forms, including notification, consultation, sharing of technical information, expertise and personnel, and joint tribal/state programming. While EPA will in all cases be guided by federal Indian law, EPA Indian Policy and its broad responsibility to assure effective protection of human health and the environment, the Agency believes that this framework allows flexibility for a wide variety of cooperative agreements and activities . . . .

Environmental Protection Agency, *EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 3-4 (July 1991). In order to encourage the desired cooperative relationship between Maine and the Houlton Band, EPA should encourage Maine to institute additional procedures, including notifications, state-tribal consultation, and technical information sharing, when State proposals under the delegated Clean Water Act program could affect water quality in Maliseet waters.

VI. Conclusion

The Houlton Band would like to extend its gratitude to EPA for the significant work the agency has done to understand the sustenance fishing and other traditional tribal uses of water in Maine, and for its efforts to take the necessary measures to protect them. We encourage you to expeditiously finalize the rule, so that any uncertainty regarding the standards that apply in Indian waters in Maine may be resolved and so that the Houlton Band might finally enjoy the full benefits of the Clean Water Act. Thank you for the opportunity to comment on the proposed water quality standards.

[14] In the past, Maine has proposed WQSs that were not science-based or designed to fulfill the requirements of the CWA, but rather seemed to be results-driven attempts to ease burdens on industry at the expense of sustenance fishing. The Houlton Band incorporates by reference its 12/17/2013 comments to EPA, Region 1, which describe some examples of such actions by the State.

Sincerely,

Chief Brenda Commander
Houlton Band of Maliseet Indians

cc

Curtis Spalding, Regional Administrator (Region 1)
Timothy Williamson, Deputy Regional Counsel (ORC) – EPA Region 1