United States Environmental Protection Agency

Office of Water
Office of Science and Technology

Response to Public Comments

Proposal of Certain Federal Water Quality Standards for Maine

December 2016

Introduction

The Environmental Protection Agency (EPA) is finalizing federal Clean Water Act (CWA) water quality standards (WQS) for certain waters under the state of Maine's jurisdiction. EPA is finalizing human health criteria (HHC) to protect the sustenance fishing designated use in waters in Indian lands and in waters subject to sustenance fishing rights under the Maine Implementing Act (MIA), based on a fish consumption rate that represents an unsuppressed level of fish consumption by the four federally recognized tribes in Maine. EPA is finalizing six additional WQS for waters in Indian lands in Maine, two WQS for all waters in Maine including waters in Indian lands, and one WQS for waters in Maine outside of Indian lands. These WQS take into account the best available science, including local and regional information, as well as applicable EPA policies, guidance, and legal requirements, to protect human health and aquatic life. EPA is promulgating these WQS to address various disapprovals of Maine's standards that EPA issued in February, March, and June 2015, and to address the Administrator's determination that Maine's HHC are not adequate to protect the designated use of sustenance fishing for certain waters.

In developing this final rule, EPA carefully considered the public comments and feedback received from interested parties. EPA provided a 60-day public comment period after publishing the proposed rule in the Federal Register on April 20, 2016. In addition, EPA held two virtual public hearings on June 7th and 9th, 2016, to discuss the contents of the proposed rule and accept verbal public comments.

Over 100 organizations and individuals submitted comments on a range of issues. Some comments addressed issues beyond the scope of the rulemaking, and thus EPA did not consider them in finalizing this rule.

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

EPA has sorted the comments and its responses into 17 general topic areas. For most of the topic areas, EPA provides a general essay that responds to the greater part of the comments received on that topic. To the extent there are individual comments which are not covered by the general essay, EPA has provided specific responses directly following the excerpt of such comments. For a few of the topic areas EPA only responds to individual comments.

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

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Topic 1 General Statements of Support

The U.S. Environmental Protection Agency (EPA) considered all input received during the public comment period and used it to inform the relevant sections of the final rule. EPA acknowledges and appreciates the support expressed by commenters for the proposed water quality standards (WQS). Comment excerpts in this General Statements of Support topic category did not include specific information, criticism, or suggestions on EPA's proposed rule. With regard to the commenters that indicate that their letters contain specific comments on the proposed rule, see the relevant essays of this comment response document for responses to the substantive comment excerpts.

Hitchings, C. (Excerpt # 76)

Commenter ID: 0306

Name: C. Hitchings

Organization: None

I would further encourage the State of Maine and the EPA to do everything possible, straight forward, to reclaim the water quality of all our waters, inland and marine, for the full benefit and enjoyment of all living things and the sustenance of the Whole Earth who is the Mother of our collective Being.

Thank You for offering these sustenance regulations and the opportunity to comment on them.

Dowzer, M. (Excerpt # 119)

Commenter ID: 0343

Name: Margy Dowzer

Organization: None

I write today to support the proposed regulations concerning water quality and related issues in my home state of Maine. I believe these regulations are necessary to protect the health and safety of human health and aquatic life.

...

Finally, as a recreational swimmer, boater and kayaker, I have an immediate concern about the health of our lakes and rivers. If the fish are too contaminated to thrive or be consumed, I certainly don't want to be in or on that waterway. Our state tourism industry is heavily dependent on the health of our environment.

Please finalize the regulations contained in Docket ID No. EPA-HQ-OW-2015-0804.

Woodman, F. (Excerpt # 86)

Commenter ID: 0311

Name: Faith Woodman

Organization: None

My name is Faith Woodman. I am a resident of Bath, Maine. I strongly support EPA's proposed Federal Quality Standards for the waters of the Penobscot River and other applicable Maine rivers.

...

I am appreciative of the Federal Government and the Environmental Protection Agency's attempt to protect the health of the Wabanaki people and all of the people of Maine.

Anonymous (Excerpt # 27)

Commenter ID: 0267

Name: Anonymous

Organization: None

My family supports the protection of indigenous people's waterways and the water quality standards proposed by the new EPA water quality standards. Thank you.

Natural Resources Council of Maine (Excerpt # 144)

Commenter ID: 0334

Name: Nick Bennett

Organization: Natural Resources Council of Maine

I am writing in support of EPA’s proposed water quality standards for Maine waters on behalf of the Natural Resources Council of Maine (NRCM). NRCM is Maine’s largest environmental advocacy group with over 16,000 members and supporters.

…

EPA is acting in its proper, high-level oversight role by promulgating the proposed standards given DEP’s consistent refusal to recognize that tribal sustenance fishing rights require stricter water quality standards for tribal waters. These proposed standards are long overdue.

Please feel free to contact me with questions.

Jim (no surname) (Excerpt # 30)

Commenter ID: 0270

Name: Jim (no surname provided)

Organization: None

Please go ahead with this proposal !

Mason, G. (Excerpt # 63)

Commenter ID: 0299

Name: George Mason

Organization: None

I strongly support efforts to protect sustenance resources from contaminants by setting federal standards for water quality within the Penobscot River.

Anonymous (Excerpt # 31)

Commenter ID: 0271

Name: Anonymous

Organization: None

I support the new WQS proposed by the EPA for Indian territory in Maine. We need to honor the treaties made with our native Americans and everyone in Maine would benefit from these cleaner waters. With climate change drying our the current "bread basket" of the US, Maine will be looked to to provide much more food for our nation, and we will need clean water to do this.

Anonymous (Excerpt # 82)

Commenter ID: 0309

Name: Anonymous

Organization: None

The proposed change would also better protect the health of all Maine's people, wildlife, and habitat.

Anonymous (Excerpt # 121)

Commenter ID: 0344

Name: Anonymous

Organization: None

I support the EPA's proposal regarding water quality standards. This affects everyone's health and to disregard this seems irresponsible. This proposal is a step in the right direction. I hope this is recognized and the proposal is accepted.

National Tribal Water Council (Excerpt # 134)

Commenter ID: 0336

Name: Ken Norton

Organization: National Tribal Water Council

The National Tribal Water Council (NTWC) supports the U.S. Environmental Protection Agency's (EPA) continued efforts to promulgate water quality standards that are fully protective for certain waters of Indian lands. There are four federally recognized Indian Tribes in the State of Maine that are represented by five governing bodies. The Penobscot Indian Nation, the Houlton Band of Maliseet Indians, the Aroostook Band of Micmacs and the Passamaquoddy Tribe. The Passamaquoddy Tribe has two governing bodies, one on the Pleasant Point Reservation and the other on the Indian Township Reservation.

...

The NTWC believes that EPA approach of the proposed rule for "Proposal of Certain Federal Water Quality Standard Applicable to Maine" is a positive and right action to establish water quality standards (WQS) where the Maine standards were not adequately protective for certain waters of Indian lands. EPA's action is an example of fulfillment of federal trust responsibility to Indian Tribes that could go far in improving relations between federal government and American Indians. This proposed rule is setting a firm course on how the government policies should be administered to fully protect and enhance Tribal people, the land and the self- government of Indian Tribes. NTWC fully supports the proposed rule for the reasons stated above.

Plourde, D. (Excerpt # 84)

Commenter ID: 0310

Name: Diane Plourde

Organization: None

I support this proposal.

...

The EPA's proposal will secure the health of the river by increasing the water quality standards. Corporate misuse of the river has been allowed to go on for too long. Once the river dies, there is no going back. Greed must not prevail. I urge you to pass this EPA proposal.

Diane Plourde

Corea, Maine

Hough, J. (Excerpt # 73)

Commenter ID: 0305

Name: Janet Hough

Organization: None

I fully support the EPA's proposed rules applying human health criteria standards for 96 pollutants to waters in Indian lands, along with the six additional WQS that the EPA is proposing for waters in Indian lands (recreational and shellfishing bacteria criteria to protect human health; tidal temperature, pH, and ammonia criteria to protect aquatic life; a mixing zone policy; and clarification that natural conditions provisions cannot be applied to human health criteria).

…

In addition, I support the two WQS that the EPA is proposing for all waters in Maine including waters in Indian lands: Dissolved oxygen criteria for Class A waters to protect aquatic life; and clarification that the Clean Water Act does not allow the commissioner of the Maine Department of Environmental Protection to waive compliance with WQS in case of oil spills.

I look forward to a future where water quality standards continue to improve throughout the State of Maine.

Janet Hough, Edmunds Township

Bowdell, F. (Excerpt # 42)

Commenter ID: 0280

Name: Fran Bowdell

Organization: None

When the Europeans came to America and more specifically to Maine, I have to assume that the waters of the Penobscot, like other rivers in what was to become the United States of America, were pristine. There was nothing going on then that would have polluted them and made them unsafe to drink from or eat fish from. Now the EPA who is charged with collecting data and overseeing the monitoring of the Penobscot River reports that there are 96 pollutants.

Certainly, it would benefit all Mainers to have a cleaner river. Some of the pollutants include arsenic, lead, chlorinated organics, and chromium to mention a few and then there are the bacteria as well. And this is just a partial list. None of these chemicals are ones that anyone would welcome in our water supplies. The EPA criteria are based on scientific studies that have proven health risks for these pollutants. If we know there are health risks, it is irresponsible not to make the necessary changes to keep the pollutants out of the rivers. Certainly we do not want the trouble in Maine that Flint, Michigan is having with lead pollution.

...

Though the proposed EPA water quality standards cannot address the non-point sources of pollution or the pollutants in the sediment of the Penobscot River, it does address what can be done now and is a beginning toward a responsible approach to cleaner waters in Maine.

Anonymous (Excerpt # 49)

Commenter ID: 0288

Name: Anonymous

Organization: None

I fully support the implementation of improved water quality standards as proposed by the EPA for the protection of Penobscot Nation's sustenance fishing rights and for all Maine waters.

I am a friend and ally to the indigenous people of Maine. Though I am not indigenous myself I have lived in this beautiful state my entire life. I have to tell you that I am mortified and embarrassed by our current administration. I was shocked and saddened to learn that behaviors I thought had been banished to the past are still alive and well, even in my own home state - behaviors detrimental to our indigenous people and our environment. This is unacceptable.

We have before us the opportunity to do something truly good for all the people of Maine, something we can be proud of. We can set an example for the rest of the country. We can take the bold step of requiring that our water quality standards are stringent enough to allow for the safe consumption of unlimited amounts of fish. We can protect sustenance fishing rights. We can ensure that our lakes and rivers are safe to swim in, fish from, and support healthy wildlife. This is good for all of Maine, but it is also a step in the right direction toward improving relations with our indigenous neighbors. This is so very long overdue.

This has always been needed, but never has this been needed more than now. There is wisdom the indigenous people have that is being lost. Our current way of life is not sustainable. A change needs to happen and it needs to happen now. Water is life. If we do not protect it we will rue the day we chose not to.

We live in a wonderful, beautiful state. I have met young people from other states in the country who cannot swim in their local lakes or rivers because they are too polluted. Never should this be allowed to happen! Fish have been a concern for regular consumption since I was young. Despite protections put in place to date this problem has not changed. Fish are an important part of a healthy diet if the fish are themselves healthy. A healthy environment benefits everyone. Allowing any food source to become polluted is not only bad policy it is actually insane.

I have been fortunate in my lifetime to have seen the improvement of the health of many rivers, beaches, and other environs due to the environmental protections put in place in the 1970's. I have

seen the eagles return and wild turkeys become prolific. I have seen salmon runs reestablished only to find that pollution still keeps the water too warm for the salmon to succeed there. Environmental protections work, they make sense, and they are needed more now than ever.

Anonymous (Excerpt # 94)

Commenter ID: 0316

Name: Anonymous

Organization: None

I urge you to implement the EPA's proposed water quality standards for waters in Maine. Clean water is a necessary and fundamental human right. As a Maine resident, I'm glad to see that the EPA is considering strong standards to protect the health of our rivers and the communities that depend on them.

Anonymous (Excerpt # 68)

Commenter ID: 0303

Name: Anonymous

Organization: None

I am grateful that the EPA was created and pray that you prevail in this case.

Ewing, B. (Excerpt # 54)

Commenter ID: 0293

Name: Brenna Ewing

Organization: None

The first imperative of a true conservative is conservation, of air, land, water and living resources. This IS the right and proper course for America, all else is utter nonsense.

Brenna Ewing, Berlin, MA & Deer Isle, ME.

Anonymous (Excerpt # 58)

Commenter ID: 0297

Name: Anonymous

Organization: None

Please implement the proposed water quality standards of the EPA for streams and rivers in Maine.

Counsel for Penobscot Nation (Excerpt # 148)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

The Penobscot Nation (the "Nation"), through counsel, hereby submits these written Public Comments to the United States Environmental Protection Agency (the "EPA") on EPA's Proposal of Certain Federal Water Quality Standards Applicable to Maine, Docket ID No. EPA-HQ-OW-2015-0804, published at 81 Fed. Reg. 23239 (April 20, 2016), pursuant to EPA's authority under the Clean Water Act (CWA). As is explained in more detail below, the Nation supports the implementation of the proposed water quality standards (WQS) for waters in Indian lands for which EPA has previously disapproved Maine's proposed WQS, as well as in the waters in which EPA is now proposing to make a determination of necessity under CWA 303(c)(4)(B).(1)

…

The Penobscot Nation Supports the Proposed WQS for All Waters in Maine

…

These proposed WQS are good for the people of Maine and the health of Maine waters, just as they are good for the people of the Penobscot Nation and the health of its members. These standards are necessary to comply with the CWA and will enable fish to continue to return to these waters. For all of the above reasons, the EPA should take final action to implement these proposed WQS.

Anonymous (Excerpt # 61)

Commenter ID: 0298

Name: Anonymous

Organization: None

Additionally, water quality standards that protect these waters protect all of us.

Anonymous (Excerpt # 36)

Commenter ID: 0276

Name: Anonymous

Organization: None

I am completely supportive of the EPA's Proposal of Certain Federal Water Quality Standards Applicable to Maine!

Anonymous (Excerpt # 15)

Commenter ID: 0258

Name: Anonymous

Organization: None

I fully support your efforts to increase the Human Health Criteria in all waters in Maine, especially in tribal waters and all waters used by tribes for sustenance fishing, to levels above what are recommended by the State of Maine. I believe that increasing these standards to a level that is safe for an "unsuppressed level" of fish consumption makes sense, both because it clearly benefits all of us to have consistently cleaner water and also because it seems to be in accord with the concept of originalism, a theory that states that in order to accurately interpret a document, "one must have an intimate knowledge of what the framers were thinking, feeling, and experiencing at the time that they created it" (Maria L. Girouard, "Original Meaning and Intent of Maine Indian Land Claims" Graduate Thesis, University of Maine, 2001, p.12).

...

Thank you for your work and recent proposal. I hope that is implemented soon. I am sure that it will have a positive effect on the safety of our waters, and hope it will have a broader effect as well.

Strickland, P. R. (Excerpt # 103)

Commenter ID: 0323

Name: Paul R. Strickland

Organization: None

I further support additional proposed water quality standards for waters in Indian lands in Maine and for waters in Maine outside Indian lands.

…

Clean water is an absolute requirement for all life on the planet. Both humans and wildlife depend on clean water for survival and health. Many consider water to be the most life-sustaining gift on Mother Earth. It is the connection between all living things. Water sustains us, flows between us and replenishes us.

Crawford, G. (Excerpt # 98)

Commenter ID: 0320

Name: Gretchen Crawford

Organization: None

Thank you for all your hard work on behalf of Maine, and all who live here and long for clean water and a healthy environment.

Sincerely,

Gretchen Crawford

Anonymous (Excerpt # 100)

Commenter ID: 0322

Name: Anonymous

Organization: None

I am TOTAL support of the EPA proposal for stricter water standards in Maine.

The Penobscot people's need for clean water for their sustenance is only showing what is the NEED of all of us. We can live our lives as if clean water doesn't matter, as if fish dying in the rivers doesn't matter and on and on, the consequences of polluting the waters around us don't matter.

We KNOW too much now, We can't survive, none of us, if we continue the habits of our past.

Thank you for your effort to bring the State of Maine around to the demands of what is needed to right our relationship to what sustains us.

Anonymous (Excerpt # 7)

Commenter ID: 0252

Name: Anonymous

Organization: None

Please adopt the standards. These EPA standards will replace Maine standards that EPA has disapproved because they are not protective of human health or aquatic life.

Houlton Band of Maliseet Indians (Excerpt # 193)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

…

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.

…

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.

Red Cliff Band of Lake Superior Chippewa (Excerpt # 194)

Commenter ID: 0355

Name: Bryan J. Banbridge

Organization: Red Cliff Band of Lake Superior Chippewa

The Red Cliff Band of Lake Superior Chippewa (Red Cliff) is located on the northern tip of the Bayfield Peninsula of Wisconsin. As a band of Lake Superior Chippewa, our rights in the ceded territory extend into Minnesota, Wisconsin, and Michigan and includes portions of Lake Superior, Lake Michigan and Lake Huron.

We support the Environmental Protection Agency's (EPA) the implementation of regulations that 40 CF part 131 require, among other things, that a state's water quality standards (WQS) specify appropriate designated uses of water. 40 CFR 131. l I (a)(I) provide that such criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 CFR l31.1 I (b)(I) requires criteria to reflect site-specific conditions, or other scientifically defensible methods.

…

Thank you for consideration of our comments and concerns. Please have your technical staff contact Amorin Mello, our Environmental Justice Specialist, and Linda Nguyen, our Environmental Director, at (715) 779-3650 to follow up on this matter.

Leaverton, L. (Excerpt # 22)

Commenter ID: 0264

Name: Lisa Leaverton

Organization: None

I support sustenance fishing rights for the Penobscot, and thank you for supporting proposed federal water standards that, according to the EPA are needed, as noted in the Summary of the "Proposal of Certain Federal Water Quality Standards." These standards, applicable to Maine would "address the administrator's determination" (based on measures of consumption of fish and shellfish as determined in the Wabanaki Study, noted in section 4: "Proposed Water Quality Standards") that Maine's disapproved HHC are not adequate to protect the designated use of sustenance fishing for certain waters."

As a Maine resident, I too, want the latest technology available to be used in addressing water standards that affect not only all humans, but fish and other species. For those entities listed in Section 1: "General Information" who must conform, including Industry, Stormwater management and municipalities, I believe these entities should all keep up to date with best practices for water health. Here is our chance to make a difference for the Penobscot and the other federally recognized tribes (as noted in section 2: Maine Indian Settlement Acts" and the state of Maine.

Thank you!

Anonymous (Excerpt # 1)

Commenter ID: 0247

Name: Anonymous

Organization: None

I believe that the proposed water quality standards (WQS) are a better option to protecting waters in Mains tribal lands as well as all other waters in Main. The WQS do nothing more than put stricter regulations on what can be added to the water through different human processes, and support a more sustainable fishery through water quality. The state of Main has shown through their inadequate proposed WQS that they are not specifically concerned with the water quality but more with what they deem to be easier goals to meet with less effort of mitigation. Overall water quality has becoming a greater and growing issue throughout the United States, and any regulations that support better water quality I am also in support of.

Anonymous (Excerpt # 12)

Commenter ID: 0256

Name: Anonymous

Organization: None

We need these water regulations in place immediately! Save or river! Save our Resources! Protect our environment please!!

Anonymous (Excerpt # 18)

Commenter ID: 0260

Name: Anonymous

Organization: None

I am commenting to support the proposed rule.

…

Thank you for taking the time to hear my concerns.

Sincerely,

NPB

Anonymous (Excerpt # 106)

Commenter ID: 0325

Name: Anonymous

Organization: None

There is no question that the waters of Penobscot MUST be kept clean and clear for both human use as well as fish. These attempts to lower standards because of money and commence MUST stop at this time. We can no longer afford to play Russian Roulette with our lives and the lives of the planet.

Anonymous (Excerpt # 19)

Commenter ID: 0261

Name: Anonymous

Organization: None

As a Maine resident, I'm glad to see that the EPA is considering strong standards to protect the health of our rivers and the communities that depend on them. Respecting the sovereignty of native peoples in Maine is good for all residents, as is restoring the health of our rivers. I hope that the EPA will pass these standards and continue to see that they are enforced. I also hope that local communities, especially our indigenous communities are involved in every step of the process, from creating policies to monitoring and enforcing them.

The Wabanaki kept these waters clean and productive for thousands of years. Let's keep it up for thousands more. Thank you!

Anonymous (Excerpt # 2)

Commenter ID: 0248

Name: Anonymous

Organization: None

The Clean Water Act acts protects farming, ranching and many forestry areas in the United States. Though Indian Lands like most covered in this proposed rule are considered sovereign nations and are difficult to govern with in certain realms. The Clean Water Act is applicable to water that is going to be polluted or destroyed. To my understanding if the state if Main does not meet the standards set forth by the EPA they fall under this pollution. They have a standard for water quality but it does not meet the EPA's standard and them for I agree that they are in violation and need to remedy their water quality standards so that they are protecting human health and wellbeing. If the EPA is well within their limits for this proposed rule in that they have issued 3 statement to the state of Main about their water quality and action needs to be taken.

The Clean Water Act does not protect waters that have not been previously covered in the Act. But these waters are and must be protected. Because these changes will benefit not only the state but the residents of the Indian lands and their surroundings this action should be taken. Thought The Clean Water Act does not address land use just potential pollution regulations need to be strict. This is a case-specific analysis that is covered in the Clean Water Act. The EPA has consulted with tribal officials to coordinate with the tribes to improve water quality and help the

indigenous marine and bird life in the areas. While many bureaucracies make it difficult for tribes to manage land interest the tribal leaders seem to have a good standing.

This proposed rule should become a rule so that the waters of Main and the tribal lands of main can improve for the sole purpose of protecting human interest, fishing capabilities, and marine and bird life.

Weiser Mason, S. (Excerpt # 107)

Commenter ID: 0326

Name: Susan Weiser Mason

Organization: None

I support the EPA regulations for improved water quality on the Penobscot River

Susan Weiser Mason

Nobleboro, Maine 04555

Beal, C. (Excerpt # 91)

Commenter ID: 0314

Name: Carole Beal

Organization: None

It is imperative that Maine maintain the highest water quality standards of the Clean Water Act.

Carole Beal, Bar Harbor, Maine

Maine Lobstering Union (Excerpt # 186)

Commenter ID: 0356

Name: Kim Ervin Tucker

Organization: Maine Lobstering Union

Dear Ms. Brundage and Ms. Hisel-McCoy:

I am writing as the legal counsel for the Maine Lobstering Union, Local 207 of the IAMAW District Lodge 4 ("IMLU"), and as a citizen and year round resident of coastal Maine. In both of these capacities, I, and the IMLU's members, continue to strongly support the EPA's efforts, as well as those of the Penobscot Nation, to improve the Water Quality in Maine waters for all Maine People.

Attached is a link to the Opinion Letter that IMLU President Rock Alley submitted to the Portland Press Herald in support of the EPA's and Penobscot Nation's efforts to ensure that there is sustenance fishing quality water in the Penobscot River Watershed:

http://www.pressherald.com/2015/09/27/maine-voices-clean-water-act-is-not-negotiable/

Great Lakes Indian Fish and Wildlife Commission (Excerpt # 147)

Commenter ID: 0337

Name: James E. Zorn

Organization: Great Lakes Indian Fish and Wildlife Commission

With respect to the proposed rule currently being considered, GLIFWC fully supports EPA's authority to develop and impose water quality standards that protect tribal sustenance/subsistence uses where state standards are insufficient.

Anonymous (Excerpt # 79)

Commenter ID: 0307

Name: Anonymous

Organization: None

Passing this proposal will demonstrate Maine's leadership in the larger effort to minimize the destructive impact of human society on the natural world.

Topic 2 Timing and Scope of EPA Action

EPA Summary of Comments and Response:

Some commenters urged EPA to finalize its rule without any further delay. Conversely, the state noted that EPA should give it additional time to adopt and submit its own WQS to address EPA's disapprovals. EPA acknowledges the perspectives of all of these commenters. EPA agrees that there is a compelling need to finalize the WQS, particularly in waters in Indian lands in Maine. For many pollutants, there are no criteria in effect for CWA purposes in waters in Indian lands, including most human health criteria, and it is important to remedy this gap in protection without further delay where possible. Further, the tribes have repeatedly expressed their desire for, and the importance of, their right to a sustenance fishing way of life, reserved for them under the settlement acts, to be protected. EPA, as a federal government agency, is taking action to protect that right, consistent with the settlement acts and CWA, as described further below. EPA also agrees that the CWA is intended to protect the Nation's waters through a system of cooperative federalism, with states having the primary responsibility of establishing protective WQS for waters under their jurisdiction. However, Maine is challenging EPA's disapproval of the HHC for waters in Indian lands in federal court, and it commented adversely on EPA's proposed HHC, pH, bacteria, and tidal temperature criteria for waters in Indian lands. Consequently, EPA has no assurance that Maine will develop WQS that EPA can approve as scientifically defensible and protective of Maine's designated uses.

Having considered these comments, EPA, in keeping with its statutory obligation to promulgate WQS within 90 days after proposing them and the need for these WQS to meet the requirements of the CWA, is finalizing the WQS. 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.

Two commenters requested EPA to expeditiously promulgate HHC for arsenic, thallium, and dioxin for waters in Indian lands, and expressed concern about the absence of applicable HHC for those pollutants until EPA promulgates them. EPA had disapproved Maine's arsenic, thallium, and dioxin HHC for waters in Indian lands, but stated in the proposed rule that it was reserving its proposal for those criteria until additional scientific assessments can be completed. EPA appreciates the importance of promulgating scientifically sound HHC for these toxic pollutants and intends to do so as soon as possible in light of the constraints discussed below. In the meantime, as EPA discussed in the proposed rule (81 FR 23245), NPDES permit limits for these pollutants will need to be based on Maine's existing narrative water quality criteria applicable to the waters in Indian lands, and ensure that designated uses are protected. As always, EPA is available to provide technical assistance to Maine DEP in developing appropriate limits, and to review DEP's draft limits in the course of EPA's permit oversight role.

With regard to arsenic, in November 2015, EPA's Office of Research and Development (ORD) announced its plan to review the toxicological assessment of arsenic with respect to human health effects. EPA's current plan for addressing these scientific uncertainties is described in the Assessment Development Plan for the Integrated Risk Information System (IRIS) Toxicological Review of Inorganic Arsenic (EPA/630/R-14/101 November 2015). EPA intends to reevaluate the existing federal arsenic human health criteria (HHC) for Maine by 2018, with particular consideration of any relevant information released as part of EPA's IRIS assessment.

For both thallium and dioxin, the toxicity values that serve as the basis for the current 304(a) criteria are

no longer supported by the most recent IRIS assessments.[1] Specifically, in 2009 and 2012, respectively, IRIS published reassessments for these pollutants. In the IRIS reassessment for thallium, a reanalysis of the basis for the Reference Dose (RfD) that serves as the basis for the current criteria concluded that there were certain critical limitations that precluded derivation of an RfD for thallium at this time. In the case of dioxin, the IRIS reassessment only included derivation of a noncancer toxicity value and indicated that a separate cancer assessment and uncertainty analysis would be completed in the future. Since that time, IRIS published its 2015 Multi-Year Agenda, indicating that the completion of the dioxin cancer assessment is being deferred as IRIS focuses on other chemical assessment needs that have been identified as higher priorities to EPA program and regional offices. EPA intends to update the 304(a) national recommended human health criteria for these pollutants as sufficient information becomes available to address technical issues. This update will include consideration of the currently available toxicity values for thallium and dioxin.

Specific Comments

Maine Department of Environmental Protection (Excerpt # 183)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

On April 20, 2016, EPA published proposed water quality standards ("WQS") for the State of Maine. 81 Fed. Reg. 23239 (April 20, 2016). These comments are submitted in response to those proposed standards. Overall, EPA's proposed WQS, especially to the extent that they are unique to unspecified tribal waters in the proposed Maine rule, are unnecessary and should be withdrawn. Maine presently maintains highly protective WQS statewide, which were approved by EPA over the past approximately thirty years. The following comments highlight the adverse impact EPA' s proposed rule will have on the regulatory environment in Maine and the licensing process managed by the Maine Department of Environmental Protection ("Department"), as well as the lack of benefit to Maine's environment and to the protection of human health that would result from EPA's proposed new WQS.

… Timing

In the Department's view, EPA's haste to promulgate these standards is unwise given the degree of impact expected. The need for additional time is evident for all parties, including EPA, to adequately address the process. Impacted parties and other commenters have expressed interest in extending the deadline for comments so that the impact of the proposed standards can be more carefully considered. …

EPA developed and has now proposed WQS for Maine, citing their obligation under the CWA to do so if the State has not made sufficient progress towards rectifying the disapproved standards. EPA has been informed numerous times that there are several WQS that will require changes in statute. EPA has been informed numerous times that the next legislature will not convene until January 2017, therefore legislative changes will have to be tabled until that time.

[1] For thallium, see http://cfpub.epa.gov/ncea/iris/index.cfm?fuseaction=iris.showQuickView&substance_nmbr=1012. For dioxin, see http://cfpub.epa.gov/ncea/iris/index.cfm?fuseaction=iris.showQuickView&substance_nmbr=1024.

…

EPA has already failed to provide the public with any opportunity to comment on other critical aspects of its novel new approach to WQS in Maine - most notably with respect to EPA's creation of its new designated use of "sustenance fishing" and its new requirement that "unsuppressed" tribal FCRs be used to develop criteria to protect tribal rights. EPA should not further compound the problem by restricting the duration of the public comment period and rushing the process with respect to this proposed Maine rule.

Conclusion

In summation, the Department maintains that the WQS approved by EPA over the past thirty years are still valid and in force, and are fully protective of all existing, Maine promulgated uses. These comments are provided to demonstrate the potential added for unnecessary complexity in permitting and compliance activities should these proposed standards be promulgated. For these reasons, EPA should withdraw these rules.

Houlton Band of Maliseet Indians (Excerpt # 202)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

…

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.

…

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

Counsel for Penobscot Nation (Excerpt # 149)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

…

The Nation further encourages EPA to expediently propose and promulgate human health criteria (HHC) for those pollutants that are not included in these current proposed WQS, including

especially standards for arsenic, thallium and dioxin, as EPA is already outside its statutorily mandated ninety-day deadline to do so.

...

CWA 303(c)(4)(B) Determination of Necessity

Assuming EPA makes this clarification requested in Section II of these comments, the Nation encourages EPA to take final action on its determination of necessity under CWA 303(c)(4)(B) for the described waters.

…

Criteria for Which EPA is Reserving Action.

EPA acknowledges that it "disapproved Maine's criteria for arsenic, dioxin, and thallium for waters in Indian Lands," which would include the main stem sustenance fishery reservation of the Penobscot Nation. EPA is therefore statutorily required to propose and adopt standards for those pollutants, and EPA is already delinquent in its ninety day deadline to do so. 33 U.S.C. § 1313(c)(4); 40 CFR 131.5. The Nation therefore encourages EPA to expeditiously take action on proposing and adopting such standards. EPA's rationale for delay is that for thallium, EPA's IRIS database does not currently contain a quantitative Reference Dose (RfD) assessment, for dioxin IRIS does not contain a quantitative carcinogenicity assessment, and for arsenic there is substantial uncertainty around its toxicological assessment.

The Nation and the Nation's sustenance fishery have suffered greatly as the result of non-Indian pollution discharged into the waters of this fishery. Indeed, such activities – in particular, those of a kraft paper mill – have had harmful impacts in the Main Stem of the Penobscot, including dioxin contamination of water resources. In the 1990s, the United States, as trustee for the Penobscot Nation, commenced a natural resources damages assessment of the Main Stem and filed a proof of claim against the dioxin discharger, Lincoln Pulp & Paper Company. *(6)* The State of Maine continues to issue health warnings regarding the consumption of fish taken from the Main Stem due to water contamination by non-Indian waste discharges into the River.

Given this history, WQS for these pollutants are very important to the Nation. The Nation recognizes that, absent specific numeric criteria, the narrative criteria informed by the latest science and policy will be applicable to these waters for CWA purposes. The Nation's position is that application of the latest science and policy means that any discharge permit for these pollutants must be as least as restrictive as the Nation's tribal water quality standards, which do contain specific numeric criteria for these pollutants.

(6) This history is laid out in more detail in the Nation's statement of counsel in its TAS application and Exhibit 3 thereto submitted to EPA on September 26, 2014. The Nation will not restate that history or resubmit those documents here, but incorporates them by reference in these comments, as background for why EPA should expeditiously take action on these other pollutants, including dioxin.

ACLU Maine (Excerpt # 127)

Commenter ID: 0318

Name: Oamshri Amarsingham, Zachary L. Heiden, Alison Beyea

Organization: ACLU Maine

Under the CWA, WQS must include human health criteria (HHC), wherein human health is the touchstone of any agency tasked with promulgating the WQS. Fish and water dwelling animals are the primary route of human exposure to a host of toxic chemicals that are harmful to human health, including those chemicals subject to this rulemaking, as well as those chemicals-- arsenic, thallium and dioxin-- subject to the previous disapprovals that are not proposed to be addressed in this rule-making (but for which EPA is still statutorily required to propose and promulgate standards). Pursuant to EPA guidance, health-based water quality standards are set to ensure that humans can safely consume fish and other organisms, without also being exposed to contaminants in harmful amounts. The toxicity of each contaminant is considered together with human characteristics and practices that expose people to the contaminant in their environment: how much of the toxin will accumulate in the tissue of fish or other animals to be consumed; how much fish and water dwelling animals will people eat, over how long a period, and how much of each contaminant will the population be exposed to over time. This analysis must take into account the particular effect on each population of Native American members within Maine's borders and be sufficiently protective of the human health of each of those populations.

National Tribal Water Council (Excerpt # 137)

Commenter ID: 0336

Name: Ken Norton

Organization: National Tribal Water Council

Fish and water dwelling animals are the primary route of human exposure to a host of toxic chemicals harmful to human health. This rulemaking includes chemicals which are subject to this, as well as those chemicals subject to the previous disapprovals that are not proposed to be addressed in this rule-making (but for which EPA is still statutorily required to propose and promulgate standards). Pursuant to EPA guidance, health-based water quality standards are set to ensure that humans can safely consume fish and other organisms, without also being exposed to contaminants in harmful amounts.

Topic 3 Indian Settlement Acts, Sustenance Fishing Use, Target Population, Fish Consumption Rate, Administrator's Determination

EPA Summary of Comments and Response:

EPA received dozens of comments in support of EPA's analysis and determinations regarding EPA's interpretation of the Indian settlement acts, the designated use of sustenance fishing and EPA's interpretation of Maine's "fishing" use to encompass sustenance fishing as applied to waters in Indian lands, identification of tribes as the target population for such use, the use of 286 grams per day as the fish consumption rate, and other various technical components that factored into this analysis. EPA also received several comments critical of these decisions. The following provides a general response to these adverse comments.

Before providing a more detailed discussion of the arguments relating to each element of EPA's analysis in this case, the Agency addresses a general observation made by several commenters that EPA has developed a complex rationale for its disapproval of Maine's HHC. It appears this comment is meant to suggest that the alleged complexity of EPA's rationale renders it suspect or unreliable.

EPA acknowledges that there are several steps in the Agency's analysis of how Maine's WQS must protect the uses in the waters in Indian lands, including application of the Agency's expert scientific and policy judgment. The basic concepts are as follows:

- The Indian settlement acts[2] provide for the Indian tribes to fish for their individual sustenance in waters in Indian lands and effectively establish a sustenance fishing designated use cognizable under the CWA for such waters.

- The CWA and EPA's regulations mandate that water quality criteria must protect designated uses of waters provided for in state law. Designated uses are use goals of a water, whether or not they are being attained.

- When analyzing how water quality criteria protect a designated use, an agency must focus

[2] There are four federally recognized Indian tribes in Maine represented by five governing bodies: the Penobscot Nation, the Passamaquoddy Tribe at Pleasant Point and at Indian Township; the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. To simplify the discussion, EPA will refer to the Penobscot Nation and the Passamaquoddy Tribe together as the "Southern Tribes" and the Houlton Band of Maliseet Indians and Aroostook Band of Micmacs as the "Northern Tribes." EPA acknowledges that these are collective appellations the tribes themselves have not adopted, and the Agency uses them solely to simplify this discussion.

In 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA) that resolved litigation in which the Southern Tribes asserted land claims to a large portion of the state of Maine. Pub. L. No. 96-420, 94 Stat. 1785. MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA, 30 M.R.S. 6201, *et seq*.), which was designed to embody the agreement reached between the state and the Southern Tribes. In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA. Pub. L. No. 96-420, 94 Stat. 1785 section 5(d)(1); 30 M.R.S. 6205-A. In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs. 30 M.R.S. 7201, *et seq*. In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. Act of Nov. 26, 1991, Pub. L. 102-171, 105 Stat. 1143.

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

on the target population that is exercising that use, and must assess the full extent of that use's goal, where data are available.

The relevant explanatory details for each step of this rationale are presented below. But the underlying structure of the analysis is straightforward, and is appropriate under and consistent with applicable law.

Another general comment EPA received was that the agency's approach "would impermissibly give tribes in Maine an enhanced status and greater rights with respect to water quality than the rest of Maine's population."[3] EPA explains below why the analysis EPA presented in its February 2015 decision and the proposal for this action is not only permissible, but also mandated by the CWA as informed by the Indian settlement acts. But as a general matter EPA disagrees that this action is impermissible because it accords the tribes in Maine "greater rights" or somehow derogates the water quality protection provided to the rest of Maine's population.

EPA is addressing the particular sustenance fishing use provided for these tribes under Maine law and ratified by Congress. Because that use is confirmed in provisions in the settlement acts that pertain specifically and uniquely to the Indian tribes in Maine, EPA's analysis of the use and the protection of that use must necessarily focus on how the settlement acts intend for the tribes to be able to use the waters at issue here. However, Maine's claim that EPA is providing tribes in Maine "greater rights" than the general population is incorrect. In this action, EPA is not granting "rights" to anyone. Rather, EPA is simply promulgating WQS in accordance with the requirements of the CWA – *i.e.*, identifying the designated use for waters in Indian lands, and establishing criteria to protect the target population exercising that use. As explained in Topic 3.2 – 3.5 below, in light of the Indian settlement acts, the designated use is sustenance fishing, the tribes are the target population, and EPA has selected the appropriate FCR of that target population. This approach, together with EPA's selection of 10^{-6} CRL, is consistent with Maine's approach to protecting the target population in Maine waters outside of Indian lands. EPA's rule provides a comparable level of protection for the target population (sustenance fishers) for the waters in Indian lands that Maine provides to the target population for its fishing designated use (recreational fishers) that applies to waters outside Indian lands.[4] Further, the resulting HHC that EPA is promulgating today protect both non-tribal members and tribal members in Maine. The great majority of the waters subject to the HHC are rivers and streams that are shared in common with non-Indians in the state or that flow into or out of waters outside Indian lands. It is not just the members of the Indian tribes in Maine who will benefit from EPA's action today.

One striking aspect of the comments EPA received on its proposal is that every individual who commented supported EPA's proposed action, including many non-Indians. Nearly all of the comments were individualized expressions of support, ranging from a profound recognition of the need to honor commitments made to the tribes in the Indian settlement acts to an acknowledgement that everyone in Maine benefits from improved water quality. It is notable that the record for this action shows that individuals in Maine who commented did not express concern that the tribes are being accorded a special status or that this action will in any way disadvantage the rest of Maine's population.

1. Indian Settlement Act Issues

[3] Excerpt 182, Comments of Janet T. Mills, Maine Attorney General, at 2.

[4] EPA recognizes that the final HHC also reflect inputs consistent with EPA's 2015 section 304(a) recommendations, which are not currently reflected in Maine's HHC. EPA anticipates that Maine will update its HHC consistent with these inputs in its next triennial review.

Several commenters challenged EPA's conclusion that the Indian settlement acts in Maine have the effect of establishing a designated use that includes sustenance fishing. This section explains how the Indian settlement acts provide for the Indian tribes in Maine to fish for their sustenance, and responds to arguments that this conclusion violates the settlement acts. In Topic 3.2 below, EPA explains how, under the CWA, it interprets those provisions of state law as a sustenance fishing designated use which must be protected by the WQS applicable to the waters where that use applies.

In its February 2015 decision, EPA analyzed how the settlement acts include extensive provisions to confirm and expand the tribes' land base. The legislative record makes it clear that a key purpose behind that land base is to preserve the tribes' culture and support their sustenance practices. MICSA section 5 establishes a trust fund to allow the Southern Tribes and the Maliseets to acquire land to be put into trust. In addition, the Southern Tribes' reservations are confirmed as part of their land base.[5] MICSA combines with MIA sections 6205 and 6205-A to establish a framework for taking land into trust for those three Tribes, and laying out clear ground rules governing any future alienation of that land and the Southern Tribes' reservations. Sections 4(a) and 5 of the ABMSA and section 7204 of the state MSA accomplish essentially the same result for the Micmacs, consistent with the purpose of those statutes to put that tribe in the same position as the Maliseets.

EPA has concluded that one of the overarching purposes of the establishment of this land base for the tribes in Maine was to ensure their continued opportunity to engage in their unique cultural practices to maintain their existence as a traditional culture. An important part of the tribes' traditional culture is their sustenance lifeways. The legislative history for MICSA makes it clear that one critical purpose for assembling the land base for the tribes in Maine was to preserve their culture. The Historical Background in the Senate Report for MICSA opens with the observation that "All three Tribes [Penobscot, Passamaquoddy and Maliseet] are riverine in their land-ownership orientation."[6] Congress also specifically noted that one purpose of MICSA was to avoid acculturation of the tribes in Maine:

> Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.[7]

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

As explained in more detail below, MICSA, MIA, ABMSA, and MSA include different provisions governing sustenance practices, including fishing, depending on the type of Indian lands involved. But each of these provisions under the settlement acts in its own way is designed to establish a land base for these tribes where they may practice their sustenance lifeways. Indeed, EPA received an opinion from the Solicitor of the United States Department of the Interior (DOI) that analyzed the settlement acts and concluded that that the tribes in Maine "have fishing rights connected to the lands set aside for them under

[5] 30 M.R.S. section 6205(1)(A) and (2)(A).
[6] Sen. Rep. No. 96-957, at 11.
[7] *Id*. at 17.

federal and state statutes."[8]

Several comments dispute that the settlement acts are intended to provide for the tribes' sustenance lifeways, and assert instead that their key purpose was to subject the tribes to the jurisdictional authority of the state and treat tribal members identically to all citizens in the state. These comments do not dispute the evidence EPA relied on in February 2015 to find that Congress intended to support the continuation of the tribes' traditional culture. Rather, the commenters argue that the overriding purpose of the settlement acts was to impose state law, including state environmental law, on the tribes, which the commenters believe the state could do without regard to the settlement act provisions for sustenance fishing. These assertions reflect an overly narrow interpretation of the settlement acts, and EPA, with a supporting opinion from DOI, has concluded that the settlement acts both provide for the tribes' sustenance lifeways and subject the tribal lands to state environmental regulation. Those two purposes are not inconsistent, but rather support each other. It would be inconsistent for the state to codify provisions for tribal sustenance fishing in one state law, which was congressionally ratified, and then in another state law subject that practice to environmental conditions that render it unsafe.

EPA disagrees with the comment that promulgation of the HHC violates the jurisdictional arrangement in MICSA and MIA. The assertion appears to be that the grant of jurisdiction to the state in the territories of the Indian tribes in Maine means that the tribes must always be subject to the same environmental standards as any other person in Maine. As EPA made clear in its February 2015 decision, the Agency agrees that MICSA grants the state the authority to set WQS in Indian territories. Making that finding, however, does not then lead to the conclusion that the state has unbounded authority to set WQS without regard to the factual circumstances and legal framework that apply to the tribes under both the CWA and the Indian settlement acts. No state has authority or jurisdiction to adopt WQS that do not comply with the requirements of the CWA. And the state, like EPA and the tribes, is bound to honor the provisions of the Indian settlement acts. Here, the CWA, as informed by and applied in light of the requirements of the settlement acts, requires that WQS addressing fish consumption in these waters adequately protect the sustenance fishing use applicable to the waters. Because this use applies only to particular waters that pertain to the tribes, the WQS designed to protect the use will necessarily differ from WQS applicable to other waters generally in the state. This result does not violate the grant of jurisdiction to the state. Rather, the state retains the authority to administer the WQS program throughout the state, subject to the same basic requirements to protect designated uses of the waters as are applicable to all states.

EPA also disagrees that promulgation of the HHC violates the so-called savings clauses in MICSA, Pub. L. No. 96-420, 94 Stat. 1785 sections 6(h) and 16(b), which block the application of federal law in Maine to the extent that law "accords or relates to a special status or right of or to any Indian" or is "for the benefit of Indians" and "would affect or preempt" the application of state law. EPA has consistently been clear that this action does not treat tribes in Maine in a similar manner as a state (TAS) or in any way authorize any tribe in Maine to implement tribal WQS under the federal CWA. Therefore, arguments about whether MICSA blocks the tribes from applying to EPA for TAS under CWA section 518(e) are outside the scope of, and entirely irrelevant to, EPA's promulgation of federal WQS.

Additionally, EPA disagrees that its disapproval of certain WQS in tribal waters and this promulgation will "affect or preempt the application of the laws of the State of Maine" using a federal law that accords a special status to Indians within the meaning of MICSA section 6(h) or a federal law "for the benefit of Indians" within the meaning of section 16(b). With this promulgation, EPA is developing WQS consistent with the requirements of the CWA as applied to the legal framework and factual circumstances created by the Indian settlement acts. EPA here is acting under CWA section 303, which was not adopted "for the

[8] Letter from Hilary C. Tompkins, Solicitor, Department of Interior, to Avi S. Garbow, General Counsel, EPA, January 30, 2015, at 11, a copy of which is in the docket supporting this action.

benefit of Indians," but rather sets up a system of cooperative federalism typical of federal environmental statutes, where states are given the lead in establishing environmental requirements for areas under their jurisdiction, but within bounds defined by the CWA and subject to federal oversight. In this case, the Indian settlement acts provide for the tribes to fish for their sustenance in waters in or adjacent to territories set aside for them, which has the effect of establishing a sustenance fishing use in those waters. Because that sustenance fishing use applies in those waters, CWA section 303 requires Maine and EPA to ensure that use is protected. It cannot be the case that the savings clauses in MICSA are intended to block implementation of the Indian settlement acts or MICSA itself.

a. Southern Tribes

i. Inland Reservations

One principal confirmation that sustenance practices are central to tribal culture is MICSA's ratification of MIA's reservation of the Southern Tribes' right to take fish for their individual sustenance:

> SUSTENANCE FISHING WITHIN THE INDIAN RESERVATIONS. Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.[9]

Under this section, "fish" is defined as "a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water."[10]

The only limitation on the Southern Tribes' right to take fish for their individual sustenance on their reservations is the state's ability to limit the take based on a finding that the tribes' fishing practices are threatening stocks outside the tribes' reservations in a process in which the state carries the burden of proof.[11] To date the state has made no such determination. So a plain language reading of this provision entitles the Southern Tribes to take as much fish as they deem necessary to sustain individual members.

The legislative history for MIA makes it clear that the Maine legislature intended to continue and ratify the state's practice of not regulating the Southern Tribes' sustenance fishing practices.[12] The special issues section of the Senate Report on MICSA confirms that the intent of this provision is to shield the Southern Tribes' right to take fish from the prospect that the state might someday interfere with it. By responding to a rhetorical assertion of a hypothetical concerned citizen (in italics below), the report confirms that the Southern Tribes have a right to take fish that is subject to state regulation only under very limited circumstances:

> *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.* – Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the

[9] 30 M.R.S. § 6207(4).
[10] 30 M.R.S. § 6207(9).
[11] 30 M.R.S. § 6207(6).
[12] *See* transcript of the public hearing held on March 28, 1980 by the Maine Legislature's Joint Select Committee on the Maine Indian Claims Settlement at 55-56.

> Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S. 2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial [evidence] that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal lands.[13]

In EPA's February 2015 decision, the Agency observed that the U.S. Department of the Interior ("DOI") had concluded that this statutorily reserved fishing right is rooted in treaty guarantees that were upheld through the settlement acts. Several commenters disputed this assertion, and argued that MICSA abrogated any claim that tribes in Maine have to aboriginal fishing rights in the state. EPA is not here addressing the basis for the settlement act provisions. EPA's action is based upon a determination that the settlement acts, by their own terms, provide for tribal sustenance fishing and therefore establish that use that must be addressed under the CWA. The aboriginal or reserved nature of the Southern Tribes' fishing rights was noted in DOI's letter as a way of understanding the statutory language, but the statutory provisions themselves are the basis for EPA's actions.

Several commenters argued that the Southern Tribes are subject to state environmental law regulating surface water quality, and therefore setting different WQS for tribal waters violates the jurisdictional formula of the Indian settlement acts. Again, EPA agrees that the state has the authority to set WQS in tribal waters that comply with the CWA. So there is no dispute over the state's jurisdiction over waters in the Southern Tribes' territories. The dispute is over how the state exercises that jurisdiction and how it must account for the basic requirements of the CWA as applied in light of the provisions of the Indian settlement acts.

ii. Southern Tribes' Trust Lands

As to the Southern Tribes' trust lands, both MICSA and MIA are clear that the land acquisition fund for the benefit of the Passamaquoddy and Penobscot Tribes was established to ensure these tribes not only had a land base to occupy, but also access to natural resources to sustain their continued existence as a unique culture, including their ability to exercise their fishing rights. "The Secretary is authorized and directed to expend . . . the land acquisition fund for the purpose of acquiring land or *natural resources* for the Passamaquoddy Tribe, [and] the Penobscot Nation . . . and for no other purpose." [14] "Land or natural resources" are defined to include "water and water rights, and hunting and fishing rights."[15]

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

> Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy

[13] Sen. Rep. No. 96-957, pp. 16-17
[14] 25 U.S.C. § 1724(b) (emphasis added).
[15] 25 U.S.C. § 1722(b).

> Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, *but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well*.[16]

The legislative history of MIA is also clear that the Maine Legislature understood that MIA was designed to accommodate sustenance fishing practices in the Southern Tribes' trust lands.[17] In creating the authority to take land into trust for the Southern Tribes, Congress understood that MIA provided for the tribes to engage in sustenance fishing in those trust lands and intended the trust lands to provide an additional base for the tribes to engage in sustenance practices.

As recognized by Congress in MICSA's legislative history, the Southern Tribes' control of fishing in certain trust waters was specifically codified in MIA. Section 6207(1) provides that the Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands. As with the Southern Tribes' fishing right in their reservations, this authority is subject only to the state's authority to limit the take after carrying the burden of proof that the tribes are depleting fish stocks. MIA specifically anticipates that any tribal ordinances regulating fishing in these waters "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation."[18]

As to great ponds and rivers and streams in or along the Southern Tribes' trust lands, MIA codifies the requirement that fishing regulations recognize that the tribes would be engaged in sustenance fishing in those waters. MIA creates the Maine Indian Tribal-State Commission (defined as the "commission" 30 M.R.S. § 6203(1)), made up of representatives appointed by the state and the Southern Tribes.[19] MIA provides that commission the exclusive authority to promulgate fishing rules in these waters. When it does so "the commission shall consider and balance" several factors, including "the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes, [and] the traditional fishing techniques employed by and ceremonial practices of Indians in Maine."[20] Importantly, as analyzed in the record supporting EPA's February 2015 decision, none of the fishing regulations adopted by the commission would impinge on the ability of the tribes to sustain themselves on fish taken from these waters.[21]

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

Commenters opposing EPA's recognition of sustenance fishing as an element of the fishing use applicable to the tribes' trust lands do not substantially dispute EPA's presentation and interpretation of the legislative record documenting the provisions supporting sustenance fishing in those lands. Instead

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[16] Sen. Rep. No. 96-957, pp. 16-17 (emphasis added).
[17] *See* transcript of the public hearing held on March 28, 1980, by the Maine Legislature's Joint Select Committee on the Maine Indian Claims Settlement at 151-152.
[18] 30 M.R.S. § 6207(1).
[19] 30 M.R.S. § 6212.
[20] 30 M.R.S. § 6207(3).
[21] See memorandum from Ralph Abele to the file for the February 2015 decision, regarding Effects of Maine Fishing Regulations on Sustenance Fishing by Maine Tribes, dated January 30, 2015.

they appear to make two related arguments. One is identical to the argument described above, that subjecting the trust lands to state environmental regulation means that there is no basis for treating tribal fishing differently. EPA addressed that comment above. The second argument is that the only place in MIA where tribal sustenance fishing is exempted from state law is the reserved fishing right in MIA section 6207(4), and therefore there is no tribal sustenance fishing provided for anywhere else in the state. This argument ignores the several provisions in MIA, described at length immediately above, that require explicit consideration of the Southern Tribes' sustenance fishing practices when developing fishing regulations that apply to the Southern Tribes' trust lands.

iii. Pleasant Point Reservation

The Passamaquoddy Tribe's Pleasant Point reservation is located on marine, not inland, waters. There is a dispute among the tribe, the state, and the commission about whether the tribe's aboriginal right to take fish in marine waters survived the passage of MICSA.[22] EPA is taking no position at this time as to the tribe's aboriginal rights to take fish in marine waters or the scope of the sustenance fishing right codified in MIA section 6207 in marine waters. Nonetheless, the marine waters that are part of the Pleasant Point reservation serve a function in supporting the sustenance of the tribe identical to the inland waters in the tribe's reservation and trust lands.

First, Congress understood that the Passamaquoddy Tribe exercised subsistence practices on its reservations, including the Pleasant Point Reservation. The Senate Report's discussion of Special Issues noted that "[p]rior to the settlement, Maine law recognized the Passamaquoddy Tribe's and Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time." As quoted more extensively above, the Senate Report then goes on to describe in detail MIA's provisions for the reserved sustenance fishing right of the Southern Tribes.[23] While some dispute whether the Southern Tribes' sustenance fishing extends into marine waters, at a minimum Congress understood that the Passamaquoddy Tribe fished for its sustenance on its reservation and that the state had accommodated that practice under state law.

Notably, Maine has continued its practice of recognizing and providing for the Passamaquoddy Tribe's sustenance marine fishing practices under state law. In 2013, the state codified a "tribal exemption" from otherwise applicable state fishing regulation of marine species for all four Indian tribes in Maine to exercise a "sustenance use if the tribal member holds a valid sustenance fishing license issued by the tribe, nation or band …."[24] That same subsection goes on to define "sustenance use" as:

> . . . all noncommercial consumption or noncommercial use by any person within Passamaquoddy Indian territory, as defined in Title 30, section 6205, subsection 1, Penobscot Indian territory, as defined in Title 30, section 6205, subsection 2, or Aroostook Band Trust Land, as defined in Title 30, section 7202, subsection 2, or Houlton Band Trust Land, as defined in Title 30, section 6203, subsection 2-A, or at any location within the State by a tribal member, by a tribal member's immediate family or within a tribal member's household.[25]

Section 6302-A imposes seasonal limits on the taking of sea urchins and limits on the number of lobster traps used to harvest lobsters for sustenance use. But it is a clear acknowledgement of and provision for

[22] See 25 U.S.C. §§ 1722(b) and 1723(b) and Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine, Maine Indian Tribal-State Commission: Special Report 2014/1 (June 17, 2014) at 7.
[23] Sen. Rep. No. 96-957 at 16-17.
[24] 12 M.S.A. § 6302-A(2).
[25] *Id*. (emphasis added).

the Passamaquoddy Tribe to take marine species for their sustenance "within Passamaquoddy Indian territory" as defined in MIA, which includes the tribe's reservations.

Again, EPA acknowledges that there is a current dispute about the extent of the state's authority to regulate the Tribes' marine fishing practices. In citing section 6302-A, EPA does not take a position on the merits of that dispute. EPA is concluding, however, that even if EPA accepts the state's position on its ability to regulate the Passamaquoddy Tribe's marine fishing practices, state law recognizes and provides for sustenance fishing on the tribe's reservation. Therefore, as with the tribes' trust lands, even if the state has authority to regulate the tribe's take of marine species, EPA concludes that one important purpose of the tribe's reservation is to serve as a land base for the tribe's exercise of sustenance practices at least to the extent consistent with Maine law regulating the taking of fish. Consistent with that Maine law, the tribe is allowed to consume sufficient marine species to sustain themselves under section 6302-A.

b. Northern Tribes

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

Authority to establish the Northern Tribes' trust lands came in several rounds of legislation. The first involved the Maliseets, who came to the negotiations around MIA and MICSA late in the legislative process. In 1980, MICSA provided that "[t]he Secretary is authorized and directed to expend . . . the land acquisition fund for the purpose of acquiring land *or natural resources* for . . . the Houlton Band of Maliseet Indians and for no other purpose."[26] "Land or natural resources" is defined to include "*water and water rights,* and hunting and fishing rights."[27]

At the time Congress authorized land to be taken into trust for the Maliseets, it specifically acknowledged that "[a]ll three tribes [Penobscot, Passamaquoddy and Maliseet] are riverine in their land-ownership orientation."[28] As mentioned above, Congress also specifically noted that one purpose of MICSA was to avoid acculturation of the tribes in Maine:

> Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.[29]

Congress's purpose in providing for the establishment of the Maliseet trust lands was to provide a land base on which the Tribe could maintain its "cultural integrity." The Maliseets have submitted extensive

[26] 25 U.S.C. § 1724(b) (emphasis added).
[27] 25 U.S.C. § 1722(b) (emphasis added).
[28] Sen. Rep. No. 96-957, at 11.
[29] Id. at 17.

comments documenting the sustenance fishing practices central to the tribe's culture.

In 1981, the Maine Legislature added provisions to MIA to correspond to the action Congress took in MICSA to recognize the Maliseets and authorize trust lands to provide a resource base for the tribe. The statute explicitly defines the Maliseet trust lands to include natural resources.[30] As in MICSA, MIA makes it clear that natural resources acquired for the Maliseets may include fishing rights.[31]

It was not until 1989 that the Micmacs negotiated a settlement with Maine as codified in the Micmac Settlement Act (MSA). Similar to the settlement with the Maliseets, MSA provides that the Micmacs' trust lands include natural resources.[32] MSA further defines natural resources to include fishing rights.[33]

In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), one key purpose of which was to ratify the MSA.[34] Congress specifically found and declared that:

> It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefited from inclusion in the Maine Indian Claims Settlement Act of 1980.[35]

To that end, Congress established the Aroostook Band of Micmacs Land Acquisition Fund,[36] and provided that:

> the Secretary is authorized and directed to expend, at the request of the Band, the principal of, and income accruing on, the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band and for no other purposes. Land or natural resources acquired within the State of Maine with funds expended under the authority of this subsection shall be held in trust by the United States for the benefit of the Band.[37]

ABMSA defines "Band Trust Land" to mean "land or natural resources acquired by the Secretary of the Interior and held in trust by the United States for the benefit of the Band" and defines "land or natural resources" to mean "any real property or natural resources, or any interest in or right involving any real property or natural resources, including (but not limited to) . . . water and water rights, and hunting and fishing rights."[38] As with the Maliseets, Congress clearly authorized the Micmacs to take land into trust that encompassed fishing rights.

The Senate conference report from the Select Committee on Indian Affairs on ABMSA indicates that Congress intended to remedy the plight of the Micmacs, who had been deprived of a land base on which

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[30] 30 M.R.S.A §§ 6203(2-A) ("'Houlton Band Trust Land' means land or natural resources acquired by the secretary in trust for the Houlton Band of Maliseet Indians . . .."); see also § 6205-A ("Land or natural resources" may be taken into trust for the Maliseets).
[31] *Id*. at § 6203(3) ("'Land or other natural resources' means any real property or other natural resources . . . including, but without limitation, . . . water and water rights and hunting and fishing rights.").
[32] 30 M.R.S. § 7202(2) ("'Aroostook Band Trust Land' means land or natural resources acquired by the secretary in trust for the Aroostook Band of Micmacs . . ..").
[33] *Id.* at § 7202(3) ("'Land or other natural resources' means any real property or other natural resources . . . including, but without limitation . . . water and water rights and hunting and fishing rights.")
[34] ABMSA § 1(b)(4).
[35] *Id*. at § 1(a)(5).
[36] *Id*. at § 4(a).
[37] *Id.* at § 5(a).
[38] *Id.* at § 3(3) and (4).

to secure the Tribe's continuation as a unique culture. "As Maine's only Native American community without a tribal land base, the Aroostook Band of Micmacs faces major challenges in its quest for cultural survival."[39] The report describes the cultural practices of the band, including its historic homeland range along the west bank of the St. John River. "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century." It goes on to note that "[t]oday, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." The discussion of the Band's history ends by observing:

> It is remarkable that the Aroostook Band of Micmac Indians, as a long disenfranchised and landless native group, has not withered away over the centuries. To the contrary, this community in Northern Maine has demonstrated an undaunted collective will toward cultural survival.[40]

As with the Maliseets, it is clear Congress intended to establish a land base for the Micmacs that would enable the tribe to secure its "cultural survival" and avoid acculturation. Congress intended for the Northern Tribes' trust lands to provide a "subsistence base" on which the tribes could assure their continued existence as a unique culture. Congress was aware that part of that subsistence base for the Northern Tribes was their sustenance fishing practices.

While Congress intended that the Indian lands in Maine provide a land base to support all the tribes' sustenance practices, it ratified significantly different regulatory frameworks within which the Southern and Northern Tribes could operate in exercising those practices. In their reservations and lesser ponds in their trust lands, the Southern Tribes are substantially free from state fishing regulations, and elsewhere in their trust lands any regulation of the Southern Tribes' fishing must consider their sustenance practices. As EPA concluded in February 2015, the Northern Tribes and their trust lands are subject to the laws of the state, including the regulation of natural resources, which includes fishing rights. So unlike the Southern Tribes, the ability of the Northern Tribes to exercise their sustenance fishing practices is potentially subject to regulation directly under state law. As DOI's legal opinion explains, the Northern Tribes' trust lands include fishing rights appurtenant to those land acquisitions, which are subject to state regulation.

But this jurisdictional arrangement does not alter the fact that Congress and the state established the Northern Tribes' trust lands for the purpose of providing these tribes a land base on which to exercise their sustenance practices to the extent possible. Finding that state law applies to the Northern Tribes' fishing rights does not alter the statutory intent for those tribes to be able to use the waters on their trust lands consistent with the purpose of setting aside their land base. The state law applicable to the Northern Tribes' fish take makes it clear that there are generous take limits that allow a catch sufficient to support sustenance fishing. As analyzed in the review of state fishing regulations supporting EPA's February 2015 decision, it appears state fishing regulations applicable to the Northern Tribes' trust lands do not impose limits that would prevent individual members of the Northern Tribes from taking fish sufficient to support a sustenance diet. Further, under state law, the Department of Inland Fisheries and Wildlife has authority to set take limits on fisheries for the purposes of their preservation, protection, enhancement and use as well as the propagation of fish for the effective management of inland fisheries resources in public waters of the State.[41] While this regulatory process does not include the same kind of procedural and burden of proof protections MIA provides for the Southern Tribes' fishing rights, it still requires the state to have a legitimate, non-arbitrary reason for limiting the take in the Northern Tribes trust lands based on the need to preserve and protect state fisheries. So as provided under state law, the Northern Tribes can fish for their sustenance in tribal waters associated with their trust lands. This conclusion is supported by

[39] 102 S. Rpt 136 (1991).
[40] *Id*.
[41] 12 M.R.S. § 10053.

the opinion letter EPA received from DOI.

Several commenters argued that the Indian settlement acts subject the Northern Tribes to state law without exception, and therefore those tribal members are prohibited from fishing for their sustenance because they are subject to the same limits on taking fish that apply to all citizens of Maine. As the Agency explained in its February 2015 decision, EPA does not dispute that the Indian settlement acts apply Maine state law to the Northern Tribes to a greater extent than the Southern Tribes. The settlement acts do not include the explicit right to sustenance fishing as is provided to the Southern Tribes. But as explained above, the applicable state law does not interfere with the provisions in MIA and MSA that allow and intend for the Northern Tribes to be able to fish for their sustenance. As part of its February 2015 decision to disapprove Maine's HHC in tribal waters, EPA carefully examined the state's fishing regulations as they apply to the waters in the Northern Tribes' trust lands. The analysis thoroughly documents that a tribal member fishing in those waters is allowed under state law to catch fish in quantities that would amply support the fish consumption rate EPA is using to calculate the HHC EPA is promulgating.[42] EPA could find no provision in state law that forbids anyone in the state from consuming the fish caught in quantities that comply with the take limits in state regulation. For these reasons, the agency disagrees with the comment stating that it would be "illegal" under the settlement acts or other state law for the Northern Tribes to engage in sustenance fishing.

c. Federal Trust Responsibility

Tribal representatives and members commented that EPA's promulgation of HHC is consistent with EPA's trust responsibility to the Indian tribes in Maine, and some suggested that EPA's trust relationship with the tribes compels EPA to take this action. Conversely, one commenter argued that EPA's action is not authorized because the federal government has no obligation under the trust responsibility to take this action, and the Indian settlement acts create no specific trust obligation to protect the tribes' ability to fish for their sustenance. These comments raise questions about the nature and extent of the federal trust responsibility to the Indian tribes in Maine and the extent to which the trust is related to EPA's action today. EPA agrees that this action is consistent with the United States' general trust responsibility to the tribes in Maine. EPA also agrees that the trust relationship does not create an independent enforceable mandate or specific trust requirement beyond the Agency's obligation to comply with the legal requirements generally applicable to this situation under federal law, in this case the CWA as applied to the circumstances of the tribes in Maine under the settlement acts.

Consulting with affected tribes before taking an action that affects their interests is one of the cornerstones of the general trust relationship with tribes. EPA has fulfilled this responsibility to the tribes in Maine. EPA has consulted extensively with the tribes to understand their interests in this matter. EPA has also carefully weighed input from the tribes, as it has all the comments the Agency received on this action.

EPA does not agree that the substance of today's action is compelled or authorized by the federal trust relationship with the tribes in Maine independent of generally applicable federal law. EPA's action today is anchored in two sets of legal requirements: first, the Indian settlement acts, which reserve the tribes'

[42] EPA also disagrees with the comment that tribal members are unlikely to engage in sustenance fishing due to "fishing seasons" and "bag limits." *See* Comment Excerpt 198. EPA examined whether state imposed fishing limits in Maine, including seasonal limits such as during the ice fishing season, would preclude tribes in Maine from taking fish for their individual sustenance *See* memorandum from Ralph Abele to the file for the February 2015 decision, regarding Effects of Maine Fishing Regulations on Sustenance Fishing by Maine Tribes, dated January 30, 2015. This analysis confirmed tribal sustenance fishing can be supported under current Maine state fishing regulations.

ability to engage in sustenance fishing; second, the CWA, which requires that this use must be protected. The trust responsibility does not enhance or augment these legal requirements, and EPA is not relying on the trust responsibility as a separate legal basis for today's action. The Indian settlement acts created a legal framework with respect to these tribes that triggered an analysis under the CWA about how to protect the sustenance fishing use provided for under the settlement acts. This analysis necessarily involves application of EPA's WQS regulations, guidance, and science to yield a result that is specific to these tribes, but each step of the analysis is founded in generally applicable requirements under the CWA, not an independent specific trust mandate.

EPA disagrees that its action is inconsistent with the agency's position in *Sierra Club v. McCarthy,* Case No. 11-CV-1759-BJR, Memorandum Order (U.S. District Court, W.D. WA, March 16, 2015). In that case, the agency argued, and the court agreed, that compliance with the generally applicable requirements of the CWA fulfilled the general trust responsibility to the tribe and the tribe did not identify a specific duty that would require more than fulfillment of the general trust obligation. Here, EPA is harmonizing the generally applicable requirements of the CWA with the terms of the Indian settlement acts, which are federal law with the same force and effect as other statutes. This harmonization is consistent with, but not based on any separate requirement, arising from the general trust responsibility.

Moreover, while the court in *Sierra Club* agreed with EPA that the general trust responsibility did not impose a duty on EPA beyond complying with the CWA, the court did not hold, as one commenter suggests, that EPA may not consider other laws when discharging its duties under the CWA. Thus, while EPA's action here is not rooted in the general trust responsibility to the tribes, EPA reasonably and appropriately considered the Indian settlement acts and their relevance to the designated uses of the covered waters when taking action under the CWA. Topic 3. 2.b includes further discussion of EPA's ability to consider other laws when acting under the CWA.

2. Designated Use of Sustenance Fishing

a. EPA's Approval of Certain Provisions in MIA as a Designated Use of Sustenance Fishing in Reservation Waters

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]

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[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.").

[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

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.

One commenter argued that EPA could not approve the sustenance fishing provisions of the MIA as a separate and specific designated use for the Southern Tribes' reservation waters because that statutory language had not gone through the particular processes that Maine DEP and the Board of Environmental Protection (BEP) are required to follow when they establish a designated use. Those processes are immaterial in this instance because MIA was adopted by the Maine state legislature, which is not bound by the particular state law procedural mandates that attach to Maine DEP and BEP. Here the legislature debated MIA, holding extensive hearings during which the nature of the tribes' fishing practices was thoroughly examined.[46] It then adopted a state law that provided for the tribes in Maine to fish for their sustenance, which, importantly, affects how the waters in Indian territories are intended to be used under state law. That action created a use that EPA was required to act on and that must be supported by the water quality criteria applicable to those waters.[47]

One commenter noted that the Maine legislature at one point considered whether to establish a designated use of subsistence fishing in the Penobscot River, but failed to pass the bill. It argued that this failure to act demonstrates that there is no provision for sustenance fishing under state law that could qualify as a designated use under state law. EPA disagrees with this comment for at least two reasons. First, it is exceedingly difficult to infer a particular intent from legislative inaction, and any attempt to do so would be too unreliable to serve as a premise to ignore the otherwise apparent designated use of sustenance

consider whether such state law has the effect of changing a WQS).

[45] See 33 U.S.C. 1313(c)(3) and 40 CFR part 131.

[46] The MIA's legislative history entitled "Report, Hearing Transcript and Related Memoranda of the Joint Select Committee on Indian Land Claims," One Hundred and Ninth Legislature, April and May 1980, contains numerous references to and explanations of tribal sustenance fishing rights provided by the MIA. See e.g., Report of Joint Select Committee on Indian Land Claims, page 2 (interpreting MIA's provisions relating to Indian sustenance hunting and fishing); Hearing Transcript, page 117 (Joe Floyd, a public member of the Atlantic Seaman's Salmon Commission, expressing his concerns about MIA's sustenance fishing provisions); Hearing Transcript, page 138 (Barry Tyne, member of the public, expressing concerns about MIA's sustenance fishing provisions); and Hearing Transcript, pages 55, 56, 151-153, 156-159, and 164-166 (attorney Patterson of the Maine Attorney General's Office discussing and responding to public comments and state legislators' questions relating to MIA's provisions for tribal sustenance hunting and fishing.

[47] 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." Because EPA's final HHC are derived using an unsuppressed level of fish consumption and EPA's latest scientifically based inputs, EPA concludes that they will provide a level of water quality that will protect any existing sustenance fishing use that has been attained between 1975 and the present.

fishing established in the settlement acts.[48] In the abstract, one could draw at least two very different conclusions from failure of the subsistence fishing bill in the state legislature. The commenter's conclusion is that the legislature rejected the idea that subsistence fishing should be protected in the Penobscot River. It is equally logical to infer that the legislature concluded that the bill for subsistence fishing in the Penobscot River was unnecessary because MIA had already amply provided for all the tribes in Maine to make use of waters in Indian lands to fish for their sustenance.

Second, even if one assumes that the Maine legislature intended to reject a specific subsistence fishing use in the Penobscot River when it failed to pass that bill, doing so has no effect on the provisions of MIA that constitute the designated use EPA approved. It may be the case that a subsequent legislature thought differently about the tribes in Maine using waters in their lands to fish for their individual sustenance. That fact does not alter the conclusion that a prior state legislature resolved the tribes' land claims in Maine by including in that settlement critical provisions for tribal sustenance fishing in Indian territories. As described more fully in Topic 3.1 above, the legislative record at both the state and federal level is rich with evidence that these provisions were an essential element of the settlement. The congressional ratification of that settlement in MICSA, which was essential to effectuating the grant of jurisdictional authority to the state, specifically provides that the MIA cannot be amended with respect to the Southern Tribes without the consent of the affected tribe.[49] It would violate federal law for a subsequent Maine legislature to unilaterally eliminate the sustenance fishing use codified in MIA from the Penobscot River without the Nation's consent -- let alone to do so through inaction on a subsequent bill.

b. EPA's Interpretation and Approval of Maine's "Fishing" Designated Use to include Sustenance Fishing.

In addition to approving certain provisions of MIA as a designated use in the Southern Tribes' inland reservation waters, EPA also interpreted and approved Maine's designated use of "fishing" to mean "sustenance fishing" for all waters in Indian lands. EPA disagrees with comments that claim that EPA had no authority to do so because EPA had previously approved that use for all waters in Maine without such an interpretation. While EPA approved the "fishing" designated use in 1986 for other state waters, prior to its February 2015 decision, EPA had not approved any of the state's WQS, including the "fishing" designated use, as being applicable to waters in Indian lands.

Under basic principles of federal Indian law, states generally lack civil regulatory jurisdiction within Indian country as defined in 18 U.S.C. 1151.[50] Thus, EPA cannot presume a state has authority to establish WQS or otherwise regulate in Indian country. Instead, a state must demonstrate its jurisdiction, and EPA must determine that the state has made the requisite demonstration and has authority, before a state can implement a program in Indian country. Accordingly, EPA cannot approve a state WQS for a water in Indian lands if it has not first determined that the state has authority to do so.

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[48] *See* Lawson v. FMR LLC, 670 F.3d 61, 80 (1st Cir. 2012) (noting "the rule of judicial wariness about legislative inaction"); Cent. & S. Motor Freight Tariff Asso. v. United States, 757 F.2d 301, 317 (D.C. Cir. 1985) ("Courts [] recognize that legislative inaction is a dangerous foundation for statutory construction."); Advanced Micro Devices v. Civil Aeronautics Bd., 742 F.2d 1520, 1541 (1984) ("The general rule is that congressional inaction or congressional action short of the enactment of positive law, like post- enactment legislative history, is often entitled to no weight in construing a statute.").

[49] MICSA section 5(e)(1), formerly 25 U.S.C. 1725(e)(1).

[50] Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1. (1998) ("[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States."); *see also* Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 128 (1993) ("[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian Country . . . .").

EPA first determined on February 2, 2015, that Maine has authority to establish WQS for waters in Indian lands. Consistent with the principle articulated above, it is EPA's position that all WQS approvals that occurred prior to this date were limited to state waters outside of waters in Indian lands. With regard to the "fishing" designated use, Maine submitted revisions to its water quality standards program now codified at 38 M.R.S. section 464-470, to EPA in 1986. This submittal included Maine's designated use of "fishing" for all surface waters in the state. On July 16, 1986, EPA approved most of the revised WQS, including the designated uses for surface waters, without explicit mention of the "fishing" designated use or of the standards' applicability to waters in Indian lands. Maine did not expressly assert its authority to establish WQS in Indian waters until its 2009 WQS submittal, and EPA did not expressly determine that Maine has such authority until February 2015. Therefore, EPA did not approve Maine's designated use of "fishing" to apply in Indian waters in 1986, and EPA's approval of that use for other waters in Maine at that time was not applicable to Indian waters in Maine.

EPA acknowledges the comment that, prior to February 2015, EPA had not previously taken the position that Maine's designated use of "fishing" included a designated use of "sustenance fishing." As explained herein, it was not until February 2, 2015, that EPA determined that Maine's WQS were applicable to waters in Indian lands, so it was not until then that EPA reviewed Maine's "fishing" designated use for those waters and concluded that, in light of the settlement acts, it must include sustenance fishing as applied to waters in Indian lands.

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

[51] *See* Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992) (holding that EPA's interpretation of state WQS in the NPDES context is entitled to "substantial deference").
[52] *See* Revision of Certain Federal Water Quality Criteria Applicable to Washington: 81 FR 85417 (November 28, 2016).
[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.").
[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

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.

One commenter briefly asserts that EPA's so-called Alaska Rule operates to make the state's pre-2000 WQS, including specifically its "fishing" designated use, applicable to waters in Indian lands. EPA disagrees. The Alaska Rule does not change the requirement that EPA review and approve state WQS before they can apply in tribal waters, nor does it limit EPA's discretion to approve or disapprove a WQS. The Alaska Rule is codified at 40 C.F.R. § 131.21(c). It was promulgated in 2000 as a result of litigation in Alaska, and it establishes a transition between EPA's former approach, and its current approach, as to when WQS are applicable under the CWA.[56] It provides that state and tribal WQS that are effective under state or tribal law and that had been submitted to EPA prior to May 30, 2000, are applicable for CWA purposes unless EPA has promulgated a more stringent replacement WQS (the former approach).[57] It provides that state or tribal WQS that go into effect under state or tribal law after May 30, 2000, are applicable for CWA purposes only after EPA approves the WQS, unless EPA has promulgated a more stringent WQS (the current approach).[58] It does not provide that state WQS apply within Indian country.[59] In addition, it does not limit EPA's duty and discretion to approve or disapprove a WQS that was submitted to EPA prior to May 30, 2000. In fact, EPA made clear that the "grandfathering" of WQS under the rule "does not alter EPA's responsibility to complete its review of any standards it has not yet approved or disapproved or to promulgate replacement standards for any disapproved standards."[60] Accordingly, in February 2015, EPA approved the pre-2000 "fishing" designated use for waters in Indian lands and explained that the use necessarily includes, for those waters, sustenance fishing.

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]

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

established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit")).

[55] *See* Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.").

[56] See 65 Fed. Reg. 24641, 24641-42 (Apr. 27, 2000).

[57] 40 C.F.R. § 131.21(c).

[58] *Id.*

[59] *See id.*

[60] 64 Fed. Reg. 37,072, 37,075 (July 9, 1999).

[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….").

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 the waters should be clean enough such that aquatic life can survive and thrive, humans can safely eat fish and shellfish from the waters,[62] 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.

Regarding the comments that EPA was required to subject the sustenance fishing designated use to public notice and an opportunity for comment, EPA notes that EPA did not promulgate a federal designated use; rather, it approved the state's designated use of "fishing" with the interpretation that, in light of MIA and the other Indian settlement acts, such fishing use necessarily includes "sustenance fishing" for waters in Indian lands. There is no CWA or regulatory requirement that EPA provide an opportunity for public comment or hold a public hearing when it approves or disapproves a state's WQS. Such obligation exists only when EPA promulgates a federal WQS following a disapproval or determination pursuant to CWA section 303(c)(4)(A) or (B). EPA's approval of the fishing designated use without the opportunity for public notice and comment was consistent with how EPA has operated for more than 40 years.

Finally, one commenter argued that the settlement acts' provisions for sustenance fishing are merely exceptions to otherwise applicable creel limits and have no implications for the WQS that apply to the waters where the tribes are meant to fish. EPA does not agree with this narrow interpretation of the relationship between the provisions for tribal sustenance practices on the one hand and water quality on the other. Fundamentally, the tribes' ability to take fish for their sustenance under the settlement acts would be rendered meaningless if it were not supported under the CWA by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance.

There are several examples of courts finding that fishing rights for tribes encompass subsidiary rights that are not explicitly included in treaty or statutory language, but are nonetheless necessary to render those rights meaningful. One line of cases focuses on the relevant tribes' ability to access fish.[63] Indeed, the Ninth Circuit Court of Appeals recently determined that the right of tribes in the State of Washington to fish in their "usual and accustomed" places necessarily included the presence of fish in such places despite the absence of any explicit language in the applicable treaties discussing fish quantity.[64] The Court explained how it interpreted the implications of the settlement that Governor Stevens negotiated with the

[62] USEPA. 2000. Memorandum #WQSP-00-03. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. http://water.epa.gov/scitech/swguidance/standards/upload/2000_10_31_standards_shellfish.pdf.
[63] *See, e.g., United States v. Winans*, 198 U.S. 371, 384 (1905) (tribe must be allowed to cross private property to access traditional fishing ground); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-34 (9th Cir. 1985) (tribe's fishing right protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch); *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Mich. Dept of Nat. Resources*, 141 F.3d 635 (6th Cir. 1989) (treaty right to fish commercially in the Great Lakes found to include a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially).
[64] *United States v. Washington*, No. 13-35474, 2016 U.S. App. Lexis 11709 (9th Cir. June 27, 2016).

tribes:

> Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to "support the purpose" of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a "moderate living" to the Tribes. *Fishing Vessel*, 443 U.S. at 686, 99 S.Ct. 3055. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.[65]

Another line of cases focuses on water quantity sufficient to support fish habitat. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle."[66]

The preceding cases focus on fishing rights, and the attendant or implicit requirement that those fishing rights not be denied through collateral action impairing that right. Analogously, when diminished water quality has hindered tribal uses of water outside the fishing context, courts have held in favor of tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. Such was the case in *United States v. Gila Valley Irrigation District*, in which farmers whose properties were located upstream from an Indian reservation were required to take steps to decrease the salinity of the river reaching the tribe's reservation so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[67]

When Congress identifies and provides for a particular purpose or use of specific Indian lands, it is reasonable and supported by precedent for an agency to consider whether its actions have an impact on a tribe's exercise of that purpose or use and to ensure through exercise of its authorities that its actions protect that purpose or use. If a tribe could not survive on its land base without water, or water clean enough to farm, for example, courts have recognized that the purpose of that reservation or trust land would be entirely defeated. So too here, it would defeat the purpose of MIA, MICSA, MSA and ABMSA for the tribes in Maine to be deprived of the ability to safely consume fish from their waters at sustenance levels. DOI's legal opinion concludes that "fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right." If EPA were to ignore the impact that water quality, and specifically water quality standards under the CWA, could have on the tribes' ability to safely engage in their sustenance fishing practices on their lands, the Agency would be contradicting the clear purpose for which Congress ratified the settlement acts in Maine and provided for the establishment of Indian lands in the state. Therefore, it is incumbent upon EPA when applying the requirements of the CWA to harmonize those requirements with this Congressional purpose.

Several commenters argue that EPA's assertion that it had not previously approved the state's WQS in tribal waters contradicts prior agency statements about the scope of the state's jurisdiction in Indian territories and prior agency actions under the CWA. As to prior agency statements about state jurisdiction under the settlement acts, there is no document prior to EPA's decision in February 2015 that concludes

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[65] *Id*. at *37.

[66] 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).

[67] 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), *aff'd*, 117 F. 3d 425 (9th Cir. 1997).

the state has authority to set WQS in tribal waters. For example, the Maine Attorney General refers to a 1982 informal report from EPA discussing the state's authority under MICSA. That was generated by an EPA Office of Public Affairs employee who specifically stated that the document "has not been reviewed by my own Agency and is not an official document." The Attorney General also refers to a 1993 legal memorandum that analyzes the extent of Maine's jurisdiction under MICSA. Based on the analysis in that memorandum, EPA limited the extent of its treatment in the same manner as a state actions under the CWA in Maine to authorizations for the tribes to receive grants under CWA section 106. But EPA never took an affirmative position on whether and how a state environmental program might apply to the tribes in Maine until its authorization of the state's NPDES permit program in 2003, and never decided whether Maine WQS apply in Indian territories until February 2015.

As to prior agency actions under the CWA, EPA acknowledges that in some instances the Agency appeared to assume, without any express consideration or decision regarding the jurisdictional or CWA issues, that state WQS applied in certain tribal waters, although the Agency disputes the extent of those instances. The Maine Attorney General in her comments incorporates the allegations in the state's second amended complaint in the pending litigation concerning EPA's February 2015 decisions. That complaint in turn refers to various actions that the state alleges demonstrate that EPA has applied the state's WQS in tribal waters prior to February 2015. Several of those allegations are based on a misunderstanding of EPA's actions.

For example, the complaint cites a 1993 letter from EPA describing how the implementation of state WQS in waters "affecting" the Penobscot Nation's reservation should serve to address the Nation's concerns about dioxin contamination in the river. When EPA said it would develop a permit to meet state WQS in waters "affecting" the Nation's reservation, it is not the same thing as saying that the state WQS apply directly in the reservation waters. In this letter, EPA was responding to the Nation's request that the Agency issue federal WQS for dioxin to apply in what the Nation then considered to be reservation waters around its reservation islands. EPA's response did not conclude that federal WQS were unnecessary because state WQS applied already. The Agency declined the Nation's request because issuing an NPDES permit to meet Maine's existing dioxin criterion where it did apply in waters "affecting" the Nation's reservation would more readily address the Nation's concern.

The complaint also cites to EPA's 2006 NPDES permit and fact sheet for the Penobscot Nation's wastewater treatment facility, which describe how the permit's discharge limits assure compliance with the state's WQS "in the proximity of" the discharge point. "Proximity" means "the state, quality, or fact of being near or next;" it does not mean in or into. When EPA is applying a WQS at the point of discharge, it states that the discharge is "to" or "into" a particular water. At the time of this permit issuance, there were disputes about the exact boundaries of waters in or around the Nation's reservation in the Penobscot River, which are now the subject of litigation pending before the Federal Court of Appeals for the First Circuit. But regardless of the scope of those waters, EPA has always recognized that the Nation's reservation and any waters it includes are abutted by non-tribal waters, where there is no dispute that state WQS apply. So in this action, EPA was assuring that state WQS were being met wherever they might apply.

Maine's complaint also cites to several requests EPA made under CWA section 401 for the state to certify that EPA-issued NPDES permits for tribal facilities assured compliance with state WQS. EPA agrees that these actions are premised on the assumption that state WQS apply at the point of discharge for these permits, since section 401 requires a certification from "the State in which the discharge originates or will originate." As EPA explained in its February 2015 decision, the Agency views these requests as mistakes. EPA notes that none of these section 401 certification requests included any explicit finding that the state WQS apply in tribal waters and certainly no analysis supporting such a finding, and so they do not – and cannot – represent a considered Agency determination that the state has made the requisite demonstration

that it had the authority to implement WQS in waters in Indian lands or that the state WQS were adequately protective of those waters.

One commenter argued that EPA's position that the Agency had not previously approved state WQS for waters in Indian lands is an "absurd position" because "it would result in a decades-long regulatory void based on a lack of any WQS and resulting CWA protections for all of Maine's Indian waters."[68] EPA agrees that its interpretation reflects a gap in WQS coverage in waters in Indian lands up to February 2015. EPA filled most of that gap with its five decisions approving many of Maine's WQS for waters in Indian lands in 2015 and 2016, and will fill the remaining gap, with the exception of HHC for arsenic, dioxin, and thallium, with this final rule. While EPA agrees that this situation is not desirable, EPA's interpretation is necessary to ensure that state WQS are applied to Indian waters only where the state has legal authority to do so and the state WQS are adequate under the CWA as applied in Indian waters. The interpretation that the state advocates would result in its WQS having been approved by EPA in tribal waters essentially inadvertently, without any conscious consideration on a reviewable record of the state's authority or the WQS effect on tribal uses. Moreover, there would have been no opportunity for the tribes to consult with EPA, consistent with the United States' government-to-government relationship with the tribes as reflected in, for example, Executive Order 13175 and EPA's Policy on Consultation and Coordination with Indian Tribes, about these questions that are central to their culture and status under the settlement acts.

The question of whether the state has jurisdiction to apply state WQS in tribal waters is not the focus of this action, but for the purposes of further explaining EPA's interpretation of its role in reviewing and approving or disapproving the state's WQS in tribal waters, the relationship between the state's jurisdictional authority under the settlement acts and this action is relevant. As further explained above and in EPA's February 2015 decision, under basic principles of federal Indian law and EPA policy, a state must expressly demonstrate its authority and the agency must make an express finding of the state's authority before state WQS can apply in tribal waters. This principle was a critical step in the analysis that allowed EPA to reconcile two potentially conflicting elements of the settlement ratified in MICSA. An important argument opposing the conclusion that the settlement acts authorize the state to set WQS in the tribes' waters was that this would give Maine unbridled authority to diminish or effectively repeal the provisions for sustenance fishing in the settlement acts. The assertion was that if the state could apply its WQS to tribal waters, it would conflict with the tribes' ability to practice sustenance fishing. EPA's review and assessment of how Maine's WQS affect tribal uses in Indian waters is an essential step in EPA's response to this argument. It is possible to reconcile the state's setting WQS in Indian waters with the tribes' ability to fish for their sustenance under the settlement acts because sustenance fishing is included in the fishing designated use that both the state and EPA are required to protect under the CWA. EPA's exercise of its oversight role and obligation to review state WQS before they apply in tribal waters effectively harmonizes the jurisdictional grant to the state in MICSA and the provision for tribes in Maine to sustain themselves on the land base that the Indian settlement acts established for the tribes.

3. Tribes as Target Population

EPA received two comments that it improperly and without justification identified the tribes as the target population, as opposed to a highly exposed subpopulation, for the HHC for waters in Indian lands. On the contrary, EPA's approach is entirely consistent with EPA regulations and policy, as informed by the settlement acts.

Pursuant to 40 CFR 131.11(a)(1), water quality criteria must be adequate to protect the designated uses. Developing HHC to protect the sustenance fishing designated use in waters in Indian lands necessarily

[67] *See* Comments of Maine's Attorney General, page 10.

involves identifying the population exercising that use as the target population.[69] The tribes are not a highly exposed or high-consuming subpopulation in their own lands; they are the general population for which the federal set-aside of these lands and their waters was designed.[70] Treating tribes as the target general population results in HHC sufficient under the CWA to ensure that the tribes' ability to exercise the designated use of sustenance fishing, as provided for in the settlement acts, is not substantially affected or impaired. Therefore, the tribal population must be the focus of the risk assessment supporting HHC for the waters to which the sustenance fishing use applies. To do otherwise risks undermining the purpose for which Congress established and confirmed the tribes' land base, as described more fully in Topic 3.1 above.

Contrary to the commenters' claims, EPA's 2000 Methodology does not mandate that the tribes be treated as a highly exposed subpopulation. EPA's general approach in the 2000 Methodology, and in deriving national CWA section 304(a) recommended criteria, is for HHC to provide a high level of protection for the general population, while recognizing that more highly exposed "subpopulations" may face greater levels of risk.[71] However, in addition to recommending protection of the general population based on fish consumption rates designed to represent "the general population of fish consumers," the 2000 Methodology recommends that states assess whether there might be more highly exposed subpopulations or "population groups" that require the use of a higher fish consumption rate to protect them as the "target population group(s)."[72] The 2000 Methodology does not speak to or expressly envision the unique situation of setting HHC for waters where there is a tribal sustenance fishing designated use. Nevertheless, it is entirely consistent with the 2000 Methodology for EPA to identify the tribes as the target general population for protection, rather than as a highly exposed subpopulation, and to apply the 2000 Methodology's recommendations on exposure for the general population, including the FCR and CRL, to the tribal target population.

One commenter disputed whether EPA has the authority under the CWA to second-guess the state's risk management decision, which it asserts protects the tribes to a level of risk equivalent to $1x10^{-5}$, even if one assumes they consume 286 g/day of fish. The commenter argues that this is a reasonable level of risk for the general population under EPA guidance. If the tribes are treated as a highly exposed subpopulation under the state's WQS, the commenter argues that they may consume up to 3240 g/day of fish with a $1x10^{-4}$ level of risk, consistent with EPA guidance. EPA disagrees. The flaw in this approach is that it ignores the purpose of the designated use of sustenance fishing in these waters and the reason Congress and the state agreed to identify these waters for the tribes to use in this manner. If high-end consumers are eating fish in a water with no sustenance fishing designation, they are highly exposed individuals fishing in waters that are designated for general recreational fishing. They are appropriately treated as part of a highly exposed subpopulation among the general population of recreational fishers for which that recreational fishing designation is designed. But where the waters are designated for sustenance fishing,

[69] Maine's Attorney General concedes as much. Her objection to EPA's approach rests on her assertion that there is no designated use of sustenance fishing for the waters in Indian lands. But she recognizes that had the Maine Legislature adopted proposed legislation for a "subsistence fishing" designated use for a portion of the Penobscot River, the adoption of that use would have protected the subsistence fishers as the target population for the stretch of the river to which the use applied. *See* Comments of Maine's Attorney General, page 11.

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

[71] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). U.S. Environmental Protection Agency, Office of Science and Technology, Washington, DC. EPA 822-B-00-004, pp. 2-1 to 2-3.

[72] *Id*., pp. 4-24 to 4-25.

and that designation stems from state and federal statutes that establish the sustenance fishing use to support a tribe's ability to continue its sustenance lifeways, the focus or purpose of the use is sustenance fishing by the tribes. They are the general population that the use is designed to protect. Having concluded that the tribes are the general population to be protected, EPA looked to state regulation to apply Maine's own risk management decision about how a general population should be protected, to a $1x10^{-6}$ level of risk, consistent with EPA's own guidance and general practice in promulgating federal criteria.

4. Use of Unsuppressed Data

EPA received several comments that the use of unsuppressed fish consumption data in determining the FCR is improper and neither authorized nor required under the CWA. EPA disagrees. CWA sections 101 and 303 and EPA's implementing regulations at 40 CFR part 131 provide the legal basis for EPA's use of unsuppressed fish consumption data in deriving the final HHC. CWA section 303(c)(2)(A) requires that water quality criteria be "based upon" applicable designated uses, and that such uses and criteria "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act." The "purposes of this Act" are in CWA section 101, and include, among other things, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." EPA's implementing water quality regulations at 40 CFR § 131.11 require water quality criteria to be based on sound scientific rationale and sufficient to protect the designated use, regardless of whether that use is currently being met. A sustenance fishing designated use, by definition, represents a level of fish consumption that is adequate to provide sustenance, regardless of whether such consumption is occurring today. It is entirely consistent with the CWA and regulations for EPA to determine that to protect the designated use, it is necessary and appropriate to derive the HHC using a FCR that reflects a sustenance level of consumption that is not artificially suppressed as a result of concerns about pollution or fish contamination where such data are available.

EPA maintains that it is important, as a CWA goal, to avoid the suppression effect that may occur when criteria are derived using a FCR for a given target population (tribal or other) that reflects an artificially diminished level of fish consumption from an appropriate baseline level of consumption for that population.[73] As EPA stated in the preamble to the proposed rule, it is EPA's scientific and policy judgment that where sustenance fishing is a designated use of the waters (due to, for example, a tribal treaty right or other federal law that provides for a tribe to fish for its sustenance), selecting a FCR that reasonably represents current unsuppressed fish consumption based on the best available information is necessary and appropriate to ensure that such sustenance fishing use is protected.

To use a FCR that is suppressed would not result in criteria that actually protect a sustenance fishing use because it would merely reinforce the existing suppressed use, or worse, set in motion a downward spiral of further reduction/suppression of fish consumption due to concerns about the safety of available fish or depleted fisheries. The CWA is meant not merely to maintain the status quo, but to improve water body conditions and the health of those consuming fish from local waters in order to protect designated uses. Therefore, deriving criteria using an unsuppressed FCR furthers the restoration goals of the CWA (section 101, which is incorporated into section 303, as explained above) and ensures protection of human health-related designated uses (as pollutant levels decrease and fish consumption increases over time).

Any fish consumption rate used in setting criteria to protect a sustenance fishing use must allow for the

[73] USEPA. January 2013. *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions* ("2013 FAQ"). Commenters claimed that EPA cited to the 2013 FAQ as the source of its authority to use unsuppressed fish consumption data, and objected that the 2013 FAQ had never been subjected to public notice and comment. However, as explained above, EPA's authority is anchored in the CWA and its implementing regulations, not the 2013 FAQ.

consumption of fish from local waters at levels that could sustain and be protective of members of the target population practicing the sustenance lifeways. If HHC are set at a level that assumes only suppressed fish consumption, the waters would only be protected to support that level of suppressed fish consumption and thus never fully support—and potentially even may directly impair—the tribes' ability to take fish for their sustenance. Accordingly, where adequate data are available indicating what the current unsuppressed FCR is for the relevant target population, the FCR selected for HHC must reflect that value. That is what EPA has done in this rule, using data from the Wabanaki Cultural Lifeways Exposure Scenario[74] (Wabanaki Study).

While the commenters object to this approach as being "new" and having been imposed without any public hearings, they fail to offer any information that challenges the reasonableness of requiring the use of an unsuppressed FCR, where the information is available to do so, to protect a sustenance fishing use. That is the standard EPA must meet in this action, regardless of whether the approach is new. Nor do they explain how the use of a FCR based on suppressed consumption would protect the sustenance fishing use in the waters in Indian lands in Maine, which, as explained above, is what the CWA and implementing regulations require. And EPA notes that the rulemaking process the agency is using to promulgate these standards gave interested parties the opportunity to comment, including two virtual public hearings and 60 days to submit written comments on the agency's approach to protecting sustenance fishing.

5. Fish Consumption Rate and the Wabanaki Study

a. EPA's use of the Wabanaki Study to develop the FCR

In rejecting EPA's use of the Wabanaki Study to derive a current unsuppressed sustenance fishing FCR, one commenter asserted that EPA failed to document any actual suppression effects based on pollution concerns of tribal members. However, it is unarguable that the tribal fish consumption in Maine is currently suppressed since tribal members in Maine cannot currently consume fish from Maine's fresh waters at sustenance levels while heeding the fish consumption advisories for waters in Indian lands, including statewide fish advisories and an advisory specific to the Penobscot River. The statewide fish advisory limits fish consumption to 7 to 47 grams per day. The water body-specific advisory limits fish consumption in the Penobscot River (downstream of Lincoln) to 7 to 15 grams per day.[75] These recommended maximum fish consumption levels are well below the sustenance FCR EPA derived from the Wabanaki study (286 g/day); the fishing rate for "Native American sensitive subpopulation" (138 g/day) that Maine derived from the 1992 ChemRisk Study data for the calculation of Maine's 2012 arsenic criteria[76](submitted to and approved by EPA for waters outside of Indian lands in 2013); and, for

[74] Harper, B., Ranco, D., et al. 2009. Wabanaki Traditional Cultural Lifeways Exposure Scenario.

[75] Maine's statewide freshwater fish safe eating guidelines recommend that nursing or pregnant women and children under the age of eight consume no fresh water fish meals from Maine with an exception for one meal (227 grams) a month of landlocked salmon and brook trout. For other adults and children over the age of eight, Maine recommends consuming no more than one fish meal a week of brook trout and landlocked salmon and 2 fish meals per month of other fresh water fish. Therefore, Maine's statewide advisories limit fish consumption to a range of 12 to approximately 76 meals per year, including brook trout and landlocked salmon (average 7 to 47 g/day) and Maine's site specific criteria for the Pensobscot River, downstream of Lincoln, is more restrictive, limiting total freshwater fish consumption to 12 to 24 meals per year (average of 7 to 15 g/day). (see "*WARNING ABOUT EATING FRESHWATER FISH", published by the Maine Department of Human Services, Bureau of Health, Environmental Toxicology, August 29, 2000, available at http://www.maine.gov/dhhs/mecdc/environmental-health/eohp/fish/documents/2kfca.pdf)*

[76] January 14, 2013, Letter from Patricia Aho, DEP to Curt Spalding, EPA, regarding *"USEPA Review of P.L. 2011, Ch. 194 and revised 06-096 CMR 584*", Exhibit 8, page 24.

the fish from the Penobscot River, even Maine's statewide fish consumption rate (32.4 g/day).

Furthermore, during consultation, tribal representatives relayed that the fish advisories do suppress consumption for many tribal members and that the fish advisories, in and of themselves, are detrimental to public health because, while they limit exposure to bioaccumulative toxins in fish, they also suppress the consumption of otherwise healthy and affordable protein. Two tribes included these assertions in their comments on the proposed rule. At the same time, a Micmac representative indicated that some younger tribal members are disregarding fish advisories and consuming "as much fish as they can"[77] despite the risks.

EPA received several comments that the FCR of 286 g/day, derived to support the sustenance fishing use, and used in the calculation of the promulgated HHC, is too high and not based on sound science. In particular, commenters asserted that it was improper for EPA to rely on the Wabanaki Study because it is irrelevant and aspirational. These commenters instead prefer the use of a 1992 study conducted by McLaren/Hart – ChemRisk of Portland, Maine ("the 1992 ChemRisk Study").[78] EPA disagrees for the following reasons.

After considering other sources, including the 1992 ChemRisk Study (see discussion below), EPA derived the FCR from a peer reviewed estimate of traditional sustenance fish consumption from the Wabanaki Study. EPA finds that the Wabanaki Study used a sound methodology (peer reviewed, written by experts in risk assessment and anthropology), and contains the best currently available information for the purpose of deriving an FCR for HHC adequate to protect present day sustenance fishing for such waters. It is the only local study focused on the tribal members and areas most heavily used by those members today. While it relies on daily caloric and protein intake to derive heritage FCRs, the FCR of 286 g/day is also the best currently available estimate for contemporary tribal sustenance level fish consumption for waters where the sustenance fishing designated use applies.

In addition, EPA consulted with tribal governments to obtain their views on the suitability of the Wabanaki Study and any additional relevant information to select a FCR for this final rulemaking. The tribes represented that the Wabanaki study and corresponding rate of 286 g/day is an appropriate and accurate portrayal of their present day sustenance fishing lifeway, absent significant improvement in the availability of anadromous fish species, and EPA gave significant weight to the tribes' representations.[79]

EPA disagrees with the commenter (see Excerpt #178) who objected to the use of the Wabanaki Study on the basis that "all individuals who lived in Maine in the 16th, 17th, 18th and 19th centuries lived in a subsistence manner," and asserted that fish consumption levels of Maine Indian tribal members likely are not artificially suppressed by pollution concerns, but rather have declined, along with the fish consumption of European Americans and other immigrant groups, due to economic development, and the availability of commercial food sources and public assistance to low income people, such that "this

[77] See Memo to File from Michael Stover, EPA Region 1 Indian Program Manager on the subject of "Tribal Technical Consultation: Maine Water Quality Standards and Human Health Criteria", documenting the consultation call of September 9, 2015, page 2.

[78] ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers*, as revised, July 24, 1992.

[79] Indeed, in developing its own 2014 tribal water quality criteria, the Penobscot Nation used a FCR of 286 g/day. The Nation explained that it chose the inland non-anadromous total FCR of 286 g/day presented in the Wabanaki Study because, although the Penobscot lands are in areas that would have historically supported an inland anadromous diet (with total FCR of 514 g/day), the contemporary populations of anadromous species in Penobscot waters are currently too low to be harvested in significant quantities. Penobscot Nation, Department of Natural Resources, *Response to Comments on Draft Water Quality Standards*, September 23, 2014, p. 9.

lifestyle is no longer necessary for survival in Maine." The commenter compared changes in fish consumption among tribal members to changes in fish consumption among high fish consuming immigrant populations, and claimed, without any asserted basis, that "it is likely" that younger tribal members voluntarily choose commercial food sources over subsistence fishing practices.

First, these comments mistakenly assume that the HHC should be set at a level necessary to protect current tribal fish consumption patterns, which, according to the commenter, are no longer "subsistence" practices. To the contrary, the HHC must protect the designated use of sustenance fishing, which is based on the settlement acts agreed to and codified by the state and Congress.

Second, these comments disregard the unique relationship that the Indian tribes in Maine have with their lands and waters, as recognized and codified in the settlement acts. Unlike immigrants from other parts of the world and their descendants, the tribes are indigenous peoples who have natural resources that were set aside for them by the federal and state governments to provide for their nourishment and for the continuity of their cultural practices. As explained in numerous comments received from tribal representatives and members in response to the proposal for this promulgation, the Indian tribes in Maine continue to greatly value their relationship to the land and water and the sustenance resources they provide, and they remain committed to preserving and protecting their traditional activities, including sustenance fishing. As stated in the Wabanaki Study, "[t]raditional cultural lifeways did not fade away as settlements intruded, they are alive and vibrant, albeit often adversely impacted by natural resource degradation."[80]

Third, heritage studies like the Wabanaki Study provide a reasonable surrogate for contemporary unsuppressed tribal fish consumption – particularly in the absence of any other data reliably addressing the issue – and support the choice of an appropriate FCR for the purpose of deriving HHC to protect the sustenance fishing use. There is no local survey of contemporary fish consumption that is a clear representation of current unsuppressed consumption for any tribes in Maine. Accordingly, EPA is using the Wabanaki Study as the best evidence of the level of fish consumption that a contemporary tribal member would consume for individual sustenance when unconstrained by concerns about water contamination.

The Penobscot Nation made the general comment that, although it supported and concurred in the use of a 286 g/day FCR for EPA's rule, a heritage FCR is more appropriate than present day FCRs for establishing WQS based on a tribal fishing right. EPA agrees that, in some cases due to data availability, such as this one, heritage rates may be the only practical way to estimate current unsuppressed rates – that is, free from the biasing influence of suppression effects, and may be useful, like in this case, in establishing a baseline for tribes' legally protected ability to sustenance fish.

As explained below, there are no other available data that reasonably represents current unsuppressed sustenance level consumption by the target population in the waters in Indian lands. The agency is in the initial stages of developing guidance on how to better gauge unsuppressed fish consumption,[81] and it is possible that in the future there may be studies that better measure the fish consumption rate that represents contemporary unsuppressed sustenance fishing practices. But absent such new information, the Wabanaki Study of heritage rates is the best scientific evidence available.

[80] Wabanaki Study at 13.

[81] "Guidance for Conducting Fish Consumption Surveys" – Draft (June 2016), available at https://www.epa.gov/sites/production/files/2016-07/documents/guidance-conducting-fish-consumption-surveys-2016.pdf

One commenter objected that use of the Wabanaki Study is speculative and unsupported by modern, scientific data. EPA disagrees that the Wabanaki Study is not scientific. The Study is a reliable product of peer reviewed science that evaluated the historic, archeological and anthropological evidence for tribal fish consumption, as well as contemporary information, to reconstruct diets that are "nutritionally complete and reflective of the three habitat types and resource utilization patterns in Maine."[82] It reasonably estimated the percentage of fish that would be consumed based on a 2000 kcal/day diet for three sustenance lifestyle scenarios, which provided a sound scientific framework for deriving an appropriate FCR in this rule.

The Maine Attorney General's office objected to EPA's reliance on the Wabanaki Study on the asserted grounds that EPA had not shared the Study with the state, and that Maine DEP was not aware of the Study until EPA used it in the February 2015 decision. EPA notes that the Wabanaki Study was peer reviewed prior to its release in 2009. Importantly, the panel of twelve specialists that reviewed the study included a toxicologist from the State of Maine Center for Disease Control and Prevention.[83] The Penobscot Nation's representative referred to the Wabanaki Study in his April 26, 2011 written testimony presented at the hearing before the legislature on Maine's 2011 draft arsenic criterion, in which Maine DEP also participated.[84] Both the Penobscot Nation and the Houlton Band of Maliseets referred to the Wabanaki Study in their November 2011 comments to DEP, as summarized by DEP in its May 25, 2012 response to comments that accompanied the state's final 2012 revised criterion for arsenic.[85] There is thus substantial evidence that the state was aware of – and involved in reviewing – the Study, and no evidence that EPA sought to conceal the Study from the state. The Study has been available to any interested party on EPA's website since its release. https://www.epa.gov/tribal/wabanaki-traditional-cultural-lifeways-exposure-scenario.

Two commenters objected to EPA's use of the Wabanaki Study because EPA funded it. EPA disagrees with the notion that Agency funding of a study necessarily taints its results. As noted above, the Wabanaki Study was extensively peer reviewed by multiple experts outside EPA. The Agency looks at the quality of the science and the rigor of the methodology to determine whether the study adequately supports the conclusion for which the study is being used. Demonstrative of this approach, EPA has not disregarded the ChemRisk Study on the basis that it was funded by industry.[86]

b. Reasons for not using the ChemRisk study Maine used to derive its FCR

EPA recognizes that Maine's HHC are based in part on local, population-specific fish consumption data, and EPA has approved those criteria for waters outside of Indian lands where recreational, and not tribal, fishers are the target population. However, as EPA explained in the February 2015 decision, the local data, from a 1990 study conducted by McLaren/Hart-ChemRisk, of Portland, Maine (the "ChemRisk Study" [87]), are not representative of unsuppressed tribal sustenance fish consumption in waters in Indian

[82] Wabanaki Study at 58.
[83] Wabanaki Study, App. 3 at 102.
[84] January 14, 2013, Letter from Patricia Aho, DEP to Curt Spalding, EPA, regarding *"USEPA Review of P.L. 2011, Ch. 194 and revised 06-096 CMR 584*", Exhibit.4, page 10.
[85] Id., Exhibit 8, pages 9 and 13.
[86] Boyle, Kevin J., *Fish Consumption, Exposure to Dioxin, and Health Risk Assessments*, 3 Maine Policy Rev. 3, (1994) (co-author of ChemRisk Study describing it as an "industry study" and its authors as "consultants for the industry").
[87] ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers,* as revised, July 24, 1992. See also Ebert, E.S., N.W. Harrington, K.J. Boyle, J.W. Knight, R.E. Keenan, *Estimating Consumption of Freshwater Fish among Maine Anglers*, North American Journal of Fisheries Management, 13:4, 737-745 (1993); http://dx.doi.org/10.1577/1548-8675(1993)013<0737:ECOFFA>2.3.CO;2

lands, and therefore the HHC that are based on the localized data are not adequate to protect the sustenance fishing use in those waters. The data from the ChemRisk Study are not suitable as a source for deriving the FCR for waters in Indian lands in Maine because it was not a survey of tribal sustenance fishers in tribal waters, and because fish consumption at the time of the survey on which it was based (1989 to 1990) was suppressed due to the presence of pollutants.

The ChemRisk Study was based on a statewide recreational angler survey that polled anglers with state fishing licenses; it was not a survey intended to characterize tribal fish consumption, nor did it focus specifically on tribal waters. As explained by tribal representatives both in comments on Maine's 2012 revisions and in comments on this rule, and by DEP in its response to comments on the 2012 revisions, tribal members are not necessarily required to get state licenses to fish and therefore were likely underrepresented in the survey.[88]

In its response to comments on the 2012 Maine WQS revisions regarding the use of the ChemRisk Study to derive FCRs for water quality criteria, DEP explained the fishing license requirements for tribal members as follows:

> The Maine Department of Inland Fisheries and Wildlife (MDIFW) indicates that tribal members do not require state fishing licenses for fishing in tribal waters, but do require state licenses when fishing in non-tribal waters. Where state licenses are required, the initial license is issued by the Tribe, whereas subsequent lifetime licenses are issued by MDIFW. The number of tribal waters in Maine is relatively small in comparison to all waters. It is possible that some individuals may have fished exclusively in tribal waters in 1989-1990, not required a state fishing license, and thus were not included in the population of license holders potentially surveyed.[89]

In addition, EPA disagrees with commenters who assert that there were no fish advisories or that there were an insignificant number of river miles covered by fish advisories at the time during the time of the ChemRisk Study. It is well documented that fish advisories were in place on some waters in Maine at the time of the ChemRisk Study survey. As documented by Maine's Department of Health and Human Services in a 2008 history of dioxin fish consumption advisories in Maine,[90] fish advisories were first issued in Maine on the Androscoggin River in 1985 and on the Kennebec and Penobscot River in 1987, before the ChemRisk Study survey was conducted. While relative to the state as a whole this may seem to be a small portion of river miles that were affected by a fish consumption advisory, the Penobscot River is a very large portion of the sustenance fishery for the Penobscot Indian Nation, and it is a waterbody with a high profile and symbolic significance in the Indian community.

Additionally, as documented by DEP in its response to comments on its 2012 WQS revisions, during the time that the ChemRisk survey was conducted:

> [P]ublic awareness of historical pollution in industrialized rivers can be expected to have

[88] Id., Exhibit 8, pages 14 and 19; June 20, 2016, Letter from Chief Brenda Commander, Houlton Band of Maliseet Indians, to Gina McCarthy, Administrator, EPA, page 15.
[89] January 14, 2013, Letter from Patricia Aho, DEP to Curt Spalding, EPA, regarding "*USEPA Review of P.L. 2011, Ch. 194 and revised 06-096 CMR 584*", Exhibit 8, page 19.
[90] Smith, Andrew E., and Frohmberg, Eric, *Evaluation of the Health Implications of Levels of Polychlorinated Dibenzo-p-Dioxins (dioxins) and Polychlorinated Dibenzofurans (furans) in Fish from Maine Rivers*, Maine Department of Health and Human Service, January, 2008, pages 2-3.

> suppressed fish consumption on a local basis. The Department is unable to quantify the extent of suppression due to historical pollution in the major rivers or the dioxin advisories in place at the time of the ChemRisk study, but believes that the ChemRisk (Ebert et al.) estimates of fish consumption for rivers and streams as well as the inclusive 'all waters' categories are likely to have been affected to some degree.[91]

Furthermore, as discussed in EPA's February 2, 2015, decision, the ChemRisk survey included questions regarding the impact of fish consumption advisories, and EPA reviewed the responses (which were not tallied and analyzed in the ChemRisk Study). The response data[92] indicate that 35% of respondents (556 individuals) were aware of the advisories during the time of the survey, and of the 160 respondents who reported that they ate fish from locations covered by fish consumption advisories, 82% (135) reported that the advisories affected whether they kept the fish caught at those locations.[93] It is not clear (because the question was not asked) whether anglers avoided certain waters in the 1989/1990 fishing season because of the fish advisories and whether that avoidance affected their total fish consumption. Nonetheless, it is clear that the existence of the advisories did result in some anglers reducing their take from those rivers.

Also as discussed in EPA's February 2, 2015, decision, EPA also reviewed the results of the Penobscot Nation's draft 1991 Penobscot River Users Survey.[94] While the survey was small (210 respondents) and the response rate was only 25%, and it was limited to Penobscot Nation members and their use of the Penobscot River, it reinforces EPA's conclusion that the ChemRisk Study does not reflect unsuppressed sustenance fish consumption in tribal waters. For example, 72.9 % of the respondents stated they did not eat fish from the Penobscot River, and a majority (66.7%) stated that they had concerns about eating fish from the river. [95] The vast majority of those concerns were related to pollution.[96] In addition, of the 37.1% who reported not using the river at all, 16.3% identified the reason as concerns about pollution.[97]

One commenter asserted that to the extent there were suppression effects, they were likely due to other factors such as historical loss of habitat and/or reductions in fish populations. As detailed in the preceding, EPA has a well-developed record for determining that the ChemRisk Study contained data affected by suppression due to pollution concerns. The commenter provides no data or evidence to support the claim that other factors account for any suppression effects. Moreover, although EPA focused on the suppressing effects of pollution concerns in evaluating the ChemRisk Study, it may be the case in certain circumstances that other factors, such as reduction in fish habitat and/or population, artificially suppress fish consumption data and thus should also be taken into account.

For all of the above reasons, EPA reasonably and appropriately determined that the ChemRisk Study was not suitable for calculating a current, unsuppressed tribal sustenance fish consumption rate for waters in Indian lands.

6. Administrator's Determination

EPA received several comments relating to the Administrator's determination under CWA section 303(c)(4)(B) that Maine's HHC do not meet CWA requirements as applied to waters in Indian lands or

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[91] January 14, 2013, Letter from Patricia Aho, DEP to Curt Spalding, EPA, regarding "*USEPA Review of P.L. 2011, Ch. 194 and revised 06-096 CMR 584*", Exhibit 8, pages 20-21.
[92] Provided by the study author, Ellen Ebert, to EPA via email October 3, 2013.
[93] EPA, *Analysis of Suppression Questions from Chemrisk Study*, Memo to File, January 30, 2015.
[94] 1991 Penobscot River Users Survey conducted by the Penobscot Nation's Department of Natural Resources (draft).
[95] Id., Appendix A, §§ A.5 and A.6
[96] Id., Appendix A, § A.6
[97] Id., Appendix A, §A.1.a

waters outside Indian lands with a reserved fishing right under the MIA. Most of those comments argued that this determination lacked adequate legal foundation, because it relied on the finding that there is a sustenance fishing use in these waters. EPA has responded to those comments in Topic 3.1 and 3.2, above. Some of the comments questioned the validity of the Administrator's determination to the extent it was designed to address the District Court's holding in the *Mills* case, which found that the MIA reserved a sustenance fishing right for the Penobscot Nation throughout the main stem of the Penobscot River from Indian Island to the confluence of the East and West Branches of the Penobscot River). These commenters argued that the outcome of the *Mills* litigation is uncertain, and so it was inappropriate for the Administrator to extend the reach of her action on HHC in response to the decision.

EPA agrees that the law of the case in the *Mills* litigation is not yet settled, and an appeal may change the law surrounding the scope of the Penobscot Nation's reserved sustenance fishing right. EPA disagrees that this situation requires the Agency to suspend its action on HHC designed to protect that fishing right. As described in more detail under Topic 4 below, EPA has designed the Administrator's determination in this matter to conform the coverage of the HHC EPA promulgates to whatever the litigation yields concerning the scope of the Nation's fishing right. This approach ensures consistency with the court's findings in the case to date and with any changes that may occur as the litigation proceeds. The District Court was unequivocal in its holding that the Nation has a reserved sustenance fishing right under the MIA in the entire main stem of the Penobscot River, and that fishing right was the result of the Maine legislature recognizing the Nation's historic fishing practices in the river surrounding its reservation. Consistent with the court's clear acknowledgement of the sustenance fishing use that the MIA provides for the Nation in the river, and EPA's approval of the provisions in MIA as a designated use of sustenance fishing, EPA must assure that use is protected under the CWA.

Specific Comments

Coalition of Dischargers in Maine (Excerpt # 178)

Commenter ID: 0332

Name: William E. Taylor

Organization: Coalition of Dischargers in Maine

On behalf of the Town of Baileyville, ME; City of Brewer, ME; City of Calais, ME; Town of Dover-Foxcroft, ME; Town of East Millinocket, ME; Guilford-Sangerville Sanitary District ; Lincoln Sanitary District; Town of Millinocket, ME; and True Textiles, Inc.; Veazie Sewer District; Verso Corporation; and Woodland Pulp LLC (the "Coalition"), we provide the attached comments on the Environmental Protection Agency's ("EPA's") proposed revisions to certain federal water quality criteria applicable to the State of Maine as set out in 81 Fed. Reg . 23239 (April 20, 2016).

The Coalition requests that EPA withdraw the proposed rule. Maine's existing water quality criteria and standards, in all respects, serve the purposes of the Clean Water Act, protect designated uses established by the Maine Legislature, and are based upon appropriate technical and scientific data. EPA's proposed criteria and standards are inconsistent with the Clean Water Act and best available science, as well as with the Maine and federal Indian Claims Settlement Acts. Further, EPA has not followed its own public participation requirements in developing and proposing these revisions. EPA's proposal creates unnecessary economic and regulatory divisions between state watersheds, between municipal and industrial dischargers within the state and,

more importantly, between Maine residents that utilize the State's water resources. EPA has failed to adequately explain why it is disapproving certain Maine WQS.

We appreciate the opportunity to comment on the proposed rule and your careful consideration of the attached comments.

...

These comments, relating to the Proposal of Certain Federal Water Quality Standards ("WQS") Applicable to Maine ("Proposed Maine Rule") by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. §§ 1251, et seq. ("CWA"), 81 Fed. Reg. 23239 (April 20, 2016), are submitted on behalf of the following MEPDES permit holders: Town of Baileyville, ME; City of Brewer, ME; City of Calais, ME; Town of Dover- Foxcroft, ME; Town of East Millinocket, ME; Guilford-Sangerville Sanitary District; Lincoln Sanitary District; Town of Millinocket, ME; True Textiles, Inc.; Veazie Sewer District; Verso Corporation; and Woodland Pulp LLC (collectively, the "Coalition").

The Coalition supports and joins in the comments submitted by Maine Attorney General Janet T. Mills, and the Coalition will not repeat those comments here. The Coalition is submitting these supplemental comments to address the following points.

I. Maine's Existing WQS Are in Compliance with CWA Requirements.

Maine's water classification system, WQS, and water quality monitoring programs are recognized as among the best in the country. Maine, through its Department of Environmental Protection ("Maine DEP"), efficiently and diligently implements the CWA and associated state laws and regulations. Under the CWA, states are responsible for establishing and revising WQS.40 C.F.R. § 131.4(a). While EPA must review and approve or disapprove state-adopted WQS, EPA's review is limited. As set out in 40 C.F.R. § 131.5, EPA's review involves a 5-part determination: (1) whether the state has adopted water uses that are consistent with the requirements of the CWA; (2) whether the state has adopted criteria that protect designated water uses; (3) whether the state has followed its legal procedures for adopting standards; (4) whether the state standards are based on appropriate technical and scientific data and analyses; and (5) whether the standards meet other minimum requirements including the antidegradation policy, certification by the state attorney general, and adequate information to determine the scientific basis for the standards. 40 C.F.R. §§ 131.6 and 135(a).

In all respects, for all designated uses and for all people in Maine, the State's WQS fully meet the requirements of the CWA. While Maine's WQS and criteria have been revised periodically over the last 20 years, the same essential components have been in place through three or more 5-year licensing cycles. During that time, EPA has recommended changes to certain criteria and has reviewed changes to designated uses and to the State's antidegradation policy. Prior to 2001, EPA issued licenses to the 33 dischargers listed in Exhibit 4-1 of the Economic Analysis for Proposal of Certain Federal Water Quality Standards Applicable to Maine ("Economic Analysis") for the proposed rule. EPA utilized the State's WQS. Subsequent to the State receiving authority to administer the CWA, Maine DEP has issued at least two 5-year permits to each of the dischargers listed in Exhibit 4-1. These permits were also based on existing WQS, including the WQS and criteria EPA now is proposing to revise.

To our knowledge, EPA never had a substantive comment or objection to Maine DEP's application of the current standards, designated uses, and criteria in any of these licenses. If EPA was concerned that the State's WQS were not consistent with the requirements of the CWA, it could have disapproved specific standards at any time. If EPA was concerned about the impact of discharges to any river segment identified in the proposed rule, including the Penobscot, Meduxnekeag, and St. Croix rivers, EPA had multiple opportunities to object to permits being

issued to dischargers in those river segments, including tributaries to those segments. This is strong evidence that Maine's existing WQS protect designated uses, are based on sound science, and are otherwise consistent with CWA requirements.

Cognizant of the foregoing, EPA indicates in its response to public comments on Maine's submission to EPA for approval of new and revised WQS that although "EPA may not have offered any comments about those permits, [it] does not constitute an acknowledgement by EPA that Maine's WQS had been approved by EPA to apply in waters in Indian lands." Page 44. It is astounding that EPA would claim that its failure to offer comments on dozens of permits for dischargers subject to the proposed new rule was not an approval of the underlying WQS upon which those permits were based. Maine DEP is similarly concerned about EPA's abrupt change regarding the State's WQS. See DEP's February 25, 2015, Position Paper, attached as Exhibit 1.

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

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

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

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

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

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

held a hearing on or adopted a designated use of sustenance fishing. Nor has the State ever provided EPA a proposed sustenance fishing designated use as part of the water quality "docket" which is periodically compiled and sent to EPA for approval.

Maine DEP, the agency that administers the classification system and enforces State WQS, agrees that there is no designated use of sustenance fishing. See Exhibit 1.

III. EPA Has Failed to Follow Proper Procedures in Developing the Proposed Rule

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

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

…

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

Maine DEP Rule Chapter 584 Surface Water Quality Criteria for Toxic Pollutants establishes 32.4 g/day as the fish ingestion rate for determining human health water quality criteria. This fish consumption rate is based on the assumption that one-half pound (227 g) of recreationally caught fish obtained from Maine waters may be consumed weekly throughout the year. This fish consumption rate was derived from data provided by EPA, and recreationally caught fish consumption surveys conducted in Maine and in other states (MCDC 2001). EPA alleges that Maine DEP's consumption rate does not adequately protect Maine's Native American Tribal consumers because it represents suppressed fishing efforts and consumption; i.e., modern fish ingestion rates are influenced by limited availability due to advisories and bans and by consumer concern for the safety of available fish. Furthermore, EPA opines that deriving WQS using traditional sustenance consumption rates is needed to protect the Tribes as a target population. Finally, EPA concludes that there are no contemporary local survey data that document fish consumption rates for sustenance fishing in waters in Indian lands in Maine. Thus, EPA has proposed that WQS for "waters in Indian lands" be based on a fish consumption rate of 286 g/day that is reported in a EPA-funded and Tribal-sponsored analysis of traditional Native American lifeways, designed specifically for producing fish consumption rates for EPA's proposal. EPA asserts that this consumption rate represents present day unsuppressed Tribal sustenance-level fish consumption.

Contrary to the foregoing, (1) site-specific, modern consumption surveys are most relevant to WQS development, (2) there are relevant, scientifically-sound, and peer-reviewed local fish consumption data available for both the general Maine fish consuming population, as well as for Tribal consumers (and these data have been applied regularly by EPA to inform fish consumption

rate estimates), and (3) the self-funded and self- directed Tribal Lifeways fish consumption value is an inappropriate and irresponsible factor on which to base WQS. Present day tribal fish consumption rates are well represented, if not over-estimated, by Maine DEP's fish consumption rate, and that value should continue to be used to inform water quality regulations for all inland waters in Maine for all populations.

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

1. Use a "site-specific fish consumption rate that represents at least the central tendency of the population surveyed (either sport or subsistence, or both),"
2. If surveys conducted in the geographic area are not available, "consider results from existing fish intake surveys that reflect similar geography and population groups (e.g., from a neighboring State or Tribe or a similar watershed type),"
3. Use intake rate assumptions from national food consumption surveys such as the national food consumption surveys conducted by the U.S. Department of Agriculture, or
4. Use EPA's defaults of 17.5 g/day for the general adult population and sport fishers, and 142.4 g/day for subsistence fishers.

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

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

A one-year state-wide survey of licensed Maine recreational anglers was conducted in 1991 (Ebert, et al., 1993, attached as Exhibit 2). Those survey data indicated that 95 percent of the Maine anglers surveyed who consumed sport-caught fish obtained through both open-water and ice-fishing in Maine consumed a total of 26 g/day or less. At the time the survey was conducted, there were fish consumption advisories present on only 200 miles of the more than 37,000 miles, or about one-half of one percent, of rivers, streams, and brooks in the state, and there were no advisories present on any of Maine's roughly 2,500 lakes and ponds. As a result, Maine anglers had the ability to fish from a nearly unlimited number of non-advisory Maine water bodies during that time period. Thus, the results of this survey can be considered to represent consumption associated with unsuppressed fishing efforts.

Fish consumption rates for a number of identified subpopulations were also estimated based on those survey data. The group with the highest consumption rate comprised those individuals who identified themselves as Native Americans. A total of 148 Native Americans were included in the surveyed population (11 percent of the population who participated) and 96 of those individuals reported consuming freshwater fish that had been sport- caught. While the median consumption rate (50th percentile) of 2.3 g/day for this subpopulation was similar to other groups evaluated,

the arithmetic mean of 10 g/day was higher than the arithmetic mean of 6.4 g/day for the total population, and the 95th percentile of 51 g/day for Native Americans was nearly double the 95th percentile for the total angler population (ChemRisk and HBRS 1992). These data indicated that there was a portion of the Maine Native American population that, on average, was consuming fish at higher rates than the general Maine angler population. However, only six (6 percent) of the 96 Native Americans who consumed fish consumed at rates higher than Maine's default fish consumption rate, 32.4 g/day. In addition, the maximum rate reported by this subpopulation (162 g/day) was lower than the maximum consumption rate of 182 g/day reported for the entire Maine population surveyed. Thus, while the average Native American angler consumed more than the average recreational angler, the consumption rates for the very highest consumers were similar to those for the population at large.

The basis for the Native American tribal fish consumption rate applied by EPA in the derivation of the proposed WQS for waters in Indian lands (and for any water to which the sustenance fishing designation use based on MIA applies [81 FR 23243, Part III.2]) is the reported results of a EPA-funded dietary reconstruction study conducted by Harper and Ranco (2009). These authors estimated historical consumption rates between 286 and 514 g/day for Maine's Native American tribes based on assumptions about caloric intake and literature-based information about the historical dietary practices of Native Americans in the 16th, 17th, 18th, and 19th centuries. The stated intent of that report was to reflect the historical patterns of individuals fully using their natural resources, and the report asserted that individuals could not return to these patterns because of present-day environmental contamination conditions but that they would return to this behavior "once protective standards are in place." This report implies that impaired water quality is the reason that individuals do not currently consume fish at the historically higher rates, and that a substantial number of them would return to those historic consumption rates if water quality was improved. However, neither assertion is true, for the following reasons:

- All individuals who lived in Maine in the 16th, 17th, 18th, and 19th centuries lived in a subsistence manner. Thus, this behavior was not limited to the tribes. Hunting, fishing, farming, and trading were the only way individuals could feed themselves, as there were no widely available commercial foods. Due to the current commercial availability of fresh, frozen, and prepared foods in stores and restaurants, and public assistance for low income persons, this lifestyle is no longer necessary for survival in Maine.
- It is very unlikely that many, if any, individuals would return to this lifestyle in the future. At the time the Maine angler survey was conducted, advisories were limited to specific main stem reaches of four warm-water rivers in the State, but there were no advisories on any other water bodies. Thus, Maine anglers had a vast number and variety of non-advisory fishing resources available at that time. Despite this, only 65 percent of the licensed Native Americans who participated in the survey actually consumed sport-caught fish. This percentage was lower than the 77 percent of the total angler population surveyed that consumed sportcaught fish. Thus, even when nearly unlimited resources were available, none of the Native Americans included in the survey consumed at the levels asserted by the Harper and Ranco (2009) study.
- While it is possible that some tribal members may desire to return to a traditional, subsistence lifestyle, this would certainly not be "typical" behavior among tribal members, which is the focus of EPA's (2000) methodology document. It is highly unlikely that younger tribal members, who have never engaged in such practices, would adopt them as a way of life. In fact, studies of traditional, highfish consuming populations that have immigrated to the U.S. indicate that, after a few years of acculturation in the U.S., their sport-caught fish consumption is substantially reduced and replaced by other proteins and commercial sources of fish. This change in behavior is even more marked for the second generations of those populations, who tend to discard the previous cultural practices and acclimate to a more typical American diet (Shatenstein, et al. 1999; Sechena, et al.1999).

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

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

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

VII. EPA's Proposed Rule Will Not Have a Measureable Benefit for Maine's Indian Tribes

EPA's proposal to promulgate chemical-specific WQS in Indian waters based on a proposed fish consumption rate of 286 g/day at a 1E-06 target risk level will not result in a measureable reduction in lifetime cancer rates. To illustrate this, we compare background or current cancer risks to the incremental change in the cancer risk based on EPA's use of a 286 g/day fish consumption rate. The background lifetime risk of developing cancer rate in the U.S. is 0.4205, or roughly 1 in 2 for men and 0.3758 or 1 in 3 for women. *(1)* Historically, Maine has relied on a 32.4 g/day fish consumption rate and a 1E-06 target risk threshold for setting WQS, so the above background risks represent the current or background exposures and risks. EPA's proposal for waters in Indian lands uses a fish consumption rate of 286 g/day, which would theoretically change the lifetime cancer risk for men from 0.420500 to 0.420491, and for women from 0.375800 to 0.375791. These differences in lifetime cancer risk are not measurable, nor are they meaningful from a public health perspective. In essence, the 32.4 g/day fish consumption rate used for setting WQS in the rest of the State of Maine provides as much meaningful protection as does the EPA's proposal, so EPA's proposed changes to the fish consumption rate for waters in Indian lands is not warranted for the purpose of protecting human health, particularly given the costs associated with the proposed rule.

VIII. The Proposed Maine Rule is Inconsistent with the Settlement Acts.

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

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

This statement wrongly asserts that a key purpose of the Settlement Acts was to allow the Maine Tribes to preserve their sustenance fishing practices in waters located outside of tribal reservation lands, including in trust lands. In fact, the Settlement Acts provide that the tribal members' sustenance fishing right is limited to the tribal reservations, which do not include trust lands. 30 M.R.S. §§ 6205 (distinguishing between tribal reservation land and tribal trust land), 6207(4)

("the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance . . . " (emphasis added)). Thus, it would be illegal for tribal members to engage in sustenance fishing when they are located in inland waters outside their reservations. When located in such waters, tribal members are subject to the fishing restrictions – including bag limits – that apply to all other Maine citizens. 30 M.R.S. § 6204.

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

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

> • TSD, pages 4-5: "the approved designated use of sustenance fishing set forth in MIA sections 6207(4) and (9) applies to all inland waters where the Southern Tribes have a right to sustenance fish, irrespective of whether such waters are determined to be within or outside of the scope of their reservations for purposes other than sustenance fishing."

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

IX. Summary

EPA has repeatedly failed to comply with mandated obligations under its own regulations. 40 C.F.R. Part 131 requires EPA to approve or disapprove state submittals of WQS within 90 days. EPA's failure to act on Maine's submittals extended for up to 10 years in some cases. At the same time, EPA allowed Maine DEP to issue permits to potentially-affected facilities without comment.

...

(1) http://www.cancer.org/cancer/cancerbasics/lifetime-probability-of-developing-or-dying-from-cancer, visited on 06/13/2016.

EPA Response: EPA's general response above responds to the bulk of these comments. With regard to the comment that EPA's rule creates "economic and regulatory divisions between state watersheds, between municipal and industrial dischargers," it is not uncommon in Maine, as in other states, for similar dischargers to have disparate permit limits based on, in part, their receiving waters. Different waterbodies have different WQS depending on, among other factors, their designated uses. In addition, even where waters have identical WQS, dischargers' permit limits to meet those WQS often vary depending on the size of the receiving water, the presence of other dischargers, and the nature of the effluent. EPA acknowledges that the majority of WQS contained in this rule will apply to only a limited number of waters in the state, but this is necessary to adequately protect the designated uses of those waters.

Maine Attorney General (Excerpt # 182)

Commenter ID: 0354

Name: Janet Mills

Organization: Attorney General

Maine Attorney General Janet T. Mills ("Maine AG") hereby submits the following comments in response to the Proposal of Certain Federal Water Quality Standards ("WQS") Applicable to Maine ("Proposed Maine Rule") by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. §§ 1251, et seq. ("CWA"). 81 Fed. Reg. 23239 (April 20, 2016). The underlying basis for much of the Proposed Maine Rule (see id. at 23241-47) is set forth in EPA Region 1's letter action dated February 2, 2015, and its accompanying 51-page rationale (collectively the "February 2, 2015 Action"), which Maine is presently challenging in a separate federal court action pending in the United States District Court for the District of Maine, Civil Action No. 14-cv-264:JDL ("Pending Action").

1. All of Maine's arguments in its Pending Action also apply to the Proposed Maine Rule.

All portions of EPA's Proposed Maine Rule that were prompted by, taken in response to, or are otherwise based on EPA's February 2, 2015 Action (including Sections II-IV(A)-(B) of the Proposed Maine Rule) are unlawful based on Maine's arguments raised in its Pending Action, which apply with equal force to EPA's Proposed Maine Rule. Maine's Second Amended Complaint filed in the Pending Action is attached as Exhibit ("Ex.") I, and is incorporated herein by reference. *(1)* The Maine AG comments more specifically as follows:

2. Maine's Indian Settlement Acts did not "expressly confirm" or establish any "aboriginal" right to tribal sustenance fishing, let alone any kind of right to any heightened quality of water and/or fish based on membership in a Maine tribe.

EPA's Proposed Maine Rule, like its February 2, 2015 Action, wrongfully asserts that an underlying purpose of Maine's various Indian settlement acts was to expand the land base for all of Maine's tribes in order to preserve their cultural sustenance practices (including sustenance fishing), and that this alleged underlying purpose in turn requires EPA, in its reviewing role with respect to Maine's WQS submissions under the CWA, to ensure a heightened quality of water and/or fish in order to protect Maine's tribes. 81 Fed. Reg. at 23241-42. Nothing in the CWA contemplates or authorizes this EPA approach. Likewise, the history and plain language of Maine's Indian settlement acts do not support EPA's interpretation of the alleged underlying (and unwritten) purpose of those acts, but instead prohibit EPA's position, which would impermissibly give Maine's tribes an enhanced status and greater rights with respect to water quality than the rest of Maine's population.

With respect to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (collectively the "Northern Tribes"), EPA's interpretation of the underlying purpose of the Maine Indian settlement acts is flatly contradicted by express provisions of the Maine Implementing Act, 30 M.R.S. §§ 6201 et seq. ("MIA"), as confirmed and ratified by the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 et seq. ("MICSA") (collectively the "1980 Acts"). Under the plain language of these 1980 Acts, the Northern Tribes are, without exception, fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources," a phrase which expressly includes water and water rights, and fishing rights. 30 M.R.S. §§ 6203(3), 6204; 25 U.S.C. §§ 1722(d), 1725(a); (Ex. 1, Second Amended Complaint, ¶¶ 47-48). Thus, under the 1980 Acts, the Northern Tribes are subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, and that aspect of the settlement is unaffected by EPA's novel new interpretation of the underlying purpose of the 1980 Acts.

The Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (collectively the "Southern Tribes") are also subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, but with a limited caveat namely, that members of these Southern Tribes may, within their respective reservations only, generally take fish free from otherwise applicable State fish and game rules regulating the method, manner, bag and size limits and season for taking fish, provided that the fish is taken for the Southern Tribal member's individual sustenance rather than for a commercial or some other purpose. 30 M.R.S. § 6207(4); (Ex. l, Second Amended Complaint, ¶¶ 41-46). This limited right of members of the Southern Tribes to take fish arises from a hunting and fishing provision in MIA, rather than from any of the express jurisdictional provisions of the 1980 Acts, which memorialized a negotiated settlement that resolved disputed claims and expressly transferred and extinguished all aboriginal tribal rights. See 30 M.R.S. § 6204; 25 U.S.C. §§ 1721(a)(2), 1721(b)(2)-(4), 1723, 1725(a)-(b)(l). *(2)* Thus, with respect to the Southern Tribes, EPA's Proposed Maine Rule wrongfully asserts that MIA, 30 M.R.S. § 6207(4), "expressly confirmed an aboriginal right" to tribal sustenance fishing in the Southern Tribes' reservations. 81 Fed. Reg. at 23241. That limited right in MIA is not an aboriginal right, as all aboriginal rights were transferred and extinguished; it is a statutory entitlement as a result of the settlement underlying the 1980 Acts. It also has nothing to do with Maine's underlying environmental regulatory jurisdiction over the quality of all State waters, which is expressly addressed by different jurisdictional portions of the 1980 Acts that contain no exceptions to Maine's statewide environmental regulatory jurisdiction. See 30 M.R.S. §§ 6204, 6206; 25 U.S.C. §§ l72l(b)(2)(4), l725(a)-(b)(l). Thus, like the Northern Tribes, the Southern Tribes are subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality, and that aspect of the settlement is also unaffected by any new EPA interpretation of any alleged underlying purpose of the 1980 Acts.

Under MICSA's Sections 1725(a)-(b)(l) and MIA's Section 6204, all Maine tribes are subject to Maine's environmental regulatory jurisdiction with respect to the quality of Maine's waters. Under MIA's Section 6206, the Southern Tribes are treated like municipalities and are exempt from Maine's jurisdiction with respect to "internal tribal matters," which the First Circuit Court of Appeals has interpreted narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation." Maine v. Johnson, 498 F.3d 37, 46 (1st Cir. 2007); see also id. at 45 (if the internal affairs exemption negated Maine's ability to environmentally regulate within tribal waters, it would be "hard to see what would be left of the compromise restoration of Maine's jurisdiction" set forth in the 1980 Acts). MIA's Section 6207(4) and its limited right to take fish free from fish and game restrictions are not mentioned in either MIA' s Sections 6204 or 6206, because that limited right to "take" fish is not a general exception with respect to Maine's environmental regulatory jurisdiction- it is confined entirely to the type of fish and game rules and regulations outlined in Section 6207 such as "the method, manner, bag and size limits and season for fishing." See 30 M.R.S. § 6207(3).

Moreover, no part of MIA Sections 6204, 6206, or 6207 suggests in any way that there is any implicit or bootstrapped tribal right to a heightened quality of water or fish for any reason, let alone as a result of Section 6207(4). This is because the intent and plain terms of the 1980 Acts require equal environmental regulatory treatment with respect to all Maine waters for all Maine citizens, including members of all of Maine's Indian tribes. (Ex. 1, Second Amended Complaint, ¶¶ 16-50, 62-67). EPA wrongly cites to 30 M.R.S. § 6207 (81 Fed. Reg. at 23241) as an alleged reflection of Maine's intent to create a CWA designated use of "sustenance fishing," which would violate other express provisions and the core principles of the 1980 Acts.

3. Maine has never adopted any CWA designated use of "sustenance fishing" for any waters, and Maine's existing designated use of "fishing" for all surface waters, which protects

Maine's general population only, has been in effect statewide since EPA's approval of Maine's Water Classification Program in the 1980s.

EPA unlawfully bases its Proposed Maine Rule on two new EPA interpretations of longstanding Maine law as establishing a new designated use of tribal "sustenance fishing" for all Maine Indian waters in order for all Maine's tribes "to preserve their culture and lifeways." 81 Fed. Reg. at 23241-42. These new EPA interpretations, first made and announced in EPA's February 2, 2015 Action (and now echoed in the Proposed Maine Rule), and which EPA wrongfully claims flow from the 1980 Acts, are unlawful.

Since at least 1986, Maine's Water Classification Program, now codified at 38 M.R.S. §§ 464-470, has included State-adopted and EPA-approved designated uses of "fishing" and "recreation in or on the water," which reflect the fishable/swimmable goals that are generally required by the CWA. (Ex. I, Second Amended Complaint, ¶¶ 68-77). Decades ago, EPA fully approved all aspects of Maine's water program, including Maine's designated uses of "fishing" for all Maine surface waters - without any exception for any tribal waters. (See Ex. I, Second Amended Complaint, ¶¶ 68-73).

EPA was also fully aware of the effect of the terms of the 1980 Acts prior to approving Maine's Water Classification Program in the 1980s. For instance, EPA issued an informal Maine status report (provided to Maine in March 1982) acknowledging Maine's statewide environmental regulatory jurisdiction over all of its waters, including Maine's Indian waters. (See Ex. 4, which is incorporated herein by reference, at p. 4, rejecting tribal rights with respect to areas under the Clean Air Act analogous to CWA designated uses, and noting that State law on environmental protection will apply in Indian territory). After EPA approved Maine's Water Classification Program (including Maine's designated use of "fishing" for all surface waters), EPA again stated its view that Maine has statewide environmental regulatory jurisdiction in a July 1993 EPA legal memorandum, which expressly limited Maine tribal rights under the CWA's new 1987 tribal provisions (Section 518) to receipt of CWA Section I 06 funding grants - specifically because of the unique provisions of the 1980 Acts Maine giving statewide environmental regulatory jurisdiction over core environmental matters such as air and water quality. (See Ex. 5, which is incorporated herein by reference).

Until EPA's February 2, 2015 Action, EPA had never taken the position that Maine's longstanding designated use of "fishing" also encompassed an unwritten second designated use of "sustenance fishing" for the protection of anyone, let alone Maine's Indian tribes, in all (undefined) Indian waters. Likewise, until EPA's February 2, 2015 Action, EPA had never taken the position that any portion of MIA (including 30 M.R.S. § 6207(4)) was intended as or constituted a designated use of "sustenance fishing" for the reservation waters of the Southern Tribes (or any other waters). These recent EPA positions (see 81 Fed. Reg. at 23241-42) are contrary to the 1980 Acts, the CWA, EPA's guidance, and EPA's historical practice with respect to Maine's WQS.

As EPA knows, for CWA purposes there has never been any State-adopted designated use of "sustenance fishing" for any Maine waters. (See Ex. 1, Second Amended Complaint, ¶¶ 68-77). As EPA also knows, Maine expressly considered but rejected a controversial 2002 State proposal to the Maine Legislature that would have created for the first time a designated use of "subsistence" fishing, which was analogous to EPA's newly created designated use of "sustenance fishing," but for only a limited portion of the Penobscot River as opposed to all of Maine's Indian waters. (See Ex. 6, which is incorporated herein by reference). Maine is aware of no other Maine effort to adopt any designated use of "sustenance" or "subsistence" fishing for any Maine waters. Moreover, as mentioned above, EPA already fully approved all aspects of Maine's Water Classification Program, including Maine's designated uses of "fishing" for all surface waters of the State, without any exception for any Maine Indian waters. Under EPA's rules, 40 C.F.R. §§

131.21 (c)-(e), these WQS, which purport to apply to all Maine waters and which were adopted by Maine and submitted to EPA for review and approval prior to May 30, 2000, have been and are the WQS in effect for CWA purposes for all Maine surface waters, including all of Maine's Indian waters. *(3)*

EPA's new interpretations of Maine's existing designated use of "fishing" and MIA's Section 6207(4) as incorporating a new designated use of tribal "sustenance fishing" for Maine Indian waters represent federal actions taken entirely by EPA and do not reflect any State adopted designated use. By these new interpretations of existing Maine law, EPA has attempted to federalize Maine's WQS and create a new federal designated use in violation of both the CWA and the 1980 Acts. In the course of creating its new federal designated use of tribal "sustenance fishing," EPA also did not adhere to any of the CWA process required for new WQS, such as seeking public comment and/or holding public hearings on the new designated use. See, e.g. 40 C.F.R. §§ 131.2l(c)-(e) (state WQS adopted and submitted to EPA prior to May 30, 2000 are the applicable WQS for CWA purposes until replaced by more stringent federal WQS), 131.22(c) (when promulgating WQS, EPA Administrator is subject to same process requirements as states); 40 C.F.R. §§ 131.l0(e) (requiring states to provide notice and opportunity for hearing "[p]rior to adding or removing any use") (removed and reserved eff. October 20, 2015, 80 Fed. Reg. 51020, 51021-22).

4. EPA also lacks authority under the CWA to create any new kind of fishing designated use because there has never been any EPA determination that Maine's existing designated use of "fishing" for all surface waters does not meet CWA requirements.

The February 2, 2015 Action and EPA's new interpretations of Maine law creating a new designated use of "sustenance fishing," were by the EPA Region I Regional Administrator, who has no authority under the CWA to replace Maine's existing statewide designated use of "fishing" with a new designated use of "sustenance fishing" for any Maine Indian waters. This was something that only the EPA Administrator could have done - if she had first made a formal determination that Maine's prior adoption of a designated use of "fishing" violated the requirements of the CWA for such waters. *(4)* To date, no such formal determination has ever been made by anyone at EPA, let alone the EPA Administrator. *(5)* This is presumably because it is something that EPA could not do under the CWA, as Maine's designated use of "fishing" for all surface waters, which is designed to protect Maine's general population rather than a more focused population, meets all CWA requirements and is in full keeping with EPA regulations and guidance. In any event, and as discussed above, such a determination would also violate the 1980 Acts and their prohibition against any special or heightened environmental regulatory treatment based solely on membership in a Maine tribe. 25 U.S.C. §§ l725(h), 1735(b).

The February 2, 2015 Action and the Proposed Maine Rule try to get around this deficiency (the lack of any EPA determination that Maine's existing statewide designated use of "fishing" violated CWA requirements) by claiming that no WQS (including designate uses) had ever been approved for Maine's Indian waters, so (in EPA's view) no such determination was ever necessary and EPA was free to simply make up its own new designated use of tribal "sustenance fishing." This revisionist approach defies historical reality, as EPA not only already fully approved all aspects of Maine's Water Classification Program for all Maine waters in the 1980s, but then also consistently enforced Maine's WQS in Indian waters in a variety of ways~ as was required under the CWA. (See Ex. 1, Second Amended Complaint ¶¶ 93-103). EPA's position also violates the CWA's requirement that States promulgate WQS for all interstate waters, and EPA's own rules and guidance. 33 U.S.C. §§ 1313(c)(l), (2); 40 C.F.R. § 13l .3(i), 131.4; PUD No. I of Jefferson Co. v. Washington Dep 't of Ecology, 511 U.S. 700, 704 (1994); 40 C.F.R. §§ 131.21(c)-(e). *(6)* It is also an absurd position, as it would result in a decades-long regulatory void based on a lack of any WQS and resulting CWA protections for all of Maine's Indian waters,

which would violate the CWA and the 1980 Acts. But this is exactly what EPA claims here - that there have never been any WQS (including designated uses) for any Maine Indian waters, and that all EPA permits, enforcement measures, and other actions taken to date with respect to water quality in Maine's Indian waters were mistakes and of no effect.

5. Maine has never chosen to protect Maine tribal members only as the "general target population" of any "fishing" or other designated use for any Maine waters.

As noted above, EPA purports to have already created (as a result of its new interpretations in its February 2, 2015 Action) a new designated use of tribal "sustenance fishing" for Maine (81 Fed. Reg. at 23242-43), which EPA designed to protect a tribal-only "general target population" that Maine itself never chose to provide with heightened protections. Id. at 23245 ("EPA's analysis of the settlement acts also led EPA to consider the tribes to be the general target population in their waters."); (see also Ex. 1, Second Amended Complaint, ¶ 86).

EPA's decision to focus on protecting Maine's tribes as the intended "general target population" is a new EPA approach that unlawfully usurps Maine's primary role over its water under the CWA, as states have the primary authority and responsibility to establish WQS, including designated uses for all interstate waters. In its EPA- approved Water Classification System, Maine deliberately chose to protect Maine's entire general population only with respect to its designated use of "fishing" for all of Maine's surface waters. Under EPA's regulations, Maine's "fishing" use has been the Maine WQS/designated use in effect for CWA purposes since its adoption by Maine and submission to EPA. 40 C.F.R. §§ 131.21(c)-(e). With respect to fishing, and in keeping with EPA's guidance, Maine made a risk management decision not to protect more specific population groups such as Maine's tribes as the "general target population" of any more focused use, such as EPA's new "sustenance fishing" use. (See EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000), §§ 2.1 (identifying the population to protect; "criteria could be set to protect those individuals who have average or "typical" exposures ... "), 4.3.3.1 ("If a State or authorized Tribe has not identified a separate well-defined population of high-end consumers and believes that the national data ... are representative, they may choose these recommended rates ... "); see also Ex. 1, Second Amended Complaint, ¶¶ 78-87).

In addition, and as noted above, in 2002 the Maine Legislature expressly considered and rejected a controversial proposal to establish this kind of a "subsistence" fishing designated use, which - if adopted by Maine - would have protected defined subsistence fishers as a "target" population for a limited stretch of the Penobscot River only. (See Ex. 6). This is something that Maine could have done voluntarily outside of the context of the 1980 Acts, but that EPA could not (and cannot) force Maine to do as a matter of federal law, as such action would violate both the 1980 Acts and Maine's State role under the CWA.

6. To protect its new designated use of "sustenance fishing," EPA unlawfully relies on aspirational tribal fish consumption data based on historical estimates in an EPA funded tribal study instead of Maine's already EPA- approved actual local data.

Even assuming that Maine had itself chosen to adopt a designated use of "sustenance fishing" in order to protect tribal members only instead of Maine's general population, which Maine purposely did not do, EPA unlawfully relies on vague historical anthropological estimates in an EPA-funded tribal study (the Wabanaki Cultural Lifeways Scenario ("Wabanaki Study")) in support of EPA' s new elevated fish consumption rate ("FCR") that it claims is required when developing HHC in Indian waters in order to protect EPA's new designated use. 81 Fed. Reg. at 23245-46. EPA's reliance on this aspirational Wabanaki Study over Maine's actual local consumption data from 1990 violates the 1980 Acts, the CWA, and EPA 's own guidance, and does not factually support EPA' s new elevated tribal FCR.

According to EPA, the Wabanaki Study was EPA-funded and conducted by the Aroostook Band of Micmacs on behalf of all Maine Indian tribes pursuant to a grant awarded by EPA (81 Fed. Reg. at 23246), all of which occurred without the knowledge or involvement of Maine's Department of Environmental Protection ("DEP"). Maine, which has the primary authority and responsibility under the CWA to establish WQS for all Maine waters, including designated uses and HHC to protect its chosen uses, was never provided with a copy of or informed about the 2009 Wabanaki Study, even though the study was designed to support EPA' s review and/or development of tribal-based WQS in Maine based on elevated tribal FCRs. 81 Fed. Reg. at 23246. In fact, Maine DEP first learned of the Wabanaki Study in connection with EPA's issuance of its February 2, 2015 Action. This secretive EPA approach is in full keeping with EPA's practice in recent years of consulting with Maine's Indian tribes only behind closed doors regarding the development of WQS for Maine's Indian waters. (See Ex. I, Second Amended Complaint, ¶¶ 110-125).

The Wabanaki Study relied upon by EPA in the Proposed Maine Rule is also irrelevant because it is based on historical evidence from the 16th through 19th centuries and has no bearing on actual tribal FCRs, either current tribal FCRs or those at the time the 1980 Acts were enacted. Thus, even if the 1980 Acts contemplated a separate designated use of tribal "sustenance fishing," which they do not, any consumption levels that such a use could arguably protect would be those existing at the time of the 1980 Acts - not levels based on estimates from as early as the 16th century. There is also nothing in the CWA that supports EPA' s abandonment of sound science in favor of historical anthropological estimates as support for present day FCRs.

EPA also states that it "consulted with the tribes in Maine about the Wabanaki Study and their sustenance fishing uses of the waters in Indian lands" (81 Fed. Reg. at 23246), but cites nothing in the Proposed Maine Rule resulting from these private consultations that would support any actual elevated tribal FCRs. Without citing any evidence, EPA also states that the Wabanaki Study reflects a former tribal lifestyle in Maine that "some tribal members practice today." 81 Fed. Reg. at 23246. EPA also cites no evidence, and Maine is aware of none, of any actual present day (or even 1980 era) FCRs for any Maine tribal population at the levels in the aspirational Wabanaki Study or in EPA' s Proposed Maine Rule.

If anything, the Wabanaki Study shows that EPA' s proposed elevated tribal FCR does not reflect any actual current (or 1980) tribal consumption patterns. See 81 Fed. Reg. at 23246 ("There has been no contemporary local survey of current fish consumption, adjusted to account for suppression, that documents fish consumption rates for sustenance fishing in the waters in Indian lands in Maine."); see also id. at 23246-47 (acknowledging "uncertainties associated with a lack of knowledge about tribal exposure in Maine Indian waters," that "contemporaneous populations of anadromous species in Penobscot waters are too low to be harvested in significant quantities," and that the "Wabanaki Study presented estimates" of historical consumption only and "not the amount consumed"). In these respects, EPA's Proposed Maine Rule is unsupported by EPA's own primary evidence.

In addition, EPA's assertion that the Wabanaki Study represents the "best currently available information" (81 Fed. Reg. at 23246) to establish FCRs for Maine Indian waters is wrong. As EPA acknowledged in the February 2, 2015 Action (Attachment A at pp. 37-38), Maine previously relied on actual 1990 local consumption data (in the form of EPA-preferred method of statewide surveys) to supp01t its highly protective statewide FCR, which was based on sound science and approved by EPA. (See Ex. 1, Second Amended Complaint, ¶¶ 87-92). As EPA noted in its February 2, 2015 Action (Attachment A at p. 38), 11 % of the participants in that 1990 EPA- approved, local statewide survey were Native Americans. EPA's only new concern with this data, as outlined in the February 2, 2015 Action, is that it does not reflect "unsuppressed

sustenance fish consumption in tribal waters" - new EPA requirements that have no legal basis under the CWA and are unlawful under the 1980 Acts.

7. To protect its new designated use of "sustenance fishing" in Maine, EPA unlawfully adds a new tribal requirement that any FCR used to develop HHC must be "unsuppressed" by tribal pollution concerns.

In its Proposed Maine Rule, EPA proposes a significantly elevated tribal FCR (286 grams/day as compared to Maine's already EPA-approved and highly protective statewide FCR of 32.4 grams/day for the general population), which EPA, without any evidence or legal support, claims is required for purposes of its new designated use and "represents present day sustenance-level fish consumption, unsuppressed by pollution concerns." 81 Fed. Reg. at 23245-47. Thus, EPA's Proposed Maine Rule and its underlying February 2, 2015 Action reflect a new EPA requirement (formerly a mere preference at most), that FCRs used to derive HHC for Indian waters reflect tribal FCRs "unsuppressed by pollutant concerns." 81 Fed. Reg. at 23244-45.

Maine is aware of nothing in either the CWA or any EPA regulation under the CWA that authorizes or provides legal support for EPA's new requirement of the use of tribal FCRs "unsuppressed by pollutant concerns." Indeed, EPA cites no such CWA or regulatory authority in support of its new requirement, but instead relies on its assertion of its "scientific and policy judgment" that EPA alleges was "necessary and appropriate" to protect EPA' s own newly created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23245. EPA's only cited authority for its new requirement of "unsuppressed" tribal FCRs is an informal EPA January 2013 "Frequently Asked Questions" document concerning HHC and FCRs generally, which, according to EPA, "generally recommends" the use of FCRs unsuppressed by concerns over the safety or availability of fish, id. at 23244 & n. 17, and which was itself never the subject of any public input or comment process. *(7)* In fact, EPA has never engaged in any public hearings, comment, or other process with respect to its new tribal policy of forcing States to use "unsuppressed" tribal FCRs. (See Ex. 7, which is incorporated herein by reference, at ¶¶ 15- 17). *(8)* EPA's unilateral creation of this new requirement, which affords members of Maine's tribes greater rights than the rest of Maine's population, also violates the 1980 Acts and their principle of equal environmental regulatory treatment for all Maine citizens.

As far as Maine is aware, EPA's February 2, 2015 Action and its Proposed Maine Rule also represent the first instances where EPA has affirmatively required "unsuppressed" tribal FCRs anywhere in the nation. (Id.). A partial transcript of EPA staff testimony in December 2015 before the Idaho Board of Environmental Quality (and submitted in an EPA headquarters' proceeding for the State of Washington) shows that EPA's focus on unsuppressed FCRs is a recent effort directed by EPA's national headquarters. (See Ex. 8, which is incorporated herein by reference). This requirement of unsuppressed FCRs, to the extent it is being applied here in Maine, also appears to have been developed in consultation with Maine's tribes without the involvement of Maine. 81 Fed. Reg. at 23247 (noting EPA's approach was "consistent with the Penobscot Nation's approach to deriving a current, unsuppressed FCR to protect sustenance fishing").

Even assuming that there is a lawful requirement that Maine use a FCR "unsuppressed by tribal pollutant concerns" when developing HHC for Maine's Indian waters, which there is not, EPA cites no surveys or other evidence (and Maine is not aware of any) detailing any actual suppression effects based on any pollution concerns by any Maine tribal populations. See 81 Fed. Reg. at 23246. Neither the Proposed Maine Rule nor the Wabanaki Study reference any such surveys or evidence. The Wabanaki Study relied on by EPA focuses instead on historical FCR estimates from the 16"' through 19"' centuries, and does not establish or support any present day tribal FCRs, let alone document any actual suppressive effects on such FCRs based on pollution

concerns. Indeed, other factors such as historical loss of habitat and/or other reductions in fish populations are equally (if not more) likely to explain the absence of any present day FCRs at the elevated levels in the aspirational Wabanaki Study and in the Proposed Maine Rule. *(9)*

…

(1) Maine requests that EPA consider as part of these proceedings and include in EPA' s administrative record all exhibits to Maine's Ex. I (Second Amended Complaint). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

(2)Maine's position on the transfer and extinguishment of all aboriginal tribal rights is more fully set forth in briefs filed in the federal Maine District Court action over PIN's alleged ownership of portions of the Penobscot River, which position and briefs are incorporated herein by reference. (See Maine's motion for summary judgment in PIN v. Mills, No. 12-cv-254- GZS, attached as Ex. 2 (at pp. 33-38), and Maine's reply in support of that motion, attached as Ex. 3 (at pp. 20-25)).

(3) As of these comments, and as discussed below, EPA has never determined that Maine's existing designated uses of "fishing" for all surface waters do not meet the requirements of the CWA, which means that EPA has never lawfully promulgated any more stringent designated uses. As a consequence, Maine's designated use of "fishing" is and has been the applicable fishing use since EPA's approval of Maine's program in the 1980s. 40 C.F.R. §§ 131.21 (c)-{ e).

*(4) If the EPA Administrator (rather than any Regional Administrator) determines that existing State WQS do not meet CWA requirements, or that a revised or new WQS is necessary to meet CWA requirements, then the EPA Administrator may, upon determining such a WQS is necessary, prepare and publish proposed regulations setting forth the revised or new WQS. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 13 l.22(a)-(b); Puget Soundkeeper Alliance v. EPA, 014 WL 4674393, *5 (W.D. Wash., 2014).*

(5) The necessity determination made by the EPA Administrator in the Proposed Maine Rule involves the sufficiency of Maine's human health criteria ("HHC") for undefined Indian waters only, and presumes the existence of EPA's newly- created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23242-43 ("for the waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, EPA hereby determines ... that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for such waters."). There has never been any EPA determination that Maine's existing "fishing" designated use does not meet CWA requirements for any waters, or that a new designated use of tribal "sustenance fishing" is required to meet CWA requirements for Indian (or any other) waters.

(6) As EPA acknowledged in July 1983 (in a tribal discussion paper), the environmental laws that EPA administers (such as the CWA) apply to all lands within the U.S. including Indian lands, as general statutes apply to all persons including Indians. See Federal Power Comm 'n v. Tuscarora Indian Nation, 362 U.S. 99, 116-18 (1960). Thus, EPA understood in the 1980s that Maine was historically required to, and did, promulgate and obtain EPA-approval for its WQS (including its designated uses) under the CWA for all Maine waters, including tribal waters. This was consistent with EPA's WQS guidance issued in 1972, 1983, and 1988, each of which state that WQS are required for all waters within the U.S.

(7) EPA's January 18, 2013 FAQ document also contains an express disclaimer that it does not "impose legally binding requirements on [EPA], states, tribes, or the regulated community ... " The FAQs also undercut EPA's position by reaffirming EPA's prior guidance allowing States to lawfully choose a cancer risk level of I in I 00,000 for the general population, and limiting the risk to I in 10,000 "for any sensitive sub-population (such as those who may consume a great deal more fish because of a subsistence lifestyle)." Because FCRs and cancer risk levels are relative, these EPA-approved State options, when combined with Maine's general FCR of 32.4 grams/day at Maine's conservative risk level of 1 in 1,000,000, equate to FCRs of324 grams/day (at a risk level of 1 in 100,000) and 3240 grams/day (at a risk level of 1 in I 0,000) - FCRs that greatly exceed the new FCR required by EPA in its Proposed Maine Rule (286 grams/day). In this way, Maine's existing HHC are scientifically defensible, adhere to EPA guidance, and far exceed EPA's requirements for the protection of both Maine's general population and Maine's sensitive subsistence fishers. (See Ex. I, Second Amended Complaint, ¶¶ 78-92).

(8) As with Ex. l, Maine requests that EPA consider as part of these proceedings and include in EPA's administrative record all exhibits to Maine's Ex. 7 (Joint Stipulations). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

(9) For purposes of setting its tribal FCR in the Proposed Maine Rule, EPA also simply assumes, without any evidence, that the insufficiency of anadromous fish (i.e. fish that is "now less available") shifted tribal diets towards inland non-anadromous species. See 81 Fed. Reg. at 23247. This is yet another unsupported aspect of EPA' s Proposed Maine Rule.

EPA Response: EPA's general response above responds to the bulk of these comments. With regard to the comment that there is no information in the record to support the agency's assertion that its consultation with the tribes in Maine supported the use of the 286 g/day fish consumption rate, EPA notes that the record for this action reveals ample support for the proposition that the tribes support EPA's use of the 286 d/day fish consumption rate. In its proposal for this action, EPA noted that the Penobscot Nation had selected 286 g/day derived from the Wabanaki Study as the basis for developing tribal water quality standards. Further, in its consultations with the tribes, EPA expressed the importance of submitting public comments on the proposed rule with regard to issues that a tribe wants EPA to consider and address in the record. Comments from the Penobscot Nation at excerpt 151 clearly indicate the Nation's support for the 286 g/day rate. The comments of the Houlton Band of Maliseet Indians in excerpt 190 also show that the Houlton Band supports EPA's approach to protecting their sustenance fishing.

Regarding the commenter's claim that EPA inappropriately assumes without further support that the tribes' diet has shifted to inland non-anadromous fish, EPA notes that both the Penobscot Nation and the Houlton Band of Maliseets supported EPA's use of a FCR based on the inland, non-anadromous diet presented in the Wabanaki Study. Moreover, the Penobscot Nation has developed its own tribal WQS based on the inland, non-anadromous diet because the contemporary populations of anadromous species in Penobscot waters are too low to be harvested in significant quantities. During consultation on the proposal of this rule, the Aroostook Band of Micmacs also stated that the Wabanaki Study's inland non-anadromous lifestyle diet reflects the current Micmac diet, although the tribe has a goal of the return and consumption of anadromous fish. EPA also analyzed whether current bag limits for inland non-anadromous fish populations, along with certain migratory species, could support a sustenance diet and concluded affirmatively.[98]

With regard to the comment that the settlement acts extinguished any aboriginal fishing right the tribes may have enjoyed, the opening summary discussion explained that this regulatory action is based on the statutory provisions. Whether or not the statutory provisions reflect aboriginal rights is not relevant to EPA's decision.

Federal Water Quality Coalition (Excerpt # 171)

Commenter ID: 0352

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

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

Dear Sir or Madam:

The Federal Water Quality Coalition ("FWQC" or the "Coalition") appreciates the opportunity to file comments with EPA regarding the Agency's proposed rule revising certain water quality criteria for Maine (the "Proposed ME Standards" or the "Notice"). The proposal was issued in the Federal Register on April 20, 2016 (81 Fed. Reg. 23239). The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made by the EPA and States under the federal Clean Water Act. The FWQC membership includes entities in the aluminum, agricultural, automobile, chemical, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: Alcoa, Inc; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Bristol-Myers Squibb; City of Superior (WI); Edison Electric Institute; Eli Lilly and Company; Freeport-McMoRan Copper & Gold; General Electric Company; Hecla Mining Company; Indiana Coal Council; Johnson & Johnson; Kennecott Utah Copper LLC; Mid America CropLife Association; Monsanto Company; National Association of Home Builders; Orange County (CA) Sanitation District; Pfizer Inc.; Rubber Manufacturers Association; Shell; Utility Water Act Group; Western Coalition of Arid States; Western States Petroleum Association; and Weyerhaeuser Corporation.

FWQC member entities or their members own and operate facilities located in Maine and elsewhere around the country. Those facilities operate pursuant to permits that impose control requirements with respect to wastewater discharges. Many of those permits include effluent limits based on water quality standards developed for the protection of human health. The criteria being developed by EPA for Maine will determine the effluent limits in permits for FWQC members in Maine, and we expect that they will serve as a precedent for how human health criteria issues are addressed in permits for FWQC members in other States. The FWQC therefore has a direct interest in the Proposed ME Standards that are being developed by EPA.

In its proposal, EPA proposes new standards for waters in Indian lands, and certain other waters in Maine. As to these waters, EPA in 2015 disapproved standards that had been adopted by the State, and the new Federal standards are intended to replace those State standards. EPA disapproved those standards based on a determination that the standards did not adequately protect designated uses. Those reasons that EPA provided for its disapproval, and the basis that EPA now provides for its own proposed standards, are closely connected. Unfortunately, those reasons are also seriously flawed, on legal and policy grounds. EPA's proposed standards are invalid, and should not be finalized. Instead, EPA should approve the State standards that were adopted previously. These comments explain the problems with EPA's proposed actions. (1) In particular, these comments focus on two primary concerns. First, EPA was wrong in developing new proposed human health standards based on a new, EPA-established use of "sustenance fishing" and a new requirement to apply "unsuppressed" fish consumption rates. Second, EPA's proposed ban on mixing zones for bioaccumulative pollutants is unauthorized and should be withdrawn. These issues are explained in more detail below.

EPA's decision on establishing new human health standards rests upon several different legal arguments. Each of these arguments is novel, and each of them has major legal flaws. These are the four claims by EPA: (1) the Maine tribal settlement acts modify the requirements of the Clean Water Act; (2) those acts entitle EPA to establish a new use of "sustenance fishing"; (3) this new use must be protected by treating sustenance groups as the "general population" in developing the standards; and (4) the standards must be derived using the "unsuppressed" fish consumption rates of tribal communities. We will address each of these issues in turn.

Modification of the CWA by the Settlement Acts

As to the settlement acts, and their relationship to the CWA, EPA starts by making the following broad statement:

[T]he settlement acts reflect Congress' intent that the tribes in Maine must be able to engage in sustenance fishing to preserve their culture and lifeways.

In support of this proposition, EPA cites to provisions in the settlement acts that "grant tribal control of fishing in certain trust waters and require the consideration of sustenance practices in the setting of fishing regulations for the remaining trust waters." Nothing more specific is cited. In particular, EPA cites no settlement act provisions that touch on, or modify, how water quality standards will be set by the State that will apply to those waters. Despite the lack of any specific indications that the settlement acts modify the obligations of EPA and State agencies under the CWA, EPA states that they do exactly that, although that position is stated in a very hazy and tentative way. Here is what EPA says:

[I]n assessing whether the State's WQS were approvable for waters in Indian lands, 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*. [italics added]

Part of that statement is a non-controversial statement of applicable law: "the CWA requirement that WQS must protect applicable designated uses and be based on sound science." The other parts seem to be an attempt to create new law, without actually citing any legal basis. What does it mean that EPA has to "effectuate" the CWA requirement? Is that different than actually complying with the CWA requirement? Does it give EPA broader authority if it can "effectuate" instead of simply following the Act and its own regulations? Even more significantly, where does EPA get authority to modify its CWA obligations through use of "the fundamental purpose" of a series of other laws, particularly when it cannot actually cite a provision in those laws that gives it that authority?

The simple answer to all of the questions posed above is this: no, EPA does not have authority beyond what is given to it in the CWA. In fact, the lack of such authority has been stated by EPA itself, in similar disputes concerning treaties with Indian tribes in other areas of the country. In a case in Washington State, EPA argued that the treaties do not affect its authority under the CWA or impose any additional obligations – and the court upheld EPA's position in that case. Sierra Club v. McLerran, 45 ELR 20052, Case No. 11-CV-1759-BJR (W.D. Wash., March 16, 2015). Remarkably, EPA makes no mention in the Notice of that case or of its position in that case.

In fact, EPA's claim to outside-of-the-CWA authority is also inconsistent with the Agency's position in other situations. For example, when EPA's approval of the NPDES program for Arizona was challenged as not complying with the Endangered Species Act, the Agency contended that it was compelled to follow the requirements of the CWA, and that the ESA could not force it to act in a manner contrary to the CWA's clear requirements. That position was upheld by the Supreme Court, in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Yet here, EPA is arguing the exact opposite – that in making CWA decisions, it must somehow take into consideration other possibly applicable laws – or, even less directly, the "fundamental purpose" of those laws. And, even though the settlement acts have existed for more than 30 years, and the CWA has existed for 44 years, the Agency has never stated this position before. There is simply no legal basis for this unsupported, completely new argument, especially when it is squarely inconsistent with EPA's clearly stated views in previous cases.

…

The FWQC appreciates the opportunity to submit these comments concerning the development by EPA of water quality standards for Maine. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Federal Water Quality Coalition (Excerpt # 213)

Commenter ID: Public Hearing June 9, 2016

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

…

Second, in terms of the human health water quality standards, we have a number of concerns because we think, again, that the Agency is going beyond its authority. For several reasons. First, we don't believe that it's legally appropriate for the Agency to take the new position which is similar to what it has said in the states of Washington and Idaho that the settlement acts, or in the case of other states, treaties, override the Clean Water Act. That is an imposition by the agency, it actually contradicts their position in other cases where it is stated that those statutes and treaties do not expand the Agency's authority under the Clean Water Act. So we think it's improper to take new action based on settlement acts that expands the Agency's authority under the Clean Water Act. We think it's also improper for the Agency to create a new use, the sustenance fishing use, which is not done in the state standards. We also believe that it is improper for the Agency to use the suppression effect issue to adopt more stringent standards. That suppression effect policy is nowhere in Agency rules or guidance, it is simply announced in an FAQ from the Agency. There's no legal basis for the suppression effect policy, and these standards should not be based on them. Finally, we are concerned about adopting standards that include an extremely high fish consumption rate. It is based on only one study. We think that is inconsistent with the Agency's general policies in terms of how to develop standards. Based on these concerns, we think the Agency should reconsider these standards before adoption. Thank you.

Anonymous (Excerpt # 67)

Commenter ID: 0303

Name: Anonymous

Organization: None

I support the Penobscot Nation's right to manage its traditional fishing waters, and I thank the EPA for doing what is necessary to safeguard Maine's water quality. It is clear that for sustenance fishing rights to have any merit the fish in the river have to live in water that meets human health criteria (HHC) for waters subject to sustenance fishing rights. I am ashamed that our state's current administration refuses to comply with a reasonable health standard. I can only interpret this as based on the belief that the health of Maine's citizens and of the Penobscot nation is less important than inconveniencing industries that want to continue polluting the state's waters.

Anonymous (Excerpt # 69)

Commenter ID: 0304

Name: Anonymous

Organization: None

I support tribal sustenance fishing and clean water in Maine! The settlement acts were intended to ensure the tribes' continuing ability to practice traditional sustenance fishing from their trust lands. EPA levels of water quality need to be in place to guard the health of those sustenance fishing.

Hough, J. (Excerpt # 72)

Commenter ID: 0305

Name: Janet Hough

Organization: None

The water systems in Maine that serve as sources of sustenance to Maine's indigenous communities are vital to the survival of these communities, as well as all people and aquatic life that share these waters.

Anonymous (Excerpt # 64)

Commenter ID: 0301

Name: Anonymous

Organization: None

I am in complete support of the EPA proposal to protect that waters of the Penobscot River. The livelihood of our native brothers and sisters has been threatened for far too long. Let us honor the treaty and return the river to a level that supports fishing and other activities so vital to the native community. Thank you.

Bahlkow, A. (Excerpt # 65)

Commenter ID: 0302

Name: Ashley Bahlkow

Organization: None

I support the proposed EPA WQS for the people's health in Maine, emphasizing the health and well being of the Wabanaki in our state, which due to the colonial history and neocolonialist mentality of present day, has been threatened and compromised time and time again, (by

genocidal (as fits the UN definition) policies), and continues to be at great risk in the face of financial interests (state and private industry).

ACLU Maine (Excerpt # 126)

Commenter ID: 0318

Name: Oamshri Amarsingham, Zachary L. Heiden, Alison Beyea

Organization: ACLU Maine

For nearly 50 years, the American Civil Liberties Union of Maine (ACLU of Maine) has been a guardian of liberty, working in courts, with the Maine legislature, and communities to defend and preserve the individual rights and liberties that the Constitution and our laws guarantee everyone. With over 6,000 members, activists, and supporters, the ACLU of Maine is a statewide organization that fights tirelessly for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

The ACLU of Maine is committed to the survival of the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseets, and the Aroostook Band of Micmacs as native peoples and sovereign nations. We recognize the great importance of hunting and fishing to the preservation of the Native American way of life.

"More than four hundred independent nations were prospering in what is now the United States when Europeans first arrived there. By 1900 war and disease had reduced a population of nearly one million Indians to three hundred thousand. Since 1900 the Indian population has increased to 1.5 million, nearly a third of whom are less than 15 years old…Indians have the lowest life expectancy of any group in the country; as a whole, Indians live only two-thirds as long as the non-Indian population. Indians also suffer from a high rate of unemployment[,] and they fall well below the national average in income, quality of housing, and education[.]…A central problem that Indians face today is the complex and confusing pattern of laws, especially federal laws, that dominate their lives. No other ethnic or cultural group is so heavily regulated. Although some federal laws were intended to benefit Indians, as a whole they have placed Indians in a political and economic straightjacket. Indians and Indian tribes are in such a precarious position today that economic survival would be difficult without major support from the federal government." *(1)*

Native American people and their tribes occupy a unique position in American society. Throughout the history of this country, Native American people have maintained cultural and religious identities distinct from those of all other peoples. American Native American tribes, including Maine's four federally recognized tribes, have continuously existed as self-governing bodies, exercising jurisdiction over their own lands and people. "An abundance of research conducted of the last 20 years shows clearly and undeniably that when native nations exert their sovereignty and take matters into their hands to create local solutions to local problems, they not only succeed but prosper…Sovereignty, above all else, determines successful economic development on reservations." *(2)* The United States Government has given repeated assurances that it would guarantee the survival of Native Americans, their land base, and their tribal groups.

The ACLU of Maine recognizes that Native Americans and their tribes, in addition to the constitutional rights to which all individuals are entitled, have rights recognized by treaties, compacts, and government commitments. The ACLU of Maine supports the rights of Maine's four federally recognized tribes to:

- A tribal land base and appurtenant natural resources, including water rights;
- Tribal self government;
- Retention of cultural and religious heritage; and
- Enforcement of the commitments made to them by the United States in treaties, compacts, and by other governmental actions.

"The right to hunt and fish on reservation lands is a long-established tribal right." *(3)* While the right of Native Americans to engage in hunting and fishing activities within their reservations free from outside interference has generally been recognized, the right of Native Americans to hunt and fish outside their reservations has long been a subject of controversy. State authorities have repeatedly challenged the existence and scope of such off- reservation rights. Native Americans have suffered from arrests, harassment, threats, and outright violence in attempting to exercise their off-reservation fishing and hunting rights.

The ACLU of Maine supports the full exercise of the right of Native Americans to hunt and fish both inside and outside of reservations. We support Maine's Native American tribes in resisting federal, state, or private action which would have the effect of restricting Native American fishing or hunting activities within the reservation. By setting water quality standards (WQS) that suppresses sustenance fishing by the Penobscot Nation and the Passamaquoddy Tribe on their own reservation lands, the State of Maine improperly ignored the sovereignty of the Tribes to fish their own lands and appurtenant waterways. By failing to treat each of the four federally recognized Native American tribes in Maine as their own general population within the waters in their territories for the Clean Water Act (CWA) purpose of setting WQS, Maine not only restricts Native American fishing or hunting activities, but attempts to ignore the sovereign existence of an entire people. This is a civil liberties and environmental justice issue that the ACLU of Maine finds untenable.

…

Furthermore, despite EPA's determination that the Settlement Acts give Maine jurisdiction that no other State in the country has, WQS for the waters at issue in this rulemaking necessarily uniquely impact the rights, resources and health and well-being of each of the four Native American Tribes and its members. In fact, when waters used by tribal members and waters that support fish and other animals consumed by tribal members are allowed to be contaminated, the interests of the Native American Tribes are profoundly affected and their people are disproportionately among the most exposed and impacted. This context is significant because it constrains, in important ways, the rulemaking authority of any agency that is promulgating WQS for these waters. Among other things, the adequacy of WQS for these waters must be considered in view of legal protections for the Nation's fishing and hunting rights, including their aboriginal rights since time immemorial, and their retained sovereign fishing and hunting rights as reflected in treaties and confirmed the Settlement Acts.

(1) Stephen L. Pevar, The Rights of Indians and Tribes 1-2 (2d ed. 1992).

(2) Steven Brimley, Native American Sovereignty in Maine, 13 Maine Policy Review 12, 23 (2004)

(3) U.S. v. Felter, 752 F.2d 1505, 1509 (10th Cir. 1985)

Anonymous (Excerpt # 95)

Commenter ID: 0317

Name: Anonymous

Organization: None

Thank you the effort you are undertaking to insist that Maine lawmakers do right by the Penobscot Nation and the River. In our current political climate, we cannot depend on our policymakers to work together to do what is in the best interests of all of the inhabitants of Maine and Wabinakiland and our ecological communities, and I feel that it is imperative that the EPA intervene in support of the Penobscot peoples where our State has failed to do so. And if our indigenous communities cannot fully exercise their rights and their ability to preserve and restore their traditional ways of living, then we also cannot be whole in our communities and in right relationship to the ecologies that support us all. While I fully support the implementation of the EPA's WQS applicable to Maine because I want to see the rights of our indigenous peoples be preserved or even improved through this action, I also do not fail to recognize that all of us in this community will benefit from cleaner water, healthier river ecosystems, and healthier indigenous neighbors as a result. Thank you for this opportunity to share these comments.

Anonymous (Excerpt # 93)

Commenter ID: 0316

Name: Anonymous

Organization: None

I support this Proposed Rule, particularly in how it raises the water quality standards of the Penobscot River and protects the sustenance of the Penobscot Nation. We need to honor the treaties made with our native Americans. There is no need for an extension. There is a need to protect Maine's most vulnerable populations.

Woodman, F. (Excerpt # 85)

Commenter ID: 0311

Name: Faith Woodman

Organization: None

By opposing the EPA's Water Quality Standards (WQS), the State of Maine is not honoring the sustenance fishing rights of the Wabanaki Indian tribes, granted under the Maine Indian Land Claims law, nore is it protecting the health and welfare of human or aquatic life.. I belive it is the fundamental right of every citizen of Maine to be granted these protections. Maine's failure to do so in this case shows its disregard for the health and well being of the Wabanaki people. The Wabanakis' health should not be jeopardized because of the State's unwillingness to impose higher standards, based on the latest scientific evidence.

Maine's four Indian tribes have historically practiced sustenance fishing, which is part of the Wabanaki culture and way of life. Because of the toxic level of chemicals in tribal waters and their carcinogenic effect, eating a sustenance diet of fish from these waters increases the rate of cancer. This is unacceptable and abhorrent.

I am ashamed of the State of Maine for opposing these obviously needed changes. Maine has a shameful and racist history in dealing with the Wabanakis. This is another example of that attitude.

Anonymous (Excerpt # 78)

Commenter ID: 0307

Name: Anonymous

Organization: None

I write in support of the EPA proposal to improve Maine's water quality standards and therefore protect sustenance fishing practices of Maine's Native peoples. Not only is it a responsibility of our state to assure the health of its Native peoples as they harvest their food from Maine's rivers, but all Maine inhabitants will benefit from the highest possible standards for the health of the Penobscot River and its surrounding habitat.

Anonymous (Excerpt # 80)

Commenter ID: 0308

Name: Anonymous

Organization: None

The EPA I pay for with my federal tax dollars must honor the needs of populations who fish and depend on the rivers of Maine for their sustenance. This has been guaranteed to native tribes by legal documents that represent our US government.

We must honor our agreements with the tribes if we still want to claim that we value "the rule of law". Following this course is best for all Americans, and is higher priority than the wishes of those who want to pollute our rivers at will, with impunity.

Anonymous (Excerpt # 81)

Commenter ID: 0309

Name: Anonymous

Organization: None

I strongly support the EPA proposed change to water quality criteria, especially as it will better protect the health of the Penobscot Nation who depend on their ancestral river for sustenance fishing

Plourde, D. (Excerpt # 83)

Commenter ID: 0310

Name: Diane Plourde

Organization: None

The water is life. The Penobscot River is the life, right, and responsibility of Penobscot Nation. This is clearly stated by Chief Francis. The Penobscot Nation needs the EPA to honor the life of the river and the ancestral sustenance rights of the Penobscot Nation on the river by passing this proposal.

Anonymous (Excerpt # 92)

Commenter ID: 0315

Name: Anonymous

Organization: None

I fully support the efforts to uphold the EPA higher water quality standards in Maine for the Wabanaki people. We must strive to support the Wabanaki people through clean air and water. The Wabanaki deserve our best efforts to help them have the cleanest water possible so the fish they eat are healthy so the people will be healthy.

Anonymous (Excerpt # 89)

Commenter ID: 0313

Name: Anonymous

Organization: None

How can we not protect the health of some, but not all, Mainers? These regulations to clean up the waters in areas of sustenance fishing and elsewhere should be enacted promptly.

Beal, C. (Excerpt # 90)

Commenter ID: 0314

Name: Carole Beal

Organization: None

As a Maine resident for 46 years with children and grandchildren living year round in Maine, I strongly support the EPA in protecting sustenance fishing for Maine Indians and all of Maine citizens.

Hitchings, C. (Excerpt # 75)

Commenter ID: 0306

Name: C. Hitchings

Organization: None

I support the upgrading of the water quality standards for Maine based on protecting the sustenance consumption of fish by tribal members.

It is especially important to live up to our treaty obligations concerning sustenance, not only as an obligation to First Nation Native Americans with whom we share the environment, but also in consideration of all the life of the Natural Environment on which we all depend.

...

The Native Peoples did not create the pollution which we all suffer from, held Nature and the Earth in the highest esteem, and therefore it is logical that we should prioritize our efforts at mitigation toward Their sustenance rights.

Anonymous (Excerpt # 16)

Commenter ID: 0259

Name: Anonymous

Organization: None

Please implement the EPA's proposed water quality standards for waters under the state of Maine's jurisdiction. Clean water is necessary for ALL species to thrive. Protect human health (particularly the tribal populations who engage in sustenance fishing), aquatic life, and all life by enforcing these water protection standards. Thank you for disapproving the inadequate protection criteria adopted by the state of Maine and thank you for proposing criteria to protect tribal populations and others based upon the latest science and EPA policy.

Anonymous (Excerpt # 51)

Commenter ID: 0290

Name: Anonymous

Organization: None

I support the Penobscot Indian Nation's right to oversee and access their ancestral fisheries and waterways within the Penobscot River. The Penobscot people have coexisted with the river for sustenance fishing and depended on the health of its wetland ecosystem for cultural practices and epistemologies for millennia. Since colonialism, dams and industry on the Penobscot River have caused pollution and kept migrating fish from reaching Indian Island and other traditional Penobscot homelands, resulting in traumas inflicted on Penobscot people who depend on the river for their survival. It's time we do what's right and stop committing cultural and environmental genocide against the Penobscot people and river, and start respecting Indigenous homelands, waterways, and fisheries. A relationship of respect for tribal sovereignty and Indigenous homelands will contribute to the health of the environment as a whole and benefit all people who enjoy the Penobscot River for recreation, beauty, and sustenance. I stand by the Penobscot people

and agree with the higher standards set by the EPA; I disagree with a recent ruling that the Penobscot do not have jurisdiction over their protected waters surrounding the Indian Island reservation. The Penobscot people have the best interests of their ancestral river and all the life it supports in mind, as they have for thousands of years. Let us honor the right of Indigenous people to practice their traditions, thus protecting culture, diversity, and environmental justice in Maine and beyond. Thank you.

Anonymous (Excerpt # 28)

Commenter ID: 0268

Name: Anonymous

Organization: None

Restore Native American rights

Roper, M. (Excerpt # 26)

Commenter ID: 0266

Name: Marilyn Roper

Organization: None

I fully support the EPA Proposal re the quality of water for Indian tribal sustenance fishing areas. Thank you EPA for protecting the health of those who eat lots of fish. As a citizen of Maine, I feel safer knowing you are trying to protect Wabanaki and other folks in this beautiful state. Marilyn Roper, Houlton

Oltarzewski, D. (Excerpt # 23)

Commenter ID: 0265

Name: Diane Oltarzewski

Organization: None

My name is Diane Oltarzewski and I am a resident of Belfast Maine, a somewhat close neighbor to the Penobscot Nation community on Indian Island. I was delighted when the Penobscot Nation developed an independent set of water quality standards to ensure that fish taken from the river would not sicken people. Many people in my town have a great deal more confidence in the Penobscot Nation's ability to monitor and protect water quality than we do in the State's Department of the Environmental Protection or Attorney General. Indeed, I would like the Penobscot WQS to apply to Maine generally - I believe we would all be better off!

It is an outrage that rather than comply with the EPA's Clean Water Act requirements, the Maine DEP and AG chose to file a lawsuit instead. Their motives appear to have been the protection of "settled regulation" and the desire to avoid further constraining industries and communities along the river from unsafe practices and pollution. If that is indeed the case and they place a higher

priority on commercial entities than on individual human beings and healthy communities, they ought to be deeply ashamed of themselves.

I support the Penobscot Nation's right to manage its traditional fishing waters, and I applaud the EPA for doing what is necessary to safeguard Maine's water quality.

Smith, D. (Excerpt # 21)

Commenter ID: 0263

Name: David Smith

Organization: None

Please, protect the water quality for the Penobscot Nation. The Nation needs the water quality standards supplied by the EPA in order to protect their sustenance fishing rights.

Anonymous (Excerpt # 32)

Commenter ID: 0272

Name: Anonymous

Organization: None

I am a resident of Bucksport, Me. which is located on the Penobscot River. I am fully supportive of EPA proposed rule change to bring the water quality standards in this river to safe levels to protect the health of the tribes who depend on subsistence fishing in this river per treaty granted rights.

Anonymous (Excerpt # 17)

Commenter ID: 0260

Name: Anonymous

Organization: None

The Maine Indian Land Claims Settlement Act cost the Tribes in Maine a lot in terms of sovereignty, so it is especially important to me (as a non-native Mainer) that we maintain what gains that Settlement did provide for them, including the right to sustenance fishing from Tribal and non-Tribal waters.

As such, I believe that it is vitally important to write science-based rules that are protective of the health of Tribal members given real-world consumption patterns and harvest locations.

Anonymous (Excerpt # 33)

Commenter ID: 0273

Name: Anonymous

Organization: None

I completely support elevated protections to our water to include our kind neighbors, the Penobscot Indians. DO THE RIGHT THING!

Anonymous (Excerpt # 14)

Commenter ID: 0258

Name: Anonymous

Organization: None

Surely when the original treaty, giving the Penobscot nation sustenance fishing rights for perpetuity in their Penobscot River was signed, sustenance meant that the amount of fishing done would not be suppressed by laws or regulations by state agencies. I also support your proposal to incorporate data and scientific information so that toxicity and exposure parameters will be continually be updated. Surely the continual updating of data and scientific information is crucial to keep these waters safe for tribal members and all other citizens and visitors. It may also be a small part of a needed process of healing between tribal members and the State and nation for the results of centuries of misunderstandings, and what is now being labeled as cultural genocide. (" Beyond the Mandate: Continuing the Conversation - Report of the Maine Wabanaki Truth and Reconciliation Commission", June14, 2015, p12).

Anonymous (Excerpt # 10)

Commenter ID: 0255

Name: Anonymous

Organization: None

The EPA was established to insure that water is clean and consumable by all humans. Water also needs to be clean so that fish and other harvested foods from the waters are not polluted with harmful substances for consumption.

Above all, indigenous people of Maine rely on fish and other harvested and foraged foods from Maine's rivers.

...

People who rely on rivers for sustenance especially need clean water and nontoxic fish.

Maine needs higher water quality standards to protect the fish and other aquatic organisms for a healthy ecosystem, and to protect fishermen, especially subsistence fishermen such as tribal populations.

EPA, I am cheering you on to do the right thing!

Stephens, Rev. C. J. (Excerpt # 9)

Commenter ID: 0254

Name: Rev. Charles J. Stephens

Organization: None

I urge the EPA to establish Federal Water Quality Standards here in Maine so they will protect sustenance fishing practices and fish consumption by the tribal members who fish in the Penobscot River. I am not a member of the Penobscot Nation, but it is important to me that the waters of the Penobscot River be protected from contaminants and the best way to protect the water quality within the Penobscot River is by setting federal standards that recognize the rights of the people of the Penobscot Nation and protect the health of their people.

Anonymous (Excerpt # 8)

Commenter ID: 0253

Name: Anonymous

Organization: None

I fully support the EPA's Proposed Rule that would improve the water quality in Maine's rivers and streams. Our waters are the source of sustenance fishing for Native Americans as well as others. Many sources of pollution endanger the health of our waters and this rule would help protect this health.

Thank you!

Anonymous (Excerpt # 6)

Commenter ID: 0251

Name: Anonymous

Organization: None

I support this EPA proposed rule in order to protect Indian self-determination and fishing rights, as well as improve water safety for all Mainers. It is essential for all Mainer's health and safety. Maine has high levels of cancers that are most likely the result of toxic substances in our food, air, and water.

...

As someone who consumes an enormous amount of fish, I am especially concerned.

Robinson, Dr. D. (Excerpt # 4)

Commenter ID: 0250

Name: Dr. Daniel Robinson

Organization: None

I am Dr. Daniel Robinson, a resident of Maine and live on Green Lake in the township of Dedham. I volunteer as a pharmacy counselor on Indian Island and have done so twice per week for the past 6 years. We have a retired UME Orono chemistry professor who has been testing the waters of Green Lake for the past 40-50 years. During that time we are pleased to report that the water quality has not changed during that entire time. I get to enjoy catching and eating landlocked salmon, lake trout, and small mouth bass. I never have to worry about how much I consume as long as I do not catch more that the approved limits of fish catch.

I would like my good friends on Indian Island to share the same assurances that I enjoy. I want them to be able to feed fish to their children and family without concern over the buildup of toxic chemicals. I ask all those involved with this decision to imagine that their family had lived on this land and waters for about 5000 years. What if you were here first and couldn't eat the fish that your sacred ancestors ate for fear of kidney, liver, and other vital organ damage, even death. Please vote your conscience rather than for any other purpose. Thank you for your careful and kind consideration of all those who we call "Mainers".

Daniel Robinson

Lauchlan, S. (Excerpt # 3)

Commenter ID: 0249

Name: Susan Lauchlan

Organization: None

As a lifelong resident of Maine, mostly in the environs of Penobscot Bay, I strongly support the EPA's Proposed Rule to apply higher water quality standards for certain waters within the State of Maine, especially the waters in and around Indian Lands. Those waters need to be protected for the safety of the people who rely on those waters for their sustenance fishing. Thank you for proposing these changes.

Anonymous (Excerpt # 20)

Commenter ID: 0262

Name: Anonymous

Organization: None

Maine is progressive in many ways, especially when it comes to allying with our Native neighbors and friends. Maine is the only state in the nation to have Truth and Reconciliation Commission which brought together two cultures for a discussion that is about 500 years over due. However, when it comes to our environment, Maine waters and rivers and lakes and streams - we are all in the same canoe. Our AG does not represent us. Distressed and diseased and poisoned water quality is not an option - ever. It seems an obvious form of ignorance to imagine that the rivers - in this case the Penobscot - are okay to have any toxins in them. We come from a culture that is so disconnected from anything but money, that toxic waste, dioxins and other pollutants dumped into the river is just "the way it is" and we are expected to live with that. Ironically, we will not live if that is our mandate.

The case of the Penobscot Nation is about protecting not only sustenance fishing rights, but the Penobscot River itself. Others also use the river - deer, water birds, plants, turtles, and humans. To have clean water is not a privilege - it is a human right and a human responsibility. Maine's "government" is very off center. To make water quality a political battle - to assume that there is only one translation of a document signed by two parties and use that as a measure for determining the stewardship of the Penobscot does not show any respect to the thousands of years that the Penobscot Nation carefully lived on its banks and understood how to care for their homeland and their waters. In 2016, water quality is carefully monitored by the Penobscot, using the most contemporary methods available, with their own scientists and scientific research confirming that high standards are not being met by state government.

I will reiterate. We, the people of Maine, again, are not represented by Attorney General, Janet Mills. We stand by the Penobscot people and agree that the higher standards set by the EPA, indeed, even higher standards set by the Penobscot Nation, keep our waters clean, healthy, livable not only for ourselves, but for our children, our grandchildren and the community of people and animals and plant life that live and play on this beautiful river. Please know that we are in agreement with EPA standards; we disagree, in a recent ruling that the Penobscot do not have jurisdiction over their protected waters surrounding the island reservation. It is about money, not about the health and quality of life of our friends, neighbors, and communities who understand the dire responsibility of clean water, air, and land.

Anonymous (Excerpt # 47)

Commenter ID: 0285

Name: Anonymous

Organization: None

The Penobscot Nation has the most intimate and enduring relationship with the river that bears its name and gives its people sustenance. Water quality standards for the river should robustly support life in preference to industry. I trust the Penobscot Nation's assessment of the requirements over that of the state of Maine, and support EPA's opinion that current law and treaties in effect demand those higher standards.

Anonymous (Excerpt # 60)

Commenter ID: 0298

Name: Anonymous

Organization: None

I strongly support the EPA's recommendations regarding Maine's waters and the need to protect the health of tribal communities that heavily depend upon sustenance fishing for their livelihoods.

…

I am gravely concerned about the current State of Maine's attitude toward our tribal neighbors...the State Attorney General's office seems bent upon narrow interpretations of the Settlement Act that thwart any efforts on the part of the tribes to protect themselves and to thrive.

Anonymous (Excerpt # 59)

Commenter ID: 0297

Name: Anonymous

Organization: None

The rights and abilities of Maine's Tribal communities to engage in sustenance fishing with healthful harvests must be protected. Clearly the EPA's standards represent best practice in ensuring this.

Anonymous (Excerpt # 56)

Commenter ID: 0295

Name: Anonymous

Organization: None

I fully support the efforts to uphold the EPA higher water quality standards in Maine for the Wabanaki people. We must strive to support all people and wildlife through clean air and water. So many people have worked to bring about real change in Maine's rivers that will outlast any elected or appointed officials in Augusta, the state capital. We must insure water quality with a long view to many generations ahead.

I am not in agreement that the Penobscots do not have jurisdiction over the river that bears their name. Clean water, sustainable fisheries, access to Penobscot historic territory hinge on standards that protect life, livelihood and traditions. Clean water supports life and culture for all people who live in Maine. As a non-native resident, I fully support the highest standards set by the EPA and urge you to overlook the current politics in Augusta in favor of the larger picture that protects our Wabanaki neighbors.

Thank you.

Anonymous (Excerpt # 55)

Commenter ID: 0294

Name: Anonymous

Organization: None

I strongly support the EPA's proposal to apply federal Clean Water Act (CWA) water quality standards to protect sustenance fishing practices and unsuppressed levels of fish consumption by members of the Penobscot Nation, for whom this is a matter of individual and cultural survival.

Johnson, Rev. Dr. M. (Excerpt # 53)

Commenter ID: 0292

Name: Rev. Dr. Myke Johnson

Organization: None

As a resident of Maine, I want to state that I do not agree with Attorney General, Janet Mills. I stand with the Penobscot people and support the higher standards set by the EPA. In fact, the higher standards set by the Penobscot Nation would keep the waters clean, healthy, and livable for everyone, and especially for children and grandchildren. To lower the standards harms everyone, but in particular it attacks the cultural and food traditions of the Penobscot people which are promised to them in treaties and agreements passed between governments.

But we kid ourselves if we create an "us" and "them" about this. All living beings are being harmed by pollution of the water, and we should all work to keep the water clean. Without water there can be no life at all. We should follow the lead of the Penobscot people who are most attuned to the quality of the water, and most conscientious about its protection.

The Rev. Dr. Myke Johnson, Portland Maine

Anonymous (Excerpt # 52)

Commenter ID: 0291

Name: Anonymous

Organization: None

We, the people of Maine, again, are not represented by Attorney General, Janet Mills. We stand by the Penobscot people and agree that the higher standards set by the EPA, indeed, even higher standards set by the Penobscot Nation, keep our waters clean, healthy, livable not only for ourselves, but for our children, our grandchildren and the community of people and animals and plant life that live and play on this beautiful river. Please know that we are in agreement with EPA standards; we disagree, in a recent ruling that the Penobscot do not have jurisdiction over their protected waters surrounding the island reservation. It is about money, not about the health and quality of life of our friends, neighbors, and communities who understand the dire responsibility of clean water, air, and land.

Anonymous (Excerpt # 29)

Commenter ID: 0269

Name: Anonymous

Organization: None

I urge you to implement the EPA's proposed water quality standards for waters in Maine. Clean water is a necessary and fundamental human right. These standards are particularly critical to the tribal populations who engage in sustenance fishing, as well as to aquatic life, and all life. I appreciate your decision to disapprove the the States inadequate protection criteria. I applaude you for proposing criteria to protect tribal populations and others based upon the latest science and EPA policy.

Anonymous (Excerpt # 50)

Commenter ID: 0289

Name: Anonymous

Organization: None

I live right on the Penobscot River and wish the river to be as clean as possible. Maine state regulators are far too willing to use unfair tactics to take control of the river's water granting use by polluters rather than use by the Penobscots for clean water and healthy fish.

Mason, G. (Excerpt # 62)

Commenter ID: 0299

Name: George Mason

Organization: None

These standards recognize the rights of the Penobscot Nation to protect the health of their people. As a Maine resident I simply do not accept that we should accept barely adequate water quality as the best we can do for ourselves and our neighbors.

All the best, George Mason

Woodland Pulp LLC (Excerpt # 198)

Commenter ID: 0284

Name: Jay Beaudoin

Organization: Woodland Pulp LLC

3.1.1 Human Health Criteria

"Exhibit 3-1 summarizes the proposed HHC for waters in Indian lands derived using the fish consumption rate of 286 g/day and EPA’s most recent recommendations for other criteria inputs. For comparison, the table also provides MEDEP’s baseline criteria, which were derived using a FCR of 32.4 g/day."

Woodland Pulp Comment: 286 g/day is unreasonable considering fishing seasons, bag limits and the fact that different species of fish bio-accumulate pollutants to varying degrees. It is unlikely, nor is Woodland Pulp aware of, anyone who consumes or would consume that amount of fresh caught fish on a daily basis.

Bowdell, F. (Excerpt # 43)

Commenter ID: 0280

Name: Fran Bowdell

Organization: None

I am writing in support of the EPA's proposed water quality standards for the Penobscot River in order that sustenance fishing practiced by the Native Americans who fish in their ancestral river can be safe for them. It is their right to fish there without fearing the bioaccumulation of pollutants that would become a health risk for them and their descendants.

Anonymous (Excerpt # 39)

Commenter ID: 0278

Name: Anonymous

Organization: None

I fully support the EPA proposed rule applying federal water quality standards to the water systems in Maine that serve as sources of sustenance to Maine's indigenous communities, and to improve the human health criteria in all waters of Maine. We should indeed have waterways that are safe to provide sustenance and health.

Saddlemrie, C. (Excerpt # 38)

Commenter ID: 0277

Name: Craig Saddlemrie

Organization: None

To Whom It May Concern,

I support provisions to protect sustenance fishing practices and fish consumption by tribal members. We must honor these sustainable traditions and the self-determination and sovereignty of indigenous people.

Sincerely,

Craig Saddlemrie

Anonymous (Excerpt # 37)

Commenter ID: 0276

Name: Anonymous

Organization: None

It is essential that we recognize the Penobscot Nation's importance and protect them by preserving sustenance fishing practices for their fish consumption in perpetuity. The waters should

The Penobscot Nation has invested significantly in the protection of this integral part of their sustenance resources from contaminants...we could learn from them once again...and using resources including the Department of Natural Resources, the Water Resources Program, legal help and their Tribe's Leadership, they have presented a plan to be adhered to through federal standards.

This should not require much discussion, obviously this plan is for their benefit but the river, our state and the USA will win because the benefit is congruent with what should be desired by everyone using, benefiting from and sharing in the Penobscot River's "blessings". The waters of this river, all rivers, should be clean and pure for any and all to fish and consume their catch every day of each year forever.

Anonymous (Excerpt # 35)

Commenter ID: 0275

Name: Anonymous

Organization: None

Water must be considered a shared resource in Maine, the USA and the world. Water is an essential part of human life, human culture and the growth of human society. The Penobscot nation in Maine is one of our longest surviving residential communities. They have lived sustainably on the river which bears their name for many generations managing the resources for the purpose of their own survival and that of the natural systems in which we live. Their livelihood and their cultural knowledge must be protected and maintained just as they have protected and maintained the resources on which they have developed as a people, a culture, a society. I urge you to support policies like this one which protect the rights of the Penobscot to the security and sustainability of the Penobscot Rivers and others like it.

Anonymous (Excerpt # 34)

Commenter ID: 0274

Name: Anonymous

Organization: None

I support this Proposed Rule, particularly in how it raises the water quality standards of the Penobscot River and protects the sustenance of the Penobscot Nation, the general health of the river, and the quality of life for all Mainers and our ecosystems.

Anonymous (Excerpt # 96)

Commenter ID: 0319

Name: Anonymous

Organization: None

As a citizen of Maine living near the Penobscot River, I fully support high standards of water quality that recognize the sustenance fishing rights and offer protection of the waters and the health and culture of the Penobscot people.

Houlton Band of Maliseet Indians (Excerpt # 190)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

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.

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 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 nonattainment 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 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 olomopeq – 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 culturehero. 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.

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 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 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; see 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.

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. …

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 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 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.

(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.

(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).

(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.

(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

(7) *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.").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.").*

(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").*

(9) *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.*

(10) *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.*

(11) *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.*

Great Lakes Indian Fish and Wildlife Commission (Excerpt # 146)

Commenter ID: 0337

Name: James E. Zorn

Organization: Great Lakes Indian Fish and Wildlife Commission

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC or Commission) submits the following comments on the proposal to adopt certain water quality standards applicable to Maine. The Commission is a natural resource agency exercising delegated authority from 11 federally recognized Indian tribes in Michigan, Minnesota, and Wisconsin.(1) These tribes retain reserved hunting, fishing, and gathering rights in territories ceded to the United States in various treaties, rights that have been reaffirmed by federal courts, including the US Supreme Court. The ceded

territories extend over portions of Minnesota, Wisconsin, and Michigan (see map) and include portions of Lakes Superior, Michigan, and Huron.

GLIFWC member tribes reserved these ceded territory treaty rights in order to guarantee that they could continue their hunting, fishing, and gathering way of life (or "lifeway") in a manner that meets their subsistence, economic, cultural, medicinal, and spiritual needs. It must be noted that GLIFWC's focus is off-reservation, and it is from that perspective that these comments are submitted. GLIFWC staff's comments on this rule should not be construed as precluding comments by individual member tribes from their own sovereign and on-reservation perspectives.

GLIFWC's member tribes understand that clean water is fundamental to life. They regard it as "the first medicine" and as the blood of their mother, the earth. With this perspective in mind, it is not difficult to understand the importance of water to the spiritual, cultural, medicinal and subsistence practices that underlie the tribal lifeway. GLIFWC's member tribes also believe that actions affecting natural resources must be judged on how well they will protect seven generations hence. They seek to ensure that principles of ecosystem management recognize and protect the fundamental interdependence of all parts of the environment.

...

It is well known that Native American tribal members consume locally-caught fish at a higher rate than the general population. Some states and the US EPA have recognized that for water quality standards to be adequately protective, they must account for high-end fish consumers by utilizing tribal subsistence fish consumption rates (FCRs) to derive these standards.

For example, in Washington, many tribes hold treaty-reserved fishing rights for subsistence, ceremonial, religious, and commercial purposes that apply to a majority of waters under Washington's jurisdiction. In 2015, the EPA asserted that the state of Washington must consider the tribes exercising their reserved fishing rights as the target population for the purposes of deriving protective criteria and that these criteria must allow the tribes to harvest and consume fish consistent with their reserved rights. As a result, the EPA and the state have proposed rules utilizing a FCR of 175 g/day for determining water quality standards, far in excess of EPA's current national default FCR of 22 g/day, which represents the 90th percentile FCR for the U.S. general population.

GLIFWC also supports EPA's determination that a human health criteria that protects sustenance fishing is necessary and appropriate, and that it should use an unsuppressed FCR as the basis for setting those criteria. Although tribal members currently consume fish at a higher rate than the general population, there is evidence that the current rates are suppressed by fish consumption advisories, among other factors. To fully realize treaty reserved fishing rates, and to best protect their culture and lifeways, tribes should be able to consume as much fish as they desire, unimpeded by consumption advisories.

Finally, GLIFWC supports EPA's determination that the designated use "fishing" means "sustenance fishing" as applied to waters in which the tribes have a right to fish. Wherever tribes have a right to fish, waters should be considered to have sustenance or subsistence as a designated use, whether or not that use is designated by the state. In the case of Maine, where fishing is acknowledged as a designated use, it must include sustenance fishing, as practiced by the tribes.

Thank you for the opportunity to submit these comments, please do not hesitate to contact me or Ann McCammon Soltis at the number above with any questions you may have.

(1) GLIFWC member tribes are: in Wisconsin – the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of the Mole Lake Band, and Red Cliff Band of Lake Superior Chippewa Indians; in Minnesota

– Fond du Lac Chippewa Tribe, and Mille Lacs Band of Chippewa Indians; and in Michigan – Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

Gehrling, B. A. (Excerpt # 116)

Commenter ID: 0341

Name: Bridget A. Gehrling

Organization: None

"We" have no business polluting ANY body of water on this planet, with ANY amount of harmful chemicals. This country (and the state) have a treaty with the Wabanaki Nation. We must honor at least those meager standards and work toward improving the quality ALL of our waterways. Let us start with the ones which directly affect the health and livelihoods of the indigenous peoples, with whom "we" have already made agreements concerning those waterways.

Respectfully, please don't let the interests of big business win out over the health of our peoples and our planet.

Bridget A. Gehrling, Oakland, Maine resident

Counsel for Penobscot Nation (Excerpt # 151)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

…

I. Background

On February 2, 2015, in the context of disapproving certain of Maine's proposed WQS as insufficiently protective of the human health of tribal members, the EPA made a threshold determination that Maine has authority to promulgate WQS for waters in Indian Lands. *(2)* EPA subsequently disapproved additional WQS on March 16 and June 5, 2015. EPA is correct to acknowledge that its February 2, 2015 threshold determination regarding the scope of Maine's jurisdiction puts EPA in a particularly unique situation in the context of this current rulemaking: the norm elsewhere in the country is that EPA has authority to set WQS for Indian country waters unless or until a tribe obtains treatment as a state under CWA section 518; states other than Maine have no such authority elsewhere in the country. *(3)* However, Maine's unique jurisdiction on this issue does not give it the authority to ignore the existence of the federally recognized Indian tribes within its borders, including the Penobscot Nation. For purposes of WQS promulgation under the CWA, the Nation must be treated as its own general population in the waters within its territories

and in which it has a sustenance fishing right, regardless of which agency has authority to promulgate WQS.

Furthermore, despite EPA's determination that the Settlement Acts give Maine jurisdiction that no other State in the country has, WQS for the waters at issue in this rulemaking continue to uniquely impact the rights, resources and health and well-being of the Penobscot Nation and its members, as well as those of the other tribes in the State. In fact, when waters used by tribal members and waters that support fish and other animals consumed by tribal members are allowed to be contaminated, the Nation's interests are profoundly affected and the Nation's people are disproportionately among the most exposed and impacted. This context is significant because it constrains, in important ways, the rulemaking authority of any agency that is promulgating WQS for these waters. Among other things, the adequacy of WQS for these waters must be considered in view of legal protections for the Nation's fishing and hunting rights, including the Nation's aboriginal rights since time immemorial, and its retained sovereign fishing and hunting rights as reflected in treaties and confirmed the Settlement Acts (and as recently held by the Federal District Court for the District of Maine to include the entire main stem of the Penobscot River from bank to bank).

Under the CWA, WQS must include human health criteria (HHC), wherein human health is the touchstone of any agency tasked with promulgating the WQS. Fish and water dwelling animals are the primary route of human exposure to a host of toxic chemicals that are harmful to human health, including those chemicals subject to this rulemaking, as well as those chemicals subject to the previous disapprovals that are not proposed to be addressed in this rule-making (but for which EPA is still statutorily required to propose and promulgate standards).

…

Under the CWA, this analysis must take into account the particular effect on the general population of the Nation's members and be sufficiently protective of the human health of the Nation's members.

…

And the Nation strongly supports selecting FCR that reflects consumption that is not suppressed by concerns about the safety of available fish or by the absence of available fish due to pollution. Following the methodologies in those guidance documents ensures that these proposed standards utilize the best available science and most current methodologies, and that they comply with the requirements of the CWA.

The Nation supports the rationale used by EPA in its February 2, 2015 decision where EPA considered the Nation to be the general target population in the Nation's waters including its sustenance fishery reservation under MIA § 6207(4) and (9), and considered whether the FCR reflected as accurately as possible, the tribe's sustenance level FCR, and whether the CRL was protective of the sustenance fishers as a general population rather than as a highly exposed subpopulation. It would be arbitrary and capricious for the EPA to depart from that rationale in the context of this rule making, and it would also be inconsistent with the CWA and implementing regulations, as well as with principles of federal Indian law to do so. The Nation appreciates that EPA's current proposed rules follow that previous rationale, and the Nation encourages EPA to continue promulgate these rules as expeditiously as possible.

…

1. Fish Consumption Rate – treating the Nation as Its Own General Population

The Nation agrees with EPA that having approved sustenance fishing as a designated use in waters in Indian lands, it is reasonable for EPA to target tribal sustenance fishers as the general

population for the purpose of establishing criteria to protect that use. Indeed, the Nation's position is that it would be unreasonable for EPA to do anything other than to consider tribal sustenance fishers as the general population for the purpose of establishing criteria to protect that use.

The Nation has commented to EPA at length on these issues in its consultation regarding Maine's previously submitted WQS. The Nation will not restate all of the comments here, but incorporates them by reference. *(7)* Indeed, because EPA relied on this rationale in its previous disapprovals, which have already become final agency action, it would be arbitrary and capricious for EPA to depart from that rationale in the promulgation of these standards. The Nation encourages EPA to continue to follow this rationale, as EPA has proposed to do here.

The State of Maine has taken the position that its increased jurisdiction over environmental matters within Indian territories should allow Maine, or preclude EPA, from treating the Penobscot Nation as its own population in the waters of its sustenance fishery reservation. EPA has rejected this argument and should continue to do so. The Penobscot Nation is a federally recognized Indian Tribe, and Maine's unusual jurisdiction within its borders does not give Maine the ability to ignore the Nation's existence and declare that it is acceptable under the CWA for the Nation's population of sustenance fishers to be exposed to a higher toxicity than the State's population of nontribal member fishers. Furthermore, given EPA's federal trust obligations to the Maine Indian Tribes, it would be a violation of its trust responsibilities as well as arbitrary and capricious and contrary to law for EPA to depart from the rationale in EPA's disapprovals and now accept Maine's interpretation of the CWA and EPA's guidance regarding the same.

a. The Nation Supports a 286 g/day FCR

The Nation supports EPA's proposed FCR of 286 g/day. As EPA acknowledges, its guidance favors local data for setting FCR. The Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Study"), which was completed in 2009, as well as the Fish consumption information provided by the Nation during its consultation with EPA (and previously incorporated by reference herein), provides the best currently available information for current fish consumption rates, unsuppressed by pollution or lack of fish.

The Nation notes that EPA's rationale is focused primarily on present fish consumption rates corrected for the effect of suppression based on pollution or lack of fish. However, the better approach is that recommended by scholars that suggest that "heritage" fish consumption rates are more appropriate for tribes, particularly with regard to rights-based fish consumption:

> The initial methodology for obtaining fish consumption local data was published as a guide for conducting contemporary fish consumption surveys (USEPA 1989, 1992, 1998) that assumes the only desired information is how much fish people might be eating at the time. Current studies on tribal fish consumption often follow this guide even if they recognize that the baseline fish consumption rate is culturally important and higher than at present (Shilling et al. 2014). It is clear that this approach oversimplifies the issue and fails to capture information about fish consumption rates that are more relevant to many tribes, namely, heritage or rights based rates.

Barbara L. Harper & Deward E. Walker Jr., Comparison of Contemporary and Heritage Fish Consumption Rates in the Columbia River Basin Human Ecology (2015). Because EPA's approval of the rights-based designated use of tribal sustenance fishing, an aboriginal right of the tribe since time immemorial that EPA correctly recognizes was reconfirmed in MIA § 6207(4) and (9), heritage fish consumption rates are more appropriate than present day fish consumption rates, even when an attempt is made to correct those present day FCR for suppression effects. *(8)*

Accordingly, the Nation believes that EPA should favor historical or "heritage" fish consumption for Native American populations, despite the fact that EPA is not proposing to do so in these

rules. As EPA correctly notes, the Wabanaki Study concludes that 514 g/day is the best estimate of heritage fish consumption rates, reflecting consumption at a time when there were sufficient inland anadromous fish to support an inland anadromous diet. The Nation is hopeful that CWA protections and other fish restoration activities will continue to lead to an increase in the availability of those species, such that the Nation's tribal sustenance fishers may one day return to that inland anadromous diet. However, the Nation supports the EPA's proposal to use the more conservative estimate of 286 g/day as the best estimate of present day consumption corrected for suppression.

As scholars have concluded:

> It is clear that setting water quality standards using contemporary suppressed fish consumption rates fails to protect traditional fishing practices, to improve water quality, or to reduce contamination enough to enable tribes to safely eat traditional amounts of fish.

Harper & Walker (2015). Accordingly, it is important for EPA to take into account both heritage fish consumption rates and best estimates at current fish consumption rates not suppressed by pollution or lack of availability of the fish. Similar to its approach here, EPA has proposed focusing on unsuppressed rates in the State of Washington, Docket ID No. EPA-HQ-OW- 2015-0174. Correcting present day fish consumption rates for suppression by taking into account local data about heritage consumption rates is the most appropriate approach under the CWA.

And EPA is correct in its conclusion that the Wabanaki Study is also the best source of local information when focusing on EPA's current guidance recommending using current unsuppressed fish consumption rates (rather than heritage fish consumption rates). Thus, for the reasons articulated in EPA's proposed rule, including those articulated in the Nation's September 23, 2014 responses to comments on it final tribal WQS, a FCR of 286 g/day represents the best available data on present day sustenance-level fish consumption, unsuppressed by pollution concerns.

To use a lower fish consumption rate, as urged by Maine, would be to allow Maine to effectively set a cap on the Nation's sustenance fishing right, which MIA expressly recognizes cannot be limited by any law of the State. MIA § 6207(4).

The Nation therefore supports the use of the 286 g/day FCR in setting these standards.

…

(2) By participating in this rulemaking, the Nation does not concede the State's authority to promulgate such WQS nor waive any right to appeal or otherwise challenge the EPA's determination regarding such authority. However, the Nation's principal concern is that WQS sufficiently protective of the human health of tribal members be made applicable to all waters used by tribal members, regardless of regulatory jurisdiction over such waters. Accordingly, while the Nation supports the implementation of these proposed WQS because they are adequately protective of tribal health, the Nation objects to the authority of any entity to promulgate standards that are not sufficiently protective of tribal health.

(3) There are other places in the country where there are tribal fishing rights on waters within state jurisdiction. One example is the State of Washington, Docket ID No. EPA-HQ-OW-2015-0174, where EPA is addressing similar issues of ensuring that WQS are sufficiently protective of tribal health, and many of the comments in that case related to the Environmental Justice aspects, and EPA's trust responsibility to tribes, are also applicable to this rulemaking. Final EPA action in promulgating these proposed rules in Maine would be consistent with EPA's position and decisions in Washington.

(7) See Public Comments of the Penobscot Nation Regarding Maine's Application for Approval of Water Quality Standards for Application Within the Penobscot Indian Reservation, submitted September 13, 2013 and Supplemental comments submitted November 25, 2013, incorporated herein by reference.

(8) The rationale for preferring heritage Native American fish consumption rates over contemporary Native American fish consumption rates is well articulated in the scientific literature, and the Nation adopts that rationale. See Barbara L. Harper & Deward E. Walker Jr., Columbia Basin Heritage Fish Consumption Rates, Human Ecology (2015); Barbara L. Harper & Deward E. Walker Jr., Comparison of Contemporary and Heritage Fish Consumption Rates in the Columbia River Basin Human Ecology (2015), attached hereto as Exhibit 1.

National Tribal Water Council (Excerpt # 136)

Commenter ID: 0336

Name: Ken Norton

Organization: National Tribal Water Council

This EPA action is an appropriate demonstration of how the federal agency is carrying out its Federal Trust Responsibility to four Indian Tribes in Maine, as affirmed by Congress over 200 years ago and known as the Doctrine of Trust Responsibility or Trust Responsibility. In 1977, a Senate report expressed this obligation as follows: "The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian Tribes and people. This includes an obligation to provide these services required to protect and enhance Indian lands, resources, and self-government (…)"*(1).* Under this approach, the federal government's trust duty "is owed to all Indian Tribes." *(2)* Trust Responsibility "transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of Tribes to continue their ways of life." *(3)* A unique relationship exists between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indian Tribes through Trust Responsibility. It is a "duty of protection" of Indian rights, Indian land and waters, Indian natural and cultural resources. EPA's "Proposal of Certain Federal Water Quality Standards Applicable to Maine" are the example of Trust Responsibility to protect all four federally recognized Maine Tribes.

On April 20, 2016 EPA proposed water quality standards (WQS) for certain waters under the State of Maine's jurisdiction. Currently, the State of Maine WQS standards are not sufficient to fully protect designated uses and are not fully protective for human and aquatic life for certain waters in Indian lands. In these newly proposed standards, EPA included Human Health Criteria (HHC) which are adequate to protect the designated use of sustenance fishing for certain waters in Indian lands and for waters subject to sustenance fishing rights under the Maine Implementing Act (MIA). The proposed HHC are based on an unsuppressed level of fish consumption by the four federally recognized Maine Tribes. Under the CWA, WQS must include Human Health Criteria (HHC), wherein human health is the touchstone of any agency tasked with promulgating WQS.

…

This analysis must take into account the particular effect on Tribal members. EPA's use of unsuppressed fish consumption rates to protect Tribal subsistence/sustenance fishing rights and practices of the Maine Tribes is not unique to Maine. The exposure scenario approach used to derive these traditional consumption rates has also been used elsewhere in the country for development of water quality and cleanup standards in Indian Country (for example the Spokane Tribe). NTWC is pleased that EPA has included best scientific information and input from the affected four Maine Tribes. NTWC strongly supports EPA's approach of treating Tribal members

of Maine Tribes, as the target representing the general population, to be protected at the cancer risk level of 1x10-6, rather than as a sensitive subpopulation.

EPA took analogous action and similar environmental justice of using unsuppressed Tribal fish consumption rates, and treating the Tribes as their own general populations when on September 14, 2015 the EPA proposed rule for Washington State "Revision of Certain Federal Water Quality Criteria Applicable to Washington", Docket ID: EPA-HQ-OW-2015-0174 came into being. NTWC applauds the EPA for taking action and agrees with the EPA determination that sustenance fishing is a designated use and that Human Health Criteria (HHC) must be protective of that use, as was highlighted in revised WQS for both the States of Maine and Washington.

EPA is correct to disapprove a number of Maine's new and revised WQS that were proposed on February 2, March 16, and June 5 of 2015. This threshold determination regarding the scope of Maine's jurisdiction puts EPA in a particularly unique situation in the context of this current rulemaking. Elsewhere in the country EPA has the authority to set water quality standards ("WQS") for Indian country waters unless or until a Tribe obtains treatment as a state under CWA section 518 or a Tribe has a Settlement Agreement ceding to state jurisdiction. However, Maine's unique jurisdiction on this issue does not give it the authority to ignore the existence of the federally recognized Indian Tribes within its borders, including the Penobscot Indian Nation, the Houlton Band of Maliseet Indians, the Aroostook Band of Micmacs, the Passamaquoddy Tribe - Pleasant Point and Passamaquoddy Tribe - Indian Township. These sovereign nations must be treated as their own general population in the waters within their territories and where they were granted a sustenance fishing right.

Today, the EPA proposes six additional WQS for waters in Indian lands in Maine; Two WQS for all waters in Maine including waters in Indian lands; and one WQS for waters in Maine outside of Indian lands. These proposed WQS take into account the best available science, including local and regional information, as well as applicable EPA policies, guidance, and legal requirements, to protect human health and aquatic life. EPA proposes these WQS to protect the designated use of sustenance fishing for certain waters in Indian lands.

Furthermore, despite EPA's determination that in 1980 the Congress passed the Maine Indian Claims Settlement Act (MICSA) that gave the State of Maine jurisdiction, WQS for the waters at issue in this rulemaking necessarily uniquely impact the rights, resources and health and well-being of the Penobscot Indian Nation and its members, as well as those of the other Tribes in the State. The MICSA granted the state authority to set WQS in waters in Indian lands. In fact, when waters used by Tribal members and waters that support fish and other animals consumed by Tribal members are allowed to be contaminated, Tribal interests are profoundly affected and Tribal members are disproportionately among the most exposed and impacted. This context is significant because it constrains, in important ways, the rulemaking authority of any agency that is promulgating WQS for these waters. The adequacy of WQS for these waters must be considered in view of legal protections for the Penobscot Indian Nation fishing and hunting rights, including their aboriginal rights since time immemorial, and its retained sovereign fishing and hunting rights as reflected in treaties and confirmed in the Settlement Act as well as those of the other Maine Tribes.

(1) American Indian Policy Review Commission, Final Report (Washington D.C.: Government Printing Office, 1977) at 128-30.
(2) Lincoln v. Vigil, 508 U.S. 182, 195 (1993) quoting with approval Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102 (9th Cir. 1986), "The Rights of Indians and Tribes" Stephen L. Pevar, NYU Press, at page 42, (2004).
(3) M.C. Woods, "Indian Land and Promise on Native Sovereignty: The Trust Doctrine Revisited," Utah, L. Rev. 1471, 1496-97 (1994).

Anonymous (Excerpt # 123)

Commenter ID: 0347

Name: Anonymous

Organization: None

The Wabanaki tribes of Maine (Passamaquoddy, Penobscot, Micmac and Maliseet) have lived in the area now known as Maine for many thousands of years . They are all connected to land and water, the Penobscot in particular are a riverine people and as such the waterways and their resources are central to their culture.

Protecting the water is an inherent responsibility and tribes have an inherent, aboriginal right to take fish from the waters of their territories and this right is statutorily recognized. The Environmental Protection Agency (EPA) is properly enacting standards that recognize and protect this fishing right of the Maine tribes and I fully support this action. The Maine tribes gave up much in the Maine Indian Claims Settlement Act of 1980, but this Act recognized and affirmed the right of the tribes to fish for their sustenance as they have for thousands of years. It is shameful to fail to acknowledge these tribal rights to fish and even more shameful to argue that the State of Maine should not have to meet standards that are protective of the health of people eating fish from these water bodies. Please continue to protect tribal fishing rights and do not allow the State of Maine, through its Attorney General's Office, continue to marginalize the Tribes and destroy their cultures.

Alexander-Ozinskas, A. (Excerpt # 117)

Commenter ID: 0342

Name: Annika Alexander-Ozinskas

Organization: None

As a non-native Maine resident, I value the health of people and ecosystems over the convenience of private interests to dump toxins into our rivers. What's more, we all live on what was once native land, and my understanding is that the Wabanaki people hold their rivers to be sacred. Therefore, it is a crime to pollute these waters, and it is the responsibility of all Maine residents to protect these waters. The newly proposed EPA water quality standards are a step in the right direction. It is my understanding that the new WQS represent a sincere effort to put in place standards that will allow the Wabanaki to eat fish without the amount being suppressed by levels of toxins in the waters. The former standard that allows people to eat 32.4 grams a day allows too many toxins -- if we want native fishing to actually provide for sustenance, and fish represents the primary protein source in a person's diet, 32 grams a day is not enough. It is my opinion that the new standard should raise the bar enough so that the Wabanaki can eat fish from their river freely, without fear that they are close to an edge beyond which their health and the health of their children will definitely be affected. Please, we must support stricter water quality standards, for the sake of Wabanki people and all Maine people.

Thank you. - Annika Alexander-Ozinskas, Wiscasset

Pierce Atwood LLC (Excerpt # 211)

Commenter ID: Public Hearing June 9, 2016

Name: William E. Taylor

Organization: Pierce Atwood LLC

Apparently this entire rule is based on the assumption that there is a designated use of sustenance fishing in Maine's water classification system, there's a standard designated use in Maine's water quality standards related to sustenance fishing. There is no such designated use. The Board of Environmental Protection and the legislature have never adopted such a use, so the basis, the entire underpinning of the rule is in doubt. We will be submitting detailed comments with respect to these and other issues, and I thank you for the opportunity to comment, but I would ask the EPA to make a prompt decision on our request for an extension of time on which to comment on the proposed rule.

Maine Department of Environmental Protection (Excerpt # 184)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

…

Comments from Janet Mills, Maine Attorney General

EPA claims authority to act pursuant to Section 3 03(c) of the Clean Water Act ("CWA"); 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5, 131.6, 13.11 and 131.21. EPA identified its February 2, 2015 disapprovals of Maine's WQS and its proposed federal WQS in the proposed rule as being "necessary" to meet CWA requirements, most notably by claiming that existing Maine WQS (Maine's human health criteria, or "HHC") are insufficient to protect designated uses, including EPA's own, newly-created designated use of "sustenance fishing." 81 Fed. Reg. 23241-23247. The Department disputes EPA's underlying determination of necessity because, among other things, EPA wrongfully relies upon and presumes the lawful establishment of a new designated use of "sustenance fishing" for unspecified tribal waters, which is a use that was never adopted by Maine. This and other legal concerns with EPA's proposed Maine rule are more fully addressed by the comments filed by Maine Attorney General Janet Mills on June 14, 2016, which are incorporated into these comments in their entirety by reference. In addition to the points raised by Attorney General Mills, the Department further comments as follows:

…

In addition, in docket filings dated June 16, 2016, EPA denied requests by several commenters to extend the comment period in order to address the many important issues implicated by EPA's proposed Maine rule. In its denials of those requests, EPA stated: "Our primary concern with extending the comment period is that for many pollutants there are currently no criteria for Clean Water Act purposes, including most human health criteria for waters in Indian lands." This explanation of the apparent urgency surrounding the promulgation of EPA's proposed Maine WQS makes no sense because EPA's new approach in Maine is the cause of the regulatory void that EPA now scrambles to address. EPA's current position, which the Department disputes, is that prior to EPA's February 2, 2015 action, there had never been any WQS of any kind, including

HHC, in effect and requiring attainment for any CWA purposes for any of EPA's unspecified Indian waters in Maine. If EPA had truly believed that such a gaping void in protection (and a clear violation of the CWA) had always existed due to the lack of any EPA-approved WQS for such waters, as EPA now claims (and the Department disputes), EPA has had decades to address the regulatory void, as Maine's WQS date back to the mid 1980s. If there is any sudden urgency now, it is entirely the result of EPA' s changed position with respect to Maine underlying its February 2, 2015 disapprovals of Maine's WQS for Indian waters and its rushed promulgation of this proposed Maine rule.

…

Fish Consumption Rates (FCR) and Excess Cancer Risk Factor

Beyond the points raised by Attorney General Mills regarding these issues, the Department urges EPA not to consider any values from the anecdotal Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Report") to develop FCR. 81 Fed. Reg. 23245-47. While the Wabanaki Report holds some anthropological value, extending its reach to regulatory standards is inappropriate. The Wabanaki Report is entirely subjective and aspirational, and is based on outdated historical estimates rather than on any actual consumption data for the population that EPA seeks to protect with its new designated use of "sustenance fishing." 81 Fed. Reg. 23246. The Wabanaki Report is certainly not the best available evidence for Maine FCR purposes, especially in light of the existence of the 1990 study based on actual local consumption data that was used to develop Maine's current statewide FCR of 32.4 grams/day at a 10-6 cancer risk level. In the Department's view, the Wabanaki Report is not even competent evidence, and is simply not the kind of reliable evidence that the Department would consider when establishing enforceable permit limits. It should not be used as support for EPA's newly proposed tribal FCR of 286 grams/day, or for any other purpose.

Even so, in light of the acceptable range of protections outlined in EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health ("2000 Guidance"), EPA's proposed HHC based on its new FCR of 286 grams/day are simply not required in order to achieve an acceptable level of protection (i.e., to meet the requirements of the CWA) because Maine's existing statewide FCR of 32.4 grams/day at a 10-6 cancer risk level already achieves what EPA considers to be an acceptable level of protection. For instance, if an individual consumed 10 times the amount of fish contemplated by Maine's current FCR (or 324 grams/day), he or she would still be protected to an EPA-acceptable risk level of 10-5. Similarly, if an individual consumed 100 times Maine's current FCR (3240 grams/day, or over 7 pounds of fish per day), he or she would still be protected to at least a 10-4 risk level, which, under EPA's 2000 Guidance, is also acceptable and adequately protective of sport and subsistence fishers. The Department is unaware of any evidence suggesting actual consumption anywhere near these levels, and doubts that it exists. But even assuming the existence of such consumption levels, Maine's existing FCR of 32.4 grams/day at a 10-6 cancer risk level is still adequately protective of all Maine-promulgated designated uses based upon the acceptable range of protections set forth in EPA's own 2000 Guidance, and there is no necessity for any higher FCR in order to meet the requirements of the CWA. Any determination of EPA necessity here is thus based purely on EPA's own, more recent risk preferences, and not on any requirements of EPA's 2000 Guidance or the CWA.

EPA's attempt to force Maine to protect tribes using an elevated 286 grams/day FCR at a 10-6 cancer risk level also may not result in any statistically relevant levels of protection. EPA's 2000 Guidance is structured to account for a broad range of consumption rates (90th to 99th percentile). A recent white paper by ARCADIS (Summary of Health Risk Assessment Decisions

in Environmental Regulations, March 6, 2015), notes that the impact of the conservative approach of EPA' s 2000 Guidance results in significantly higher levels of protection from the development of one excess cancer due to exposure to chemicals in the environment. Under principles of compound conservatism, protection to the 95th percentile based on exposure, and amount of fish consumed, and total number of years consuming, protects significantly more than the 95th percentile for each of those variables individually. In their example, protecting to the 95th percentile (or 9,500 out of 10,000, which is equivalent to 104 risk level) actually protects to the 99.781h percentile when considering the combined impact of each assumption in EPA's 2000 Guidance. Factoring in these same assumptions to Maine's WQS clearly results in protection for more highly exposed subgroups not exceeding the 104 level. The ARCADIS paper shows that the proposed EPA standards protect well beyond that required by EPA's 2000 Guidance, and that Maine's WQS, especially combined with principles of compound conservatism are well within the acceptable range of protection for exposed subgroups authorized by EPA's 2000 Guidance.

Maine Indian Tribal-State Commission (Excerpt # 180)

Commenter ID: 0345

Name: John Dieffenbacher-Krall

Organization: Maine Indian Tribal-State Commission

These comments reflect the Maine Indian Tribal-State Commission work to increase fish stock and improve fish habitat in waters in Tribal territory that are under Commission jurisdiction.

The MITSC can be contacted through John Dieffenbacher-Krall, Executive Director mitsced@roadrunner.com Maine Indian Tribal-State Commission (MITSC), (207) 944-8376.

The Maine Indian Tribal-State Commission (MITSC) is an inter-governmental entity created by the Maine Implementing Act of 1980. Six members are appointed by the State, two by the Houlton Band of Maliseet Indians, two by the Passamaquoddy Tribe, and two by the Penobscot Indian Nation. The thirteenth, who is the chairperson, is selected by the twelve appointees. The Maine Indian Tribal State Commission is charged in part to: Continually review the effectiveness of the Act and the social, economic, and legal relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, the Penobscot Indian Nation, and the State (30 M.R.S.A. 6212(3)).

In 1980, legislation passed at both the state and federal levels that established specific legal parameters for the settlement of claims by the Passamaquoddy Tribe and the Penobscot Indian Nation for the return of 12.5 million acres of land, roughly 60% of the state of Maine, and damages of 25 billion dollars. A settlement negotiated among the parties became law with the passage of two separate pieces of legislation: Act to Implement the Maine Indian Claims Settlement, commonly known as the Maine Implementing Act (MIA) and the Maine Indian Claims Settlement Act (MICSA). The MIA created:

Under 30 MRSA 6207.3, Adoption of Regulations by the Commission.

The commission shall have exclusive authority to promulgate fishing rules and regulations on:

A.Any pond [greater than 10 acres where] 50% or more of the linear shoreline of which is within Indian Territory;

B.Any section of a river or stream both sides of which are within Indian territory; and

C.Any section of a river or stream one side of which is within Indian territory for a continuous length of mile or more.

In promulgating regulations, one of the factors that the MITSC must consider is the "ecological interrelationship of the fishery" to cultural use, non-Native fishery practices and the preservation of habitat. Additionally, under 30 MRSA 6207.8, the Commission shall "consult with the Passamaquoddy Tribe and the Penobscot Nation and landowners and state officials, and make recommendations to the commissioner and the Legislature with respect to implementation of fish and wildlife management policies on non-Indian lands in order to protect fish and wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or the commission."

It is in the completion of this task that the MITSC has come to the consensus that these fish and wildlife stocks are reliant on cleaner water and healthier habitat than what exists.

In 2012, the MITSC offered testimony to James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples. We reported, in part, that many traditional Wabanaki food sources are no longer safe to eat due to toxic contamination by the paper mills that discharge pollutants into Wabanaki waters. After review of the material submitted by the MITSC, Mr. Anaya concluded: [The] Maine Indian Claims Settlement Act and Maine Implementing Act create structural inequalities that limit the self-determination of Maine tribes; structural inequaltity contribute to Maine tribal members experiencing extreme poverty, high unemployment, short life expectance, poor health, limited educational opportunities and diminished economic development.

Since 2012, we have recommended that habitat restoration be central to the improvement of quantity and quality of fish stocks. Right now, children under the age of eight and pregnant women are told not to consume fresh water fish. The MITSC is aware that Tribe citizens regularly consume fish caught in the lakes, streams and brooks within their traditional territories at a rate that exceeds this recommendation. We are also aware that many non-Native fishers eat fish at rates that are above the safe guidelines for consumption.

We have offered testimony on the restoration of Alewife in the St. Croix Watershed, developed a formal position: MITSC Positions on Natural Resource Management and River Herring Restoration to the St. Croix Watershed, testified on state legislation that is connected to habitat restoration and authored a special report: An Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy & State of ME http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf

For the health of all who fish in the rivers and streams in Tribe territory and elsewhere, we ask that the EPA apply a water quality standard that would improve both the quality and the quantity of the once abundant fresh water, catadromous and anadromous fish.

Olson, L. (Excerpt # 112)

Commenter ID: 0331

Name: Lloyd Olson

Organization: None

We need to protect all of our waters, whether they are in the Indians backyard or ours. In the end it all the same backyard.

Lloyd Olson

Anonymous (Excerpt # 125)

Commenter ID: 0351

Name: Anonymous

Organization: None

I wish to speak in favor of the proposed regulation intended to insure water quality sufficient to support the lifestyle of the riverain Penobscot Nation. The regulations promulgated by the State of Maine are insufficient to guarantee safe water and thereby fish safe for human consumption.

Maddaus, J. (Excerpt # 168)

Commenter ID: 0350

Name: John Maddaus

Organization: None

My name is John Maddaus, and I am a citizen of Maine and a resident of the Town of Orono, one of the municipalities bordering the Penobscot River in the State of Maine. As a non-Native person, I strongly support Water Quality Standards for the State of Maine which ensure that members of the Penobscot Indian Nation are able to safely practice sustenance fishing in the Penobscot River. As a faculty member at the University of Maine in Orono, I was involved in the formation of the University's Native American Studies program in the mid-1990's. In developing the framework for Native American Studies, I had the honor and privilege of working closely with members of the Penobscot Indian Nation, as well as members of other federally recognized tribes in Maine. One of the things that the Penobscot Indian people with whom I worked repeatedly impressed upon me while we were designing the Native American Studies program was the centrality of the Penobscot River and of fishing and eating fish from that river to the culture of the Penobscot Indian Nation. The same was true of the Passamaquoddy Tribe with respect to the St. Croix (Schoodic) River. Yet for almost 200 years, Maine municipalities and businesses have polluted the Penobscot and St. Croix Rivers to the point where eating the fish from these rivers entails a risk to individual health. Furthermore, having to curtail their consumption of fish has forced the Penobscot and Passamaquoddy peoples to alter their traditional ways of life in other ways, such as becoming more dependent on the market economy for both income and necessities of life. It is important to recognize that the ancestors of the Penobscot, Passamaquoddy, Maliseet, and Micmac peoples did not come to the United States seeking to become Americans. Instead, they were here millennia before any of our non-Native ancestors arrived here, and they have long sought to maintain their own cultures and traditions, despite pressure to assimilate into American culture. For over twenty years, I have supported inclusion of information about the cultures and histories of the four tribes in Maine in the curricula of educational institutions from pre-school to graduate study. I strongly believe that all non-Native people should respect Native traditions and self- determination. Furthermore, I

believe that the Water Quality Standards that would allow the Native people of Maine to safely eat fish from Maine's rivers would also benefit non-Native people who would also like to be able to safely eat these fish. Tremendous progress has been made on the Penobscot and St. Croix Rivers in recent years through removal of barriers to sea-run fish entering these rivers and reaching their traditional spawning grounds. These changes promise to greatly increase the runs of several species of fish that spawn in our rivers.

But that change will be meaningless in terms of sustenance fishing if levels of pollution make the fish unsafe to eat. I strongly urge that the EPA ensure Water Quality Standards that are sufficient to ensure the effective practice of the tribes' sustenance fishing rights, as guaranteed by both treaties and federal laws. Thank you for your consideration of my views in this very important matter before you.

Anonymous (Excerpt # 162)

Commenter ID: 0346

Name: Anonymous

Organization: None

I strongly support EPA regulations for the Penobscot River that will ensure SAFE, sustainable fishing rights for the Penobscot Nation, as specified in numerous treaties. Uncontaminated water is essential not only to the health of Penobscots but to their culture as well.

Anonymous (Excerpt # 113)

Commenter ID: 0335

Name: Anonymous

Organization: None

I write today to urge the EPA to protect the sustenance fishing practices of the Wabanaki People and improve Maine's water quality standards. Setting federal standards recognizes the rights and protects the health of the native people. These increased standards demonstrate strong leadership in the efforts to reduce the destructive impact of all people on the environment and serve to protect health and aquatic life.

Crawford, G. (Excerpt # 97)

Commenter ID: 0320

Name: Gretchen Crawford

Organization: None

The Wabanaki people have always lived here and have sustenance fishing rights. They deserve to be able to eat lots of fish daily and safely!

I fully support your efforts to improve water quality and the health of native fish species that is critical to the well-being of the Wabanaki people, and everyone who lives in or visits this still partly wild and wonderful state.

Anonymous (Excerpt # 124)

Commenter ID: 0349

Name: Anonymous

Organization: None

I have been a resident of Maine since 1978 and stand with the tribes in their support of the EPA proposal for stricter water quality standards in the Penobscot River. The Penobscot Nation has always tested their own water and that should remain their responsibility. The Penobscot is their ancestral river and belongs under their care with help from the EPA.

Natural Resources Council of Maine (Excerpt # 145)

Commenter ID: 0334

Name: Nick Bennett

Organization: Natural Resources Council of Maine

NRCM supports EPA's proposed standards because they reflect the trust responsibility of federal agencies to protect the rights of federally recognized Maine tribes. The laws implementing the Maine Indian Claims Settlement Act of 1980 guarantee Maine tribes the right to sustenance fishing.

Maine state law, specifically 30 MRSA § 6207(4), states:

> 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…

Although Maine has delegated authority to implement and develop water quality standards under the Clean Water Act, EPA has the duty to ensure that water quality standards protect the "designated uses" (1) of the waterbodies to which those standards apply. NRCM strongly agrees with the following EPA statement in its analysis supporting the February 2, 2015 decision to reject Maine's existing water quality standards for tribal waters:

A critical element of tribal cultural survival is the ability to exercise sustenance living practices, including sustenance fishing. There are multiple provisions in the Indian settlement acts that specifically codify the Tribes' sustenance practices. Maine general law regulating fish take accommodates sustenance fishing, and in several regards also specifically codifies the Tribes'

ability to sustenance fish. The legislative record supporting the Indian settlement acts in Maine makes it clear that the statutes intend to create a land base on which the Tribes in Maine may fish for their sustenance. Therefore, EPA interprets the State's "fishing" designated use, as applied in tribal waters, to mean "sustenance" fishing; and EPA is approving a specific sustenance fishing right reserved in one of the settlement acts as a designated use for certain tribal reservation waters.

When it promulgated water quality standards for tribal waters, Maine's Department of Environmental Protection (DEP) failed to account for the right of tribal members to consume more fish – quantities comparable to their historical practices – than Maine people who are not tribal members. Again, Maine law specifically gives this right to tribal members. To correct this failure, DEP would need to use a higher fish consumption rate in recalculating water quality standards for pollutants in tribal waters than in other Maine waters. DEP has not done this and has consistently refused to do so over many years.

(1) Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained (see http://water.epa.gov/learn/training/standardsacademy/mod2/page2.cfm.)

Dowzer, M. (Excerpt # 118)

Commenter ID: 0343

Name: Margy Dowzer

Organization: None

I agree with and support whole-heartedly the ability of the four federally-recognized tribes of Maine to sustain themselves through traditional fishing practices. This proposed regulation addresses these concerns.

Rather than comment on the science that supports this regulatory action, of which there is ample reportage, I choose to address the more human and personal effects of water quality in the Penobscot River.

A close friend of mine was born and grew up along the Penobscot River. This is the river that surrounds Indian Island and has provided a major waterway through our state for thousands of years. The waters of the Penobscot were the basis of so much of the community's life, including food, gathering spaces, transportation for trade and visiting relatives. My friend (I'll call her K) and her brothers and sisters came from a poor family that struggled to survive. Like most of the Native people there, they ate a lot of fish that came from the river.

The fish was plentiful, did not cost them anything, and was their right to take. K learned about the traditional ways of survival and spiritual practice from her grandfather, a Maliseet elder. Despite the difficulties of her early life, K became a successful writer and mutlimedia artist.

One time I asked K if she and her husband wanted to have children. Her face immediately changed from relaxed and happy to downcast and sad. She told me that her reproductive system did not function properly, and then spoke about how much fish they ate as a family. At that time, they did not know what effect eating so many fish contaminated by industry along the river would have on their lives. She spoke of the paper mills and other industries that caused pollution. As a

poor family, they did not have many other options. Later, I learned that K has a connective tissue disorder of unexplained origin. I have never wanted to ask K to explain further, since it clearly caused her so much pain and distress.

Water quality affects not just human health in the present, but for generations to come. In fact, when Native people cannot have children, it becomes a form of genocide wherein communities are slowly disappeared over time. It becomes more likely that some day there will be no future generations. When my friend K cannot have children, it is not only wrong and preventable, but dispiriting to an entire community. And K is not the only one. When Native people cannot raise their own children in their customs and traditions (sustenance fishing), that, too, is a form of genocide.

Sample, G. W. (Excerpt # 131)

Commenter ID: 0328

Name: Greg W. Sample

Organization: None

Both EPA and the U.S. District Court for Maine in Penobscot Nation v. Mills proceed from the appropriate premise – that it was a primary purpose of the tribal participants in the Settlement Act process, a purpose substantially accepted and incorporated by the Maine Legislature and Congress in the Maine Indian Claims Settlement Act (MICSA) and the Maine Implementing Act (MIA), "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 FR 23241. EPA draws upon language in the MIA as establishing that tribal sustenance fishing is a designated use of certain Maine waters under the Clean Water Act requiring protection through appropriate WQS.

The *Mills* decision and EPA would each protect tribal sustenance fishing in certain areas outside tribal reservations and trust lands (such lands collectively referred to as "waters in Indian lands" in EPA's proposal). The court in *Mills* finds a clear intention in MIA to preserve what the evidence in the case established was a long history of Penobscot sustenance fishing in the Main Stem of the Penobscot River, bank-to-bank. It then concluded that Penobscot tribal members have a continuing right to such fishing throughout the Main Stem, notwithstanding (a) the court's simultaneous conclusion that the Penobscot Reservation in the Main Stem is limited to the upland islands therein, and (b) that MIA Section 6207(4) limits tribal regulation of sustenance fishing to areas "within the boundaries of [the tribal] reservations."

…

Each of these Settlement Act provisions provides an independent means of protecting tribal sustenance fishing in waters that are outside of "waters in Indian lands" because in each case, the MIA expressly acknowledges tribal sustenance fishing as either a designated use in the regulated waters, where directly regulated, or the possibility of a protected tribal use of downstream waters. Accordingly, tribal or MITSC action under any of these 6207 subsections could constitute a basis for Clean Water Act water quality standards when deemed necessary to protect tribal sustenance fishing rights.

Section 6207(1) also affirms the full possession by the tribes of riparian and littoral rights associated with reservation and trust lands.

As EPA has noted, Section 6207(9) makes clear that the foregoing subsections “include[] inland fish and anadromous and catadromous fish when in inland water.

Anonymous (Excerpt # 99)

Commenter ID: 0321

Name: Anonymous

Organization: None

I write in full support of the Penobscot Nation's right to have safe waters to fish in. Can society take any more from those who were here first. It was very disheartening when-I believe it was back in the 1970s--we first started to warn people that they could not eat fish from our waters. Is this the best we can do? Stop eating fish! How about stop poisoning the incredible planet that nourishes us.

I strongly urge the EPA to do what is necessary to protect and improve Maine's water quality for the Penobscot tribe and the planet we are blessed to inhabit.

Red Cliff Band of Lake Superior Chippewa (Excerpt # 195)

Commenter ID: 0355

Name: Bryan J. Banbridge

Organization: Red Cliff Band of Lake Superior Chippewa

Red Cliff believes the EPA has a federal trust responsibility to enforce WQS to support tribal sustenance and subsistence levels wherever tribes have a right to fish and recreate. Red Cliff has a long and thriving tradition of commercial fisheries on Lake Superior, and an even longer tradition of sustenance fishing on Lake Superior, its tributaries, and inland waterbodies. These traditions are protected by reserved treaty rights between the Lake Superior Chippewa and the United States of America. Red Cliff is in support of the EPA 's detennination of "fishing" designated uses of water to be interpreted as "sustenance fishing" in all cases where this definition is applicable. To quote GLIFWC's response to Docket ID No. EPA-HQ-OW-2015-0804 via electronic submission:

"Although tribal members currently consume fish at a higher rate than the general population, there is evidence that the current rates are suppressed by fish consumption advisories, among other factors. To fully realize treaty reserved fishing rates, and to best protect their culture and lifeways, tribes should be able to consume as much fish as they desire, unimpeded by consumption advisories. "

Red Cliff supports the proposed rule 's analysis of extraordinary differences between the national fish consumption rates (FCR) in contrast with the FCR of local tribal communities. Furthermore, this proposed rule categorizes two types of aquatic resources, three major habitats, and three traditional lifestyle models based on the "Wabanaki Study", providing a range of FCRs established with credible ethno-historical, ecological, nutritional, archaeological, and biomedical literature. Red Cliff supports the additional information assembled about general foraging,

seasonal patterns, dietary breadth, abundance, and food storage. Specifically, Red Cliff is in support of including unsuppressed FCRs as part of all designated uses of water.

Strickland, P. R. (Excerpt # 102)

Commenter ID: 0323

Name: Paul R. Strickland

Organization: None

I fully endorse and support the EPA's proposed water quality standards that would apply to human health criteria for waters in Indian lands and for waters subject to sustenance fishing rights for Maine's Native people.

...

It makes no sense to me whatsoever to protect sustenance fishing rights without ensuring that fish from those waters are edible and free of contaminants that are harmful to human health.

…

I have concerns that contaminated water will impact wetland sustainability and indigenous and non-indigenous fisheries sustainability.

...

Lastly, I am particularly cognizant of the ongoing impact of water quality standards on the rights and health of the people of the Penobscot Nation and the surrounding environmental justice issues that need to be addressed.

Anonymous (Excerpt # 115)

Commenter ID: 0339

Name: Anonymous

Organization: None

As a non-native Maine resident, I value the health of people and ecosystems over the convenience of private interests to dump toxins into our rivers. What's more, we all live on what was once native land, and my understanding is that the Wabanaki people hold their rivers to be sacred. Therefore, it is a crime to pollute these waters, and it is the responsibility of all Maine residents to protect these waters. The newly proposed EPA water quality standards are a step in the right direction. It is my understanding that the new WQS represent a sincere effort to put in place standards that will allow the Wabanaki to eat fish without the amount being suppressed by levels of toxins in the waters. The former standard that allows people to eat 32.4 grams a day allows too many toxins -- if we want native fishing to actually provide for sustenance, and fish represents the primary protein source in a person's diet, 32 grams a day is not enough. It is my opinion that the new standard should raise the bar enough so that the Wabanaki can eat fish from their river freely,

without fear that they are close to an edge beyond which their health and the health of their children will definitely be affected. Please, we must support stricter water quality standards, for the sake of Wabanki people and all Maine people. Thank you.

Vaughan, J. (Excerpt # 105)

Commenter ID: 0324

Name: Joy Vaughan

Organization: None

I support the Penobscot Nation's right to manage its traditional fishing waters, and I thank the EPA for doing what is necessary to safeguard Maine's water quality.

Joy Vaughan,

South Bristol, Maine

Anonymous (Excerpt # 108)

Commenter ID: 0327

Name: Anonymous

Organization: None

I strongly support the EPA regulations that protect the fishery of the Penobscot Nation and all the native tribes in the State of Maine. How is protecting the water to be of a quality to consume healthy fish not of value to all peoples who reside in the State of Maine? Please help the Penobscot keep their sustenance fishing rights and in doing so help all the citizens of Maine.

Federal Water Quality Coalition (Excerpt # 143)

Commenter ID: 0352

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

…

2. EPA Creation of New “Sustenance Fishing” Use

After claiming that the settlement acts modify the CWA, EPA takes another step, in justifying its proposed Federal standards for Maine, that is just as problematic. The Agency argues that this

implicit modification of the CWA entitles it to create a new designated use for the State. EPA does not put it quite that way, arguing that it is just "interpreting":

In waters where the settlement acts provide for the tribes to engage in sustenance fishing, EPA interprets Maine's designated use of "fishing" to include sustenance fishing.

This is another unprecedented argument by the Agency. We find no EPA rules or guidance that allow the Agency to "interpret" a State's designated uses. That is particularly so where, as here, the State itself has stated clearly that this "interpretation" is completely wrong. It would be a different situation if EPA were stating, as it has in other situations, that the State's designated uses lack some critical component, and therefore violate the CWA. If that were true, then EPA could either force the State to modify its uses, or if the State refused, issue a Federal rule adopting that lacking component of the designated uses. But EPA has not done that here. Instead, it has claimed the power to "interpret" the current designated uses in State water quality standards, in a way contrary to the State's own interpretation. That power simply does not exist.

3. Deeming Sustenance Fishers to be the "General Population"

The EPA claim of a "sustenance fishing" use leads, in the Agency's logic, to yet another problematic claim of authority: to treat tribal sustenance fishers as the "general population" for purposes of the proposed standards. Here is the Agency's rationale:

Having found that sustenance fishing is a designated use in the waters in Indian lands, it is reasonable for EPA to target tribal sustenance fishers as the general population for the purpose of establishing criteria to protect that use. The same analysis applies to waters outside of Indian lands where the sustenance fishing designated use applies.

EPA provides no justification for this decision, as to who the "general population" is, other than that it is "reasonable." The Agency does not mention its applicable guidance on this issue, probably because the guidance does not support this decision. EPA's Human Health Methodology, issued in 2000, discusses sustenance populations, as well as Tribes. But it does not state that sustenance or Tribal groups should be deemed to be the "target population" for development of standards. Rather, the focus of standards, according to the 2000 Methodology, is appropriately on the general population; highly exposed groups can be protected through development of site-specific standards. EPA does not address these recommendations, from its own guidance, in its Maine proposal. Instead, the Agency simply states that its decision was "reasonable." We disagree.

4. Use of "Unsuppressed" Fish Consumption Rates

Having focused the proposed Maine standards on the fish consumption of sustenance Tribal groups, EPA then has to determine the appropriate fish consumption rate (FCR) for those groups, to use in calculating the numeric standards. It is here that the Agency creates yet another new legal requirement, mandating that the fish consumption rate must be an "unsuppressed" one. Here is the new policy:

EPA also generally recommends, where sufficient data are available, selecting a FCR that reflects consumption that is not suppressed by concerns about the safety of available fish or fish availability….While EPA encourages doing so in general, where sustenance fishing is a designated use of the waters (due to, for example, tribal treaty or other federal law that provides for a tribe to fish for its sustenance), 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. Such FCR must consider suppression and where adequate data are available to clearly demonstrate what that value is for the relevant population, the FCR must reflect that value. (emphasis added)

Here, EPA cites no authority at all for these new mandates, other than a Frequently Asked Questions document that the Agency has recently issued. It appears that EPA is conceding that this new set of requirements is nowhere in the 2000 Human Health Methodology or in EPA regulations. Yet, EPA is disapproving State standards, and issuing new Federal standards, based on the new policy that an FCR is not adequate if it does not reflect "unsuppressed" fish consumption levels. There is simply no legal basis for making a water quality standards decision based on the fact that an existing or proposed standard does not reflect "unsuppressed fish consumption rates." Yet, that is what EPA is proposing to do in Maine – which provides another reason why the proposal is illegal and should be withdrawn.

Marks, D. (Excerpt # 110)

Commenter ID: 0329

Name: Dan Marks

Organization: None

I am a registered Professional Engineer in the state of Maine and have reviewed the proposed rule entitled "Proposal of Certain Federal Water Quality Standards Applicable to Maine" on the merits. I am grateful to the EPA for disapproving Maine's water quality standards (WQS) on the basis of protecting the Indian tribes right to sustenance fishing. I applaud the EPA for consulting with the tribes to form the basis of the fish consumption quantities as it would be represented to a level un-suppressed by contamination levels. I believe it is critical that we as individuals, the state of Maine, and the federal government stand up for tribal rights and sovereignty after a long history of denying those rights and sovereignty, treating the tribes as subordinate to the state, or the genocide and land stealing that initiated our current relationship.

…

Again, I appreciate EPA's work on these proposed rules and support their implementation. I believe the basis of protection of sustenance fishing rights, wherever fishing is identified as a designated use and the tribes use the waters for such activities, is a more sound approach then using simply "waters on Indian lands", which may be subject to the legal proceedings in the territorial dispute. If you should have any follow up questions, please do not hesitate to contact me.

Chandler, J. (Excerpt # 114)

Commenter ID: 0338

Name: Jason Chandler

Organization: None

As a non-native Maine resident, I value the health of people and ecosystems over the convenience of private interests to dump toxins into our rivers. What's more, we all live on what was once native land, and my understanding is that the Wabanaki people hold their rivers to be sacred. Therefore, it is a crime to pollute these waters, and it is the responsibility of all Maine residents to protect these waters. The newly proposed EPA water quality standards are a step in the right direction. It is my understanding that the new WQS represent a sincere effort to put in place standards that will allow the Wabanaki to eat fish without the amount being suppressed by levels of toxins in the waters. The former standard that allows people to eat 32.4 grams a day allows too many toxins -- if we want native fishing to actually provide for sustenance, and fish represents the primary protein source in a person's diet, 32 grams a day is not enough. It is my opinion that the new standard should raise the bar enough so that the Wabanaki can eat fish from their river freely, without fear that they are close to an edge beyond which their health and the health of their children will definitely be affected. Please, we must support stricter water quality standards, for the sake of Wabanki people and all Maine people. Thank you. -Jason Chandler, Phippsburg resident

American Forest and Paper Association (Excerpt # 214)

Commenter ID: Public Hearing June 7, 2016

Name: Jerry Schwartz

Organization: American Forest and Paper Association

Thank you. My name is Jerry Schwartz and I'm here on behalf of the American Forest and Paper Association. We represent the U.S. pulp and paper packaging and tissue and wood products processing manufacturing industry. Our members provide high paying jobs across America including in Maine. We appreciate the opportunity to provide this testimony on EPA's proposed water quality criteria for Maine. EPA’s proposal touches on two sensitive issues related to fish consumption, cancer risk and tribal treaty rights.

Everyone agrees even one additional cancer is too many and society should do all it reasonably can to minimize cancer risks. To address this problem, resources should be deployed where they have the best chance of achieving actual cancer risk reduction. We also know that fish consumption has important cultural and religious significance for tribal members and our testimony is not intended to diminish that significance nor disrespect tribal members.

For decades it has been a common theme of EPA Administrators including Gina McCarthy that we can grow the economy and protect the environment at the same time and we agree. Policy makers must make wise policy choices that balance benefits and costs and achieve true human health protection for the cost incurred. EPA proposal fails that test. I will discuss three issues today but that should not be interpreted as support for the other aspects of the proposal. We have concerns with many of the other requirements and we will address those when we submit written comments.

The first issue is the fish consumption rate. EPA proposed human health criteria based on a fish consumption rate of 286 grams per day, which EPA says represents the unsuppressed fish consumption rate of tribes in Maine. While a policy to base human health criteria on an unsuppressed fish consumption rate may be well intentioned, there are three problems with it. First, there is no legal authority for the policy which EPA first announced in the Northwest states.

In both Washington state and Maine, EPA cites to a frequently asked questions document as its authority for the new policy. The document supposedly is based on the EPA 2000 human health methodology and existing guidance, but the requirement for an unsuppressed fish consumption rate is not in the methodology at all. Second, the FAQ document simply appeared one day on EPA's website without an opportunity for public comment and no input even from EPA's co regulators at state environmental agencies, several of whom had serious concerns with it. Third, even assuming there was some authority for the new policy, EPA is largely basing the 286 gram per day fish consumption rate on just one study that the Agency funded again without any public input. I want to emphasize again we understand how important fish consumption is for tribal members and that these comments are not intended to diminish that significance. We are simply saying that when EPA creates a new policy that has such a large impact on discharges there needs to be much more scrutiny of the legal and scientific basis for that policy. In light of these laws the 286 gram per day fish consumption rate should not be used to set criteria in Maine.

American Forest and Paper Association (Excerpt # 167)

Commenter ID: 0340

Name: Jerry Schwartz

Organization: American Forest and Paper Association

The American Forest & Paper Association (AF&PA) appreciates the opportunity to comment on the Proposal. AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

AF&PA's sustainability initiative - Better Practices, Better Planet 2020 - is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. Our member companies have collectively made significant progress in each of the following goals, which comprise one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry: increasing paper recovery for recycling; improving energy efficiency; reducing greenhouse gas emissions; promoting sustainable forestry practices; improving workplace safety; and reducing water use.

AF&PA is a member of the Federal Water Quality Coalition (Coalition) and we incorporate their comments by reference. Our members in Maine have a direct interest in this rulemaking because their water permits could include limits calculated based on the Proposal. EPA is applying its new policy on tribal treaty rights and water quality standards in other states; precedents set in Maine also could be applied in those states. Therefore, our members across the country have an interest in this rulemaking.

We would like to highlight certain of the points made in the Coalition comments as well as in comments submitted by a Maine-based coalition of industrial and municipal organizations. Our comments address only a limited number of issues raised by the Proposal and our lack of comment on other provisions should not be taken as support for them.

Designated Uses

EPA's proposed HHC and its Clean Water Act (CWA) Section 303(c)(4)(B) determination that revised HHC are necessary is premised on a newly-created "sustenance" designated use for certain waters, based on tribal fish consumption. EPA regulations require states to hold a public hearing before adding or removing any use, and those same regulations state that if EPA is promulgating water quality standards, the agency is subject "to the same policies, procedures, analysis, and public participation requirements established for states" in the federal regulations. 40 C.F.R. § 131.22(c). In addition to technical and legal objections to the development of the sustenance designation, EPA did not follow required administrative procedures. Specifically, the agency failed to hold a public hearing or provide any opportunity for impacted users and the public to comment or provide input on the technical and legal basis for and merits of the matter prior to adopting the sustenance designated use. Therefore, the sustenance designated use is not valid for CWA purposes, and neither are EPA's Section 303(c)(4)(B) determination nor the proposed HHC that are based on that use designation.

…

Fish Consumption Rate (FCR)

EPA's proposed HHC are based on a FCR of 286 grams per day, which EPA says represents the unsuppressed fish consumption rate of certain tribes in Maine. As stated in the Proposal, the agency "generally recommends, where sufficient data are available, selecting a FCR that reflect consumption that is not suppressed by concerns about the safety of available fish." However, EPA goes on to say that based on its "scientific and policy judgment" an unsuppressed fish consumption rate…"is necessary and appropriate to ensure that a sustenance fishing use is protected. Such FCR must consider suppression" and if sufficient data are available "must reflect" an unsuppressed rate (emphasis added). 81 Fed. Reg. 23244. The FCR is legally deficient, inconsistent with EPA regulations, and is scientifically indefensible for the following reasons:

There is no legal authority for this new policy, whether it is a "recommendation," or a requirement, which EPA first announced in Northwest states. In the proposed HHC for Washington and now Maine, EPA cites a "Frequently Asked Questions" (FAQ) document as authority for its new policy. The FAQ document states that it is based on the EPA 2000 Human Health Methodology and existing guidance. But the requirement for an unsuppressed FCR is not mentioned anywhere in the Methodology at all, and we are unaware of any previous guidance document mentioning an unsuppressed FCR.

The FAQ document articulating this new FCR policy was posted on EPA's website, without any notice to the public, or opportunity for public comment. This is a violation of the Administrative Procedures Act. Further, EPA did not seek or obtain input on the document even from EPA's co-regulators at state environmental agencies, several of whom have serious concerns with it.

Even assuming there was some authority for this new "recommendation" or requirement, EPA is largely basing the 286 grams/day FCR on just one study that the agency funded, again without any public input. The study includes literature reviews about the historical dietary practices of Native Americans in the 16th through 19th centuries and makes a number of "best professional judgment" assumptions. Based on the study and input from certain tribes, EPA reached the

conclusion that 286 grams/day "represent[s] present day sustenance-level fish consumption, unsuppressed by pollution concerns, in the waters covered by this action." 81 Fed. Reg. 23246-47.

However, actual fish consumption surveys in Maine more than adequately support Maine's existing FCR of 32.4 grams/day and EPA has not identified any evidence that the tribal fish consumption patterns reflected in those studies were suppressed by contamination concerns. Thus, consistent with the 2000 Human Health Methodology's data hierarchy for selecting FCRs, EPA should use the 32.4 grams/day FCR because it is the result of contemporary site-specific surveys, instead of a theoretical study that derives an FCR based in part on centuries' old consumption assumptions.

…

• The Proposal also treats tribal sustenance fishers as the "general population" for purposes of deriving the proposed standards, presumably meaning the HHC for the relevant waters should be based on a 10^{-6} ELCR and an FCR of 286 grams/day, along with all the other conservative assumptions described above. This is inconsistent with the 2000 Methodology, which provides for differing ELCRs for high consuming subpopulations, or for the development of site specific standards for those subpopulations, if needed.

…

EPA's regulations are clear that the agency must approve HHC that are protective of designated uses. 40 C.F.R. § 131.11(a)(1). As demonstrated above, the sustenance designated use on which the Proposal is based is not valid. Even if the sustenance designation was valid, Maine's existing HHC are more than adequate to protect that use. While EPA may have adopted a new policy recommending or requiring that states use an FCR reflecting unsuppressed fish consumption, that is simply a policy choice and therefore not a legally binding requirement on the states. States are free to accept that policy choice or adopt criteria that reflect policy choices that differ from EPA's preferences, but the criteria still must be approved if they reflect "site specific conditions" or are "scientifically defensible." 40 C.F.R. § 131.11(b).Considering the very ample compounded conservatism built into EPA's HHC, and that Maine's FCR is based on data from actual fish consumption surveys, its criteria easily meet those standards. Accordingly, EPA had no basis for disapproving Maine's HHC and for the Proposal.

…

EPA should withdraw the Proposal and its prior disapproval of Maine's water quality standards.

Topic 4 Geographic Extent of Tribal Waters

EPA Summary of Comments and Response:

EPA received numerous comments supporting EPA's approach to the geographic scope of waters to which the WQS contained in this rule apply. EPA responds below to the adverse comments the Agency received concerning the extent of covered waters.

The HHC contained in the rule are designed to protect the designated use of sustenance fishing as exercised by the tribes in Maine. The HHC thus apply to waters where that designated use is approved. EPA approved a sustenance fishing designated use in two general categories of waters: (1) waters in Indian lands, and (2) waters outside of Indian lands where the sustenance fishing right reserved in MIA section 6207(4) applies.[99] The first category, "waters in Indian lands," covers waters within the tribes' reservations and trust lands as provided for under the settlement acts. The second category applies in the limited circumstances where it is determined that a Southern Tribe's sustenance fishing right reserved in MIA § 6207(4) extends to a waterbody outside of its reservation as provided for under the settlement acts. As explained below, this situation currently exists in only one waterbody, a clearly delineated stretch of the Penobscot River.

The outer bounds of waters that may fall within the two categories of the rule are based on the settlement acts and are thereby generally identifiable. The rule, however, does not identify the specific boundaries of each waterbody or portion thereof to which the HHC apply. Whether a specific waterbody falls within one of these categories will depend on the status of such water under applicable federal and state law. The status of such a waterbody may therefore change or be determined as a result of litigation or other legal developments regarding that specific waterbody. The two general categories of waters to which the HHC apply, however, will remain constant.

Three commenters asserted that this approach is overly broad and vague. EPA disagrees. Here, EPA has clearly described the specific categories of waters to which this rule applies, which flow directly from and are bounded by the express provisions of the settlement acts. The purpose of the rule is to establish WQS that address EPA's disapprovals and necessity determination and adequately protect applicable designated uses. It is both reasonable and appropriate, and consistent with prior practice under the CWA, for EPA to promulgate these WQS without a final adjudication or determination of the precise boundaries of each specific waterbody that falls within each category, so long as the WQS protect the uses and clearly apply only to waters subject to those uses. As described below, the extent of waters in Indian lands is largely established under the settlement acts and subsequent trust conveyances that have occurred under the terms of those acts. But there are isolated disputes and one pending lawsuit regarding the boundaries of Indian lands and the geographic extent of tribal sustenance fishing rights. EPA's approach is designed to be responsive to the potential that these disputes could result in clarifications of the particular boundaries of

[99] For "waters in Indian lands," today's final rule promulgates HHC as well as six other WQS (narrative and numeric bacteria criteria for the protection of primary contact recreation and shellfishing; ammonia criteria for protection of aquatic life in fresh waters; provisions that ensure that WQS apply to HHC even if they are naturally occurring; a mixing zone policy; a pH criterion for fresh waters; and tidal temperature criteria). For the second category of waters, where there is a sustenance fishing designated use outside of waters in Indian lands, the rule promulgates only the HHC. This response focuses on the HHC because the HHC apply to the broadest set of tribal-related waters and because the comments addressing the geographical scope of the rule are largely framed in terms of concerns about the HHC.

the disputed waters, while maintain the protection of the tribes' sustenance fishing use.[100]

1. Adequate Notice.

Although this rulemaking does not identify the exact boundaries of each waterbody or portion thereof covered by the rule, it nevertheless provides adequate notice to potentially regulated parties because the categories are clearly described, and waters that could reasonably fall within these two categories are either precisely described in the settlement acts or, in circumstances where there are ongoing disputes or uncertainties, located in limited areas in Maine, representing a small fraction of all waters within the state. In fact, any uncertainties as to the scope of waters in Indian lands largely pertain to only particular stretches of the Penobscot and St. Croix Rivers. EPA anticipates that any existing uncertainty will be addressed by the current litigation regarding the Main Stem of the Penobscot River and DOI's on-going analysis of the relevant stretch of the St. Croix River.

The first category – "waters in Indian lands" – covers waters within a tribe's reservation or trust lands. The tribes' trust lands are all the result of modern conveyances recorded after the 1980 settlements, the boundaries of which are described in the deeds for those parcels. Although there are ongoing disputes over the extent of some of the reservation lands, the Indian settlement acts identify the outer bounds of what could reasonably be identified as reservation land. In the Economic Analysis conducted for this rulemaking, EPA took a conservative approach and identified all discharges for which there is any reasonable potential that they discharge to waters in Indian lands or their tributaries. In doing so, EPA identified a total of only 33 facilities, a small subset of the 478 Maine Pollutant Discharge Elimination System (MEPDES) permitted dischargers in the state.

One commenter expressed concern that the boundaries of the sustenance fishing designated use as it applies to the tribes' trust lands may expand if any of the tribes exercise what remaining authority they may have under the settlement acts to purchase and take more land into trust outside the reservations. However, EPA did not intend for its approval and disapproval decisions on WQS for waters in Indian lands, or for this rule, to apply to waters that may be part of after-acquired trust lands. EPA's promulgation of HHC to address the disapprovals is thus limited to waters in trust lands as of February 2, 2015, and waters in the Southern Tribes' reservations. EPA's promulgation of HHC in accordance with the Administrator's determination is likewise limited. The sustenance fishing designated use and appropriate HHC would not apply to any waters in after-acquired trust lands until such time as the state or EPA took further action under the CWA. This step would give interested parties an opportunity to comment on that action. EPA also notes that where the settlement acts have not already specifically identified parcels that qualify to be taken into trust, they clearly provide for the state to receive notice of any trust acquisition.[101]

The second category is quite narrow, limited to waterbodies outside of Indian lands where the Southern Tribes' sustenance fishing right reserved in MIA section 6207(4) applies. Currently, the Main Stem of the Penobscot River is the only waterbody in the state that has been adjudicated to be a waterbody outside of

[100] It is important to note that EPA has expressly answered the question of who has jurisdiction over all the waters involved in this matter, irrespective of which category they fall under or which use(s) and criteria apply. EPA did so in its February 2015 decision when it determined that the state has jurisdiction to set WQS over all waterbodies in Maine, including those within tribal reservations and trust lands. EPA is also determining that the HHC at issue will apply only where designated use of sustenance fishing applies. EPA is not, however, making any determinations in this rulemaking on the more narrow and technical question regarding the full extent of precise waters to which that use, and thus the HHC, apply.

[101] 30 MRSA 6205-A(1); 30 MRSA 7204.

Indian lands to which a tribe, the Penobscot Nation, has a right to sustenance fish based in MIA.[102] The "Main Stem" addressed by the court in the *Mills* litigation is clearly identified as "a portion of the Penobscot River and stretches from Indian Island north to the confluence of the East and West Branches of the Penobscot River." [103] Significantly, the court in *Mills* concluded that the Penobscot Nation has a sustenance fishery reservation, under MIA section 6207, in "the waters adjacent to its island reservation," under MIA section 6203. [104] Accordingly, in scenarios like the one addressed by the court in Mills, waters that fall under this second category will likely share a geographic nexus with the Southern Tribes' reservations.

This second category thus represents a limited universe of potential waters that fall outside the existing waters in Indian lands only to the extent the fishing right reserved in MIA section 6207(4) extends beyond the reservation of a Southern Tribe under MIA section 6203 under the reasoning of the U.S. District Court in the *Mills* litigation. In the event the law of the case in the *Mills* litigation changes, it is also possible that no waters would fall within this second category. Accordingly, the waters covered by this rule are at most the waters in Indian lands and the limited additional waters where a Southern Tribe has a right to sustenance fish, which will likely share a geographic nexus with the tribes' reservations.

2. General Approach.

Under the CWA, it is not uncommon for a state, authorized tribe, or EPA to take an approach, when promulgating WQS (i.e., designated uses, water quality criteria, and antidegradation policies), of identifying a category of waters to which the WQS apply, where additional information will need to be gathered before the implementing agency can determine whether such WQS applies to any specific waterbody. For these WQS, any uncertainties regarding applicability to a specific waterbody are appropriately resolved as the standards are implemented through various actions under the CWA, such as NPDES permitting and listing of impaired waters under section 303(d) of the CWA, among others.

An example of this approach already in effect in Maine involves the state's criteria for dissolved oxygen (DO). Maine's longstanding DO criteria for Class B and C waters include generally applicable criteria as well as more protective criteria that apply only to fish spawning areas in the colder months.[105] The DO criteria do not list each specific fish spawning area in Class B or C waters, nor do the more general classifications of fresh waters at 38 M.R.S. 467 and 468. Rather, Maine must determine whether a spawning area is implicated on a permit-by-permit basis.[106] Similarly, Maine's WQS contain certain natural conditions provisions that alter the way in which pollutants may be treated for WQS purposes if they are naturally occurring. [107] The waters in which such conditions occur are not identified in the WQS themselves but rather must be determined on a case-by-case basis.

There are numerous examples from other states identifying general categories of waters to which certain standards apply. For example, the State of Wisconsin has several narrative water quality criteria that apply to "wetlands," defined as "an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions."[108] Florida has promulgated numeric interpretations of its narrative nutrient criteria that apply

[102] *Id*. at 222-223.
[103] *Penobscot Nation v. Mills*, 151 F. Supp. 3d at 186.
[104] *Id*. at 221-222.
[105] 38 M.R.S. sections 465.3.B and 465.4.B, respectively. Note that as part of this rulemaking, EPA is promulgating dissolved oxygen criteria for Class A waters, also with specific criteria that apply to fish spawning areas.
[106] 06-096-585 Code of Maine Rules, Chapter 584, Surface Water Quality Criteria for Toxic Pollutants.
[107] EPA's rule today includes provisions to ensure that these natural conditions WQS are not applied to HHC.
[108] WIS. ADMIN. CODE NR section 103.03 (2016). For additional examples of states with WQS for "wetlands," *see* 5

to "streams," defined as "a predominantly fresh surface waterbody with perennial flow in a defined channel with banks during typical climatic and hydrologic conditions for its region within the state," but excluding certain non-perennial stream segments, ditches, canals, and other conveyances that have various characteristics as defined in the regulation.[109] Whether a specific discharge implicates a waterbody that falls within these general categories, and thus whether the associated water quality criteria apply, is left to the implementing agency to determine by applying the case-specific facts to the general category definition.

EPA is taking a similar approach here, by defining two general categories of waters covered by today's rule. The determination of whether a specific waterbody falls within one of these categories will be made, in the first instance, by the implementing (e.g., permitting) authority. Determining whether a waterbody is within one of the two categories covered by EPA's rule will require application of the facts relevant to that particular waterbody to the definition of the category. However, disputes regarding the extent of waters which may be subject to this rule are primarily limited to stretches of two waterbodies, as described above. Therefore, EPA anticipates that the case-by-case identification of whether a waterbody is covered by this rule will be straight-forward in most instances.

3. Specific Disputes

Along with its proposal, EPA developed a Technical Support Document (TSD) to provide further clarification of EPA's views on which waters could fall within the two general categories of waters to which the HHC apply. EPA notes that the TSD was not intended to serve as an affirmative determination of whether any specific waterbody falls within the scope of this rule, but rather was intended to provide useful background and insight into EPA's view regarding specific waters. As noted above, the determination of whether a specific waterbody is covered by this rule is appropriately addressed, in the first instance, as the standards are implemented through various actions under the CWA.

Nevertheless, three commenters disagreed with EPA's view on the status of two specific waters or sought further detail on specific waters. EPA acknowledges these disagreements, but notes that to the extent there exist uncertainties as to the scope of waters in Indian lands, the uncertainties largely pertain to only two waterbodies – the Penobscot and St. Croix Rivers. EPA anticipates that any existing uncertainty will be addressed by the current litigation regarding the Main Stem of the Penobscot River and DOI's work with the Passamaquoddy Tribe to determine the status of the relevant stretch of the St. Croix River.

With regard to the Penobscot Nation's reservation on the Main Stem of the Penobscot River, the boundary dispute between the Penobscot Nation, the United States, and Maine is now before the First Circuit Court of Appeals. The designated use of sustenance fishing and the HHC will apply as appropriate under the law of the case in *Mills*.

As to the St. Croix River, EPA received three comments asserting that the Passamaquoddy Tribe has neither a reservation nor sustenance fishing rights on a stretch of the river identified in MIA as the "15 islands in the St. Croix River in existence on September 19, 1794 and located between the head of the tide of that river and the falls below the forks of that river . . . ."[110] The commenters assert that the Passamaquoddy do not own these islands in any manner, that it enjoys no common law riparian rights to the waters in this stretch, and otherwise holds no fishing rights of any kind to these waters. Again, EPA is not reaching any conclusions on the status of any specific water, including this stretch of the St. Croix

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COLO. CODE REGS. section 1002-31.11 (LexisNexis 2016); IOWA ADMIN. CODE r. 567-61.3 (2016); MINN. R. 7050.0186 (2016)l 117 NEB. ADMIN. CODE section 7-001 (2015); 15A N.C. ADMIN. CODE 02B.0231 (2016); OHIO ADMIN CODE 3475-1-50.

[109] FLA. ADMIN. CODE. ANN. r. 62-302.200 (2016).

[110] 30 M.R.S. § 6203(5).

River. EPA recognizes the commenters' assertions and also understands that the DOI and the Passamaquoddy Tribe are working to determine the status of the 15 islands. For purposes of conducting its economic analysis and in its TSD, EPA considered this stretch of the St. Croix as a water that could reasonably fall within one of the two categories of waters to which the HHC apply because it is expressly identified in MIA as part of the Passamaquoddy Reservation. Should it be determined that waters in this stretch are not within the Passamaquoddy Reservation, EPA notes that it may nevertheless be the case that the Tribe has a right to sustenance fish in the waters adjacent to the islands based on MIA sections 6207(4) and (9) and the interpretation of the meaning of "reservation" in section 6207(4) adopted by the U.S. District Court in *Mills*.

Specific Comments

Counsel for Penobscot Nation (Excerpt # 153)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

The Nation does ask EPA to clarify certain statements about the scope of waters to which this current action applies (see Section II below), and suggests certain additional local data EPA should consider in calculating these WQS.

…

In Section II.C, EPA has proposed that these WQS be made applicable to "waters in Indian lands," that were the subject of the February 2, March 16 and June 5, 2015 disapprovals described in Section II.B.1. At the time that EPA issued those disapprovals, the position of the federal government (and the understanding of EPA) was that those waters included the entire main stem of the Penobscot River from Indian Island northward thereof (the "Main Stem of the Penobscot"). The Federal District Court subsequently held in Penobscot v. Mills that the right guaranteed by 30 M.R.S. § 6207(4) for Penobscot members to sustenance fish "within the boundaries of [the Penobscot] reservation[]" applies "in the entirety of the Main Stem section of the Penobscot River." Penobscot Nation v. Mills, No. 1:12-cv-254-GZS, 2015 U.S. Dist. Lexis 169342 (D. Maine Dec. 16, 2015) (formerly, Penobscot v. Schneider). Accordingly, EPA should take final action to promulgate these WQS for all Penobscot Indian territory, including the Main Stem of the Penobscot on the basis of EPA's previous disapprovals, whether or not EPA takes final agency action on its determination of necessity under CWA 303(c)(4)(B).

EPA should also take final agency action on its determination of necessity under CWA 303(c)(4)(B) with regard to the two groups of waters in Maine that EPA identifies in its proposed rule: 1. waters in Indian Lands, to the extent Maine's WQS are deemed to have been previously been approved in those waters and 2. "waters where the sustenance fishing designated use based on MIA section 6207(4) and (9) extends beyond 'waters in Indian lands.'" Both of these groups of waters are identified with specificity in EPA's Technical Support Document regarding Scope of Waters ("Scope of Waters TSD"), and include the Main Stem of the Penobscot River. The Nation supports EPA taking final action on its determination of necessity under CWA 303(c)(4)(B) on both these groups of waters. However, the Nation asks that EPA clarify that its determination of necessity for this second class of waters (waters outside of Indian Lands), and EPA's related discussion of the geographic areas in which it previously approved the designated

use of sustenance fishing, is not meant as an adjudication of or limitation on the geographic scope of tribal rights to sustenance fish that may extend beyond the waters identified by EPA in this rulemaking.

Specifically, the Penobscot Nation asks EPA to take action on its proposal that these WQS will be made applicable to all "Waters in Indian Lands" as defined in Section I of the Scope of Waters TSD including waters in Penobscot Trust Lands and including the entire Main Stem of the Penobscot River from Indian Island northward thereof, both as a result of EPA's previous disapprovals and as a result of its current determination of necessity under CWA 303(c)(4)(B) (which EPA should now make final), but to clarify that EPA is not, in this action, taking any position at this time on whether or not the Penobscot Nation's sustenance fishing reservation (and therefore the sustenance fishing designated use) extends to any other waters in the State of Maine. The two Technical Support documents (4) make clear that EPA is not making a CWA 303(c)(4)(B) determination of necessity as to the tributaries and branches of the Penobscot River outside the Main Stem of the Penobscot River into which certain identified NPDES permittees currently discharge, and the Nation is not asking EPA to make any such determination as part of this rulemaking, but the Nation does seek to clarify that the Mills decision does not purport to define the outer scope of the Nation's sustenance fishery reservation, and that EPA should similarly not purport to do so here.

In the Mills decision, the only dispute that was jurisdictionally before the court involved the waters in the Main Stem of the Penobscot River, and the Court held that the Penobscot's sustenance fishing right under MIA § 6207(4) and (9) extended to the entirety of the waters that were jurisdictionally before the Court, notwithstanding the definition of Penobscot Reservation in MIA § 6203(8). If the Mills rationale is upheld such that the Penobscot Nation's sustenance fishing right is not constrained by the language in MIA § 6203(8) and the other MIA and MICSA provisions that rely on the section 6203(8) definition, then it may be that the Nation's sustenance fishing right extends to additional waters that were not jurisdictionally before the court in Mills. The Nation is not asking the EPA to take any action as to those additional waters, but the Nation is asking EPA to clarify that, in not taking any such action, EPA is not purporting to determine the scope of additional waters outside of its 6203(8) reservation to which the Penobscot's sustenance fishing right under 6207(4) and (9) may apply under the reasoning of the Mills decision. Assuming EPA makes this clarification, the Nation encourages EPA to take final action on its determination of necessity under CWA 303(c)(4)(B).

(4) In addition to the Scope of Water TSD, the Economic Analysis TSD, in analyzing the impact on the NPDES dischargers that are located upstream of and on the tributaries of the main stem, implies that EPA is not making a finding of necessity as to those waters at this time.

EPA Response: With this final rule, EPA is promulgating HHC for waters in Indian lands related to the disapprovals, and for all waters identified in EPA's CWA 303(c)(4)(B) determination, including waters outside of waters in Indian lands that are subject to the sustenance fishing designated use based on MIA section 6207(4) and (9). As stated in the general response, EPA is not making any conclusion with regard to which specific waters fall within the categories of waters that EPA has identified as being subject to the final rule, including the tributaries and branches of the Main Stem of the Penobscot River.

Maine Attorney General (Excerpt # 196)

Commenter ID: 0354

Name: Janet Mills

Organization: Attorney General

…

8. The scope of the Maine waters subject to EPA's newly created designated use of "sustenance fishing" is overly broad, vague and indefinite, and unlawful.

The waters contemplated by EPA's February 2, 2015 Action underlying the Proposed Maine Rule are themselves vague, indefinite, and unsupported, because the February 2, 2015 Action does not define EPA's concept of "Indian waters" or the scope of that prior action. Instead, the February 2, 2015 Action (at Section 1.4.1, pp. 6-7) vaguely incorporates "waters adjacent to land held in trust" for tribes by the federal government, disputed reservations, and additional common law rights with uncertain application to Maine tribes, yet still acknowledges "remaining uncertainties" in areas such as the Penobscot and St. Croix rivers.

At the outset, the scope of EPA's vague and indefinite concept of "Indian waters" at issue in the February 2, 2015 Action (underlying the Proposed Maine Rule) is overly broad, contrary to the CWA and EPA's tribal WQS regulations, and unlawful, as the scope of those waters impermissibly encompasses indefinite waters adjacent to trust lands in addition to reservation waters. This is significantly broader than the limits of any WQS program that any authorized tribe could lawfully establish under the CWA's tribal TAS provisions and related regulations, which confine such tribal WQS programs to water resources within tribal reservation borders. See 40 C.F.R. § 131.8(a)(3); see also Wisconsin v. EPA, 266 F.3d 741, 746 (i11 Cir. 2001). In this respect, EPA is unlawfully attempting to expand tribal influence over water quality regulation beyond what is contemplated by or permissible under the CWA and EPA' s own regulations.

The Proposed Maine Rule does not clarify or limit the scope of the waters affected by the rule or EPA's new designated use of "sustenance fishing," which remains overly broad, vague and indefinite, and unlawful.

Although EPA provides some additional information regarding the scope of waters at issue in the Proposed Maine Rule (see Section II(C), 81 Fed. Reg. at 23242-43 and n.8-9, and the new EPA supporting Technical Support Document, both entitled "Scope of Waters"), the same underlying problems regarding the scope of affected waters persist, and new uncertainties are raised. For instance, the Proposed Maine Rule vaguely states that it will apply to "[a]ny waters in Indian lands in Maine for which a court in the future determines that EPA's 2015 disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect." Id. at 23243. In addition to undercutting the lawfulness of EPA's underlying February 2, 2015 Action as well as EPA's authority to disapprove Maine's HHC in that action, this statement also serves as proof of the inherently vague and indefinite nature of the Proposed Maine Rule.

The Proposed Maine Rule also states that the rule and EPA' s new designated use of "sustenance fishing" are intended to open-endedly apply to protect the Southern Tribes wherever they ultimately have a limited right to take fish pursuant to MIA's Section 6207(4), which has yet to be finally determined. Id. at 23243, n.9. 10 Thus, the scope and intended effect of EPA's Proposed Maine Rule are knowingly based on multiple uncertainties, which hinge on the resolution by federal courts of the Pending Action (addressing Maine's challenge to the February 2, 2015 Action, currently pending in the United States District Court for the District of Maine), PIN v. Mills (addressing disputes over the ownership of portions of the Penobscot River and the limited right to take fish in MIA Section 6207, currently on appeal to the First Circuit Court of Appeals), and possibly other actions.

EPA's supporting "Scope of Waters" technical document adds further uncertainty to the application of the Proposed Maine Rule and EPA's new designated use of "sustenance fishing." For instance, this document asserts (at p. 3) that the Proposed Maine Rule and the new designated use of "sustenance fishing" may apply to the "thread" (i.e., generally the middle) of waters adjacent to tribal trust lands, which creates uncertainty based on the potential existence of multiple different designated uses in a single body of water, separated by an invisible line in the water representing the water's "thread." As noted above, the application of any EPA rule to waters adjacent to tribal trust lands would also be impermissibly broad, as no tribal WQS program could lawfully have such an extended reach under the CWA' s tribal TAS provisions and related regulations.

The "Scope of Waters" document further suggests (at p. 3) that the waters subject to EPA's Proposed Maine Rule and its new designated use of "sustenance fishing" may also be enlarged in the future through the acquisition of additional trust lands on behalf of any Maine tribe.

The "Scope of Waters" document also announces (at pp. 3-4) that EPA will adhere to its own expansive interpretation of the District of Maine's decision in PIN v. Mills, No. I:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015). This EPA interpretation, which is contrary to the actual District Court holding and disputed by Maine, creates additional uncertainty by suggesting that EPA believes that there may be additional tribal rights in waters around the outside of the PIN reservation based on "common law riparian rights in the river."

Finally, the "Scope of Waters" document suggests (at pp. 4-5) that EPA believes that there may be similar additional tribal rights in waters in and around the reservation of the Passamaquoddy Tribe in the St. Croix River, which EPA suggests would also be subject to the Proposed Maine Rule and the new EPA designated use of "sustenance fishing." Such rights in that waterbody have never been established by law and would likely be vigorously contested by both Canadian and U.S. parties, were they to be asserted For all of these reasons, the scope of EPA's Proposed Maine Rule is overly broad, vague and indefinite, and unlawful.

(10) EPA's technical "Scope of Waters" document (at pp. 2, 4-5) also acknowledges that portions of its Proposed Maine Rule may apply outside of Indian lands based on the holding in PIN v. Mills, No. 1: 12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015) regarding the geographic scope of the limited right to take fish in MIA' s Section 6207(4), and that the extent of the application of its new designated use of "sustenance fishing" is currently unknown.

EPA Response: The summary essay for this topic addresses most of the comment immediately above, but there are some particular issues addressed here.

The commenter claims that the scope of “waters in Indian lands” to which EPA’s rule applies is broader than the scope of any WQS program that an authorized tribe could lawfully establish under the CWA's treatment in a similar manner as a state (“TAS”) provision of the CWA, 33 U.S.C. § 1377(e), and EPA’s implementing regulations. A tribe is eligible for TAS for purposes of a WQS program if it meets certain criteria, including that the program must pertain to “water resources which are within the borders of the Indian reservation.” 40 CFR § 131.8(a)(3). Accordingly, a tribe must submit in its TAS application to EPA a description of the “area over which the Indian Tribe asserts authority to regulate surface water quality.” 40 CFR § 131.8(b)(3)(i). In contrast, the commenter asserts, EPA’s rule “impermissibly” applies to waters adjacent to trust lands in addition to reservation waters.

Although a tribe may obtain TAS only for water resources within the borders of its reservation, including tribal trust lands (which are reservations under CWA § 518), a designated use based on a tribal treaty right, settlement act, or other law, is not necessarily so limited. A tribe may have a right, which must be protected as a designated use under the CWA, that applies to waters outside of the borders of its

reservation. This may be the case for the Penobscot Nation depending on the ultimate outcome of the *Mills* litigation. This is the case for the so-called "Stevens-treaties" tribes in Washington state.[111] Accordingly, the requirements and limitations for TAS are not relevant when considering the extent of a designated use based in a treaty, settlement act, or other law.[112]

With regard to waters "adjacent" to trust lands, EPA's view is that trust lands include any waters that are interior to the trust lands as described in the relevant deeds of trust as well as waters to which the tribes, or the U.S. as a trustee for the tribe, hold riparian or littoral rights. Generally, based on the default Maine common-law property rule under which owners of riparian land also own out to the thread, or middle, of most streams, Wilson & Son v. Harrisburg, 107 Me. 207, 212-213 (1910), any such trust acquisition would have included waters adjacent to land taken into trust where the deed in trust does not specifically indicate to the contrary. Thus, such adjacent waters out to the thread of the waterbody are included in the trust holding, and are "waters in Indian lands."

The commenter also suggests that it is confusing to have "multiple different" uses apply to portions of a single body of water. EPA agrees that having different WQS apply to different segments or portions of a body of water could, for example, complicate decisions about what permit conditions are necessary to protect all the WQS that might be affected by a discharge to that water body. But it is not uncommon for different WQS to apply to different segments of a river or lake. This situation can arise both within a state, where different segments of a river may be classified differently and therefore be subject to different WQS, and where a water forms or crosses the boundary between states. So there is nothing particularly anomalous or unworkable about the situation where different WQS apply to different portions of a water body.

Finally, the commenter questions the legality of EPA's determination under CWA section 303(c)(4)(B) as it applies to "any waters in Indian lands in Maine for which a court in the future determines that EPA's 2015 disapprovals for such waters were unauthorized and that Maine's existing HHC are in effect." EPA issued this determination in response to the legal challenge brought by the State of Maine in federal district court. In its complaint, the state alleges, in part, that its HHC were in effect in waters in Indian lands at the time of EPA's February 2015 disapproval. Thus, according to the state, EPA had no procedural basis under the CWA to review and disapprove its HHC for waters in Indian lands. Although EPA disagrees with the state's interpretation, the Administrator's CWA section 303(c)(4)(B) determination serves as a legal backstop to ensure that EPA has the authority to promulgate the HHC and that the tribes' sustenance fishing use is protected, even if Maine's challenge to EPA's disapproval authority were to prevail. This approach is both permissible under the CWA and an efficient use of agency resources, as there is no doubt that Maine's HHC, should they be held to be in effect in waters in Indian lands, are not adequate to protect the designated use of sustenance fishing. Rather than engage in a separate and resource-intensive future rulemaking should Maine's argument prevail, the Agency has ensured that it has a procedural basis under the CWA to promulgate HHC for waters in Indian lands, irrespective of the validity of Maine's claim.

Sample, G. W. (Excerpt # 132)

Commenter ID: 0328

Name: Greg W. Sample

[111] *See* United States v. Washington, 2016 U.S. Dist. LEXIS 11709, at *28 (9th Cir June 27, 2016) ("The fishing clause of the Stevens Treaties guarantees to the Tribes a right to engage in off-reservation fishing"). *United States v. Winans*, 198 U.S. 371, 382 (1905); *see also* http://wdfw.wa.gov/hunting/tribal/treaty_history.html.

[112]

Organization: None

EPA seeks to reconcile the Mills sustenance fishing ruling with the agency's means of determining sustenance fishing areas by reliance on a property-law-based conception of "waters in Indian lands," a standard presumably derived from MIA 6207(4)'s language. EPA bridges the difference by extending the proposed WQS protecting the tribal sustenance fishing use to "all waters outside of Indian lands where the designated use of sustenance fishing applies." EPA "Scope of Waters" Technical Support Document, April 8, 2016, cited at 81 FR 23242, n. 8.

Both the court's and the agency's approaches have significant limitations. In addition to being non-final and subject to appeals in which all parties seek substantive changes in the Mills ruling, the court's decision is inherently and expressly limited to the Penobscot Reservation and the waters of the Main Stem. EPA's seeming reliance on Mills to extend waters where tribal sustenance fishing is a designated use beyond "waters in Indian lands" (including associated riparian and littoral rights) leaves real uncertainty about exactly which waters other than the Penobscot Main Stem have a designated use of tribal sustenance fishing, and thus subject to WQS to protect that use.

In my view, EPA's purpose would be more fully realized, and EPA's action would be more clear about which waters will have tribal sustenance fishing as a designated use, and its WQS rule would therefore be more effective, if the federal sustenance fishing WQS were based upon all of the parts of MIA Section 6207 in which the State, through the Maine Implementing Act, has long ago acknowledged tribal rights to sustenance fishing. In addition to Section 6207(4), approving tribal regulation of sustenance fishing within the boundaries of Indian Reservations, other subsections of Section 6207 address tribal sustenance fishing:

30 MRSA Section 6207(1) acknowledges the "exclusive authority" of the Penobscot Nation and the Passamaquoddy Tribe to adopt tribal ordinances to regulate fishing on smaller ponds wholly within their Indian territory (trust lands), and declares that "such ordinances may include special provisions for the sustenance of the individual members" of the tribe. This subsection is functionally identical to 6207(4) as a foundation for designating tribal sustenance fishing as an existing use of such waters.

Subsection 6207(1) separately affirms the tribal right to exercise "all of the rights incident to ownership of land under the laws of the State," providing a clear State-approved basis securing tribal rights in the waters associated with trust lands through the property law principles of riparian and littoral rights.

30 MRSA Section 6207(3) acknowledges the "exclusive authority" of the Maine Indian Tribal-State Commission, formed by the federal Maine Indian Claims Settlement Act, "to promulgate fishing rules or regulations on:

> Any pond other than those specified in subsection 1, paragraph B, 50% or more of the linear shoreline of which is within Indian territory;
>
> Any section of a river or stream both sides of which are within Indian territory; and
>
> Any section of a river or stream one side of which is within Indian territory for a continuous length of 1/2 mile or more."

Like Section 6207(1), subsection 3 expressly approves MITSC consideration of tribal sustenance fishing and ceremonial practices in setting fishing regulations. Upon certification to the State commissioner of Inland Fisheries and Wildlife of their adoption under this provision, the MITSC rules supersede State regulation.

This non-State authority to regulate fishing on certain segments of rivers and streams, and on certain ponds not subject to tribal regulation (all of which waters are associated with Indian lands) is not reliant on riparian or littoral rights. Instead, it allows regulation of river or stream segments bank-to-bank, and entire ponds where tribal trust lands represent a significant share of adjacent land ownership.

While not involving direct regulation of sustenance fishing like subsections (1), (3) and (4), Section 6207 subsection (8) should be considered relevant. This part of the MIA exists solely to protect fish and wildlife in the waters regulated by the tribes or MITSC under 6207(1), (3) and (4), but it addresses fisheries regulation in non- Indian lands. It is based on the fact that upstream practices can adversely impact designated uses of waters downstream, potentially violating the WQS for downstream waters regulated under MIA 6207(1), (3) or (4).

Section 6207(8) offers a means by which tribes, through MITSC, can "study, consult … and make recommendations to the commissioner [of IF&W] and the [Maine] Legislature" concerning, among other things, "fish . . . management policies on non-Indian lands in order to protect fish and wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or [MITSC.]" The fish stocks in any of the waters subject to tribal or MITSC regulation may be a sustenance fishing resource.

Each of these Settlement Act provisions provides an independent means of protecting tribal sustenance fishing in waters that are outside of "waters in Indian lands" because in each case, the MIA expressly acknowledges tribal sustenance fishing as either a designated use in the regulated waters, where directly regulated, or the possibility of a protected tribal use of downstream waters. Accordingly, tribal or MITSC action under any of these 6207 subsections could constitute a basis for Clean Water Act water quality standards when deemed necessary to protect tribal sustenance fishing rights.

Section 6207(1) also affirms the full possession by the tribes of riparian and littoral rights associated with reservation and trust lands.

As EPA has noted, Section 6207(9) makes clear that the foregoing subsections "include[] inland fish and anadromous and catadromous fish when in inland water.

RECOMMENDATION:

EPA should specify that the WQS designed to protect tribal sustenance fishing as a designated use will apply automatically as a consequence of official actions by the tribes or MITSC under any of the several subsections of 30 MRSA 6207 that are expressly designed to protect tribal sustenance fishing. These provisions specify a means for managing tribal sustenance fishing in specified bodies of water to be exercised by a tribe or a commission formed under the MIA in which the tribes participate, and which regulations, when adopted, take precedence over any other law of the State. EPA could and should tailor its federal WQS designed to protect tribal sustenance fishing to be triggered by tribal or MITSC actions under 30 MRSA Section 6207 subsections (1), (3), (4) or (8) designed to protect tribal sustenance fishing.

The Mills ruling with respect to the Main Stem rests on a judicial construction of the MIA, independent of any of the cited statutory provisions, but not in conflict with them.

EPA Response: EPA reads this comment as largely supportive of the goals behind the agency's proposal, but suggesting an alternative basis for identifying where a sustenance fishing use would apply. As described above, EPA has identified two categories of waters where these HHC will apply. The first is waters in Indian lands. EPA agrees that the provisions in MIA that establish MITSC are important

evidence that the statute intended to provide for and protect a sustenance fishing use in the trust lands of the Southern Tribes in addition to their reservations. But the commenter appears to question the wisdom of EPA identifying the second category of waters, where there is a reserved sustenance fishing right under MIA outside of Indian lands. EPA is using this second category to address the U.S. District Court's holding in the *Mills* case. The commenter is correct that the law of that case may change as a result of the pending appeals. But EPA's two categories serve to address the fundamental goal of this action: to assure that these HHC apply wherever the Indian settlement acts provide for these tribes to fish for their sustenance and where, correspondingly, EPA has approved a CWA designated use of sustenance fishing. Without this second category, if the holding in *Mills* remains the law of the case, the HHC would not reach all of the waters where the designated use associated with the Penobscot Nation's sustenance fishing right reserved under the MIA applies.

To the extent that the commenter suggests that the regulation by MITSC should be a basis for application of the HHC, EPA notes that the HHC apply where the designated use of sustenance fishing applies. The approval of the designated use in February of 2015 was a final agency action separate from this rulemaking. Additionally, that designated use is not dependent on what entity has regulatory authority over a waterbody, but whether the Settlement Acts codify the right or ability for the tribes to sustenance fish in the water. Framing the reach of the HHC on the right/ability to sustenance fish under the settlement acts, rather than on what entity has regulatory authority, is appropriate because the purpose of the HHC is to protect the tribes' ability to sustenance fish. Lastly, EPA notes that many of the waters covered by MITSC authority are wholly or partially within reservations and trust lands and thus addressed by this rule.

Coalition of Dischargers in Maine (Excerpt # 175)

Commenter ID: 0332

Name: William E. Taylor

Organization: Coalition of Dischargers in Maine

The scope of the proposed rules is so vague that potentially-affected dischargers do not have fair notice of the rule's impact.

…

EPA's Proposed Rule Does Not Provide Fair Notice to Potentially Affected Dischargers

In the proposed rule, EPA indicates that the proposed WQS apply to waters in Indian lands and "waters where there is a sustenance fishing designated use outside of waters in Indian lands." 81 Fed. Reg. 23242. EPA notes that the Technical Support Document ("TSD") accompanying the proposed rule provides further information regarding waters where the designated use of sustenance fishing applies. In the TSD, EPA interprets the recent Penobscot Nation v. Mills decision as extending "the designated use of sustenance fishing to the entire main stem of the Penobscot River, including any portion of that waterbody that may be located outside of Indian lands." TSD, at p. 5. Similarly, EPA suggests that the Passamaquoddy Tribe's right to sustenance fishing may be extended, at a minimum, to large portions of the main stem of the St. Croix River, including the 15 islands referred to in 30 M.R.S. § 6203(5) of the Maine Implementing Act ("MIA").

This extension of the designated use of fishing to waters outside Indian reservations is apparently based on historical fishing practices that somehow establish a right to sustenance fish in those locations. This argument is inconsistent with the Maine Indian Claims Settlement Act, 25 U.S.C.

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

…

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

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

Second, even assuming the islands are within the Passamaquoddy Reservation, that does not mean the surrounding waters are within the Reservation. In fact, as with the Penobscot Reservation, the Passamaquoddy Reservation does not include submerged lands and waters adjacent to the islands, but only the actual lands enumerated in the Settlement Acts. 30 M.R.S. § 6203(5). Nor does Maine riparian rights law operate to magically expand the reservation to include such submerged lands or waters adjacent to reservation islands, which would be contrary to the express terms of the Settlement Acts. Because the State of Maine owns reservation land in trust for the Tribes, it is the State, not the Tribe, that owns any adjacent submerged lands. See, e.g., (1) Maine Attorney General Opinion dated December 18, 1951, in which Assistant Maine Attorney General James Frost stated as follows: "it would seem that fee simple title to that land is today in the Indians. However, the State, from time to time, has taken control of these lands to the extent that their alienation has been restricted. The whole question of the status of tribal lands is therefore somewhat anomalous. Though the land would appear to be vested in the Indians, legislation has so encompassed his ability to transfer such land, that ultimately the conclusion must be that the land on a reservation is state land, but held for the use of the Indians, at least so long as they remain a tribe, on that reservation."; (2) Opinion dated June 7, 1972, in which Assistant Maine Attorney General John Kendrick stated as follows: "The actual control of tribal lands has long been in the State. The reservation, held for the use of the Indians, is State land.";

(3) May 17, 1983 letter to FERC from Lawrence Jensen, the Associate Solicitor for DOI's Division of Indian Affairs, in which Jensen states that "title in fee simple to the subject islands and affected lands is held by the State of Maine in trust for the benefit of the Penobscot Nation which possesses the right of perpetual occupancy and use."; (4) Resolves 1983, Chapter 24, in which the Maine Legislature granted to Governor Brennan the authority to confirm the granting of a 1931 power line easement given by a Penobscot Indian to Bangor Hydro-Electric Company over Mattanawcook and Chokecherry Islands -- which are (and were at the time) part of the PIN Reservation; (5) Testimony of Andre G. Janelle, Legislative Counsel to Governor Brennan, on L.D. 712, March 1, 1983, in support of Resolves 1983, Chapter 24, that "the State of Maine has a reversionary interest in the reservation land of the Penobscot Nation. Although the Reservation belongs to the Penobscot Nation, its ownership interest is not absolute. In the event that the Penobscot Nation should cease to exist as a tribe its reservation land would revert to the State of Maine," thus, the State was required to grant the easement to Bangor Hydro; (6) Easement deed signed on February 13, 1984, by Governor Brennan.

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

EPA states that it is working with the Passamaquoddy Tribe and the U.S. Department of the Interior to confirm the status of these 15 islands. It would have saved significant resources if EPA had also worked with the State of Maine to confirm not only the ownership of the bed in the international portions of the St. Croix River, but ownership of the 15 islands, prior to developing an economic analysis for impacts associated with the proposed rule, and the proposed rule itself. For this reason alone, the proposed rule should be deferred until information becomes available that would give the potentially affected dischargers on the St. Croix River adequate notice of potential liabilities and allow an adequate economic analyses to be undertaken.

…

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

…

Further, EPA has failed to properly delineate the scope of Indian waters in this proposed rule. As a result, permittees listed in the proposed rule, as well as other licensed dischargers, will suffer significant economic and regulatory consequences.

EPA Response: EPA's general response above contains its reply to the commenter's concerns regarding fair notice and the status of the "15 island" stretch of the St. Croix River.

With regard to the comment that the settlement acts preclude sustenance fishing outside of Indian reservations, EPA notes that the court in *Mills* held that the Penobscot Nation enjoys a sustenance fishery reservation "in the waters adjacent to its island reservation," under MIA section 6203.[113] Accordingly,

[113] *Id*. at 221-222.

EPA has structured its rule to account for the *Mills* decision and the possibility that other waters related to a Southern Tribe's reservation may be similarly situated.

EPA does not assume, as the commenter states, that the Northern Tribes have a sustenance fishing right based in the settlement acts that may apply "beyond" their trust lands. The situation where a tribe may have a sustenance fishing reservation under MIA section 6207(4) outside of its reservation under MIA section 6203 applies only to the Southern Tribes' reservations. As they pertain to the Northern Tribes, the HHC contained in this rule apply only to waters within the boundaries of their trust lands.

As to the commenter's assertion that the Northern Tribes have no fishing right within their trust lands, please see the discussion in Topic 3.1.b above that discusses how the settlement acts provide for the Northern Tribes' sustenance fishing practices.

Coalition of Dischargers in Maine (Excerpt # 210)

Commenter ID: Public Hearing June 9, 2016

Name: William E. Taylor

Organization: Coalition of Dischargers in Maine

Thank you for the opportunity to comment. My name is William Taylor. I'm an attorney at Pierce Atwood. I represent a coalition of Maine dischargers, approximately 14 in number, and I say approximately because that number is changing daily as we get new members joining the coalition. The coalition is comprised of both municipal and industrial dischargers who may be affected by the proposed rule. The reason that the coalition is growing and changing rapidly is because of the lack of, we believe, fair notice about the scope of this rule. The rule has -- I've requested an extension of the comment period as previously mentioned by Mr. Andes. We have also requested an extension of the comment period to allow potentially affected dischargers in Maine to review the rule. Many don't even know that the rule may affect them, many are hearing for the first time in the last few days that they may be potentially affected. So we are asking for an extension and we have filed that in writing already, and we would ask EPA to seriously consider that extension request. Just a couple key points about the rule. We will be filing detailed written comments on the proposed rule, but as I mentioned, we do not believe that the rule has provided fair notice to potentially affected dischargers. In the proposed rule, EPA indicated that the scope of waters subject to the new proposed rule would apply to waters in Indian lands but also to waters where there is a sustenance fishing designated use outside of waters in Indian lands. Nobody can tell us, nobody knows what that means currently. So as a result, many dischargers don't know whether they may be impacted or not, and many dischargers don't know what the cost and benefit or cost to them might be. Certainly EPA cannot do an adequate cost benefit analysis without them themselves knowing all of the waters where there may be a designated use of sustenance fishing outside of Indian lands. For that reason, we think it's very important not only to get an extension of the comment period, but to fully inform all of the potentially affected dischargers about the scope of the rule.

Bahlkow, A. (Excerpt # 66)

Commenter ID: 0302

Name: Ashley Bahlkow

Organization: None

Please help change this paradigm by ensuring that these WQS applied to water where sustenance fishing takes place, despite whether the waters are deemed as Indian territory by the state. It seems only logical that we protect the health and cancer risks to Wabanaki people, no matter whether their water rights are usurped by the State (further diminishing territory for native people for the benefit of industry and protection of municipality expenses, sadly) or not. Thank you for taking this request.

Ashley Bahlkow

Woodland Pulp LLC (Excerpt # 44)

Commenter ID: 0284

Name: Jay Beaudoin

Organization: Woodland Pulp LLC

"For the purposes of this report, the term “waters in Indian lands” refers to waters in the reservations and trust lands of the four Indian tribes in Maine, as described more fully in the preamble to the proposed rule and in EPA’s Technical Support Document, entitled “Scope of Waters”; and “discharges to waters in Indian lands and their tributaries” refers to discharges directly into waters in Indian lands, discharges indirectly to such waters where the point of discharge is upstream of the boundary of the Indian lands, and discharges to the tributaries of such waters."

Woodland Pulp LLC Comment: There are no reservation or trust lands in the freshwater receiving segment of St. Croix River below Woodland Pulp’s discharge. Sustenance fishing is not reserved in this segment. The Passamaquoddy Tribe does not own or otherwise hold title to any Islands in this segment. The thermal discharge from the Mill in no way impacts the Passamaquoddy reservation at Sipyak some 30 miles downstream in the open salt water bay. Under Maine law the bed of the St. Croix river on the U.S. side is owned by the State, this is unique as on other rivers in the state the riparian owner would own to the thread of the river or stream. These waters are not part of any reservation or trust lands.

Maine Department of Environmental Protection (Excerpt # 185)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

Tribal Waters

Beyond the points raised by Attorney General Mills regarding this issue, the Department has serious concerns about the impact of the overly broad, vague and indefinite language used to define EPA's concepts of "Indian waters" and "waters where the Southern tribes have a right to sustenance fish" on the regulatory and licensing process. Without clear definitions of such waters, it is impossible for the Department's permit writers to develop permit limits that are reflective of

applicable standards, make many important permitting decisions, or even identify which facilities may be affected by EPA's proposed rule.

Marks, D. (Excerpt # 111)

Commenter ID: 0329

Name: Dan Marks

Organization: None

One thing about the pending rule that concerns me is the effect of the definition of "waters in Indian lands." The reason this definition concerns me is that there is currently a lawsuit underway in which the state of Maine and the Penobscot Nation are in disagreement over whether or not the Penobscot Nation territory includes the waters of the Penobscot River among the islands that are included in the Penobscot Nation. In this rulemaking, EPA identifies the Maine Indian Claims Settlement Act (MICSA) and notes that the norm in other states is that EPA has the authority to set WQS for Indian Country waters (footnotes 3 and 4). In Section II.C, this rule proposes that "'waters in Indian lands' are those waters in the tribes' reservations and trust lands as provided for in the settlement acts." Maine Implementing Act sections 6207 (4) and (9), referenced throughout this rule, apply to "sustenance fishing within the Indian reservations." In Section III, this rule identifies that Maine is challenging the "EPA's disapprovals in federal district court, asserting that EPA did not have the authority to disapprove of (human health criteria) in waters in Indians lands."

Section III goes on to say that in the event Maine's territorial challenge prevails, this rule would remain in effect: this needs to be guaranteed. It is critical that the state's challenge to Penobscot territory is not allowed to further erode the tribes' ability to sustenance fishing or other activities that the Penobscot deem appropriate in their water. It seems that the way to ensure this is, as mentioned in footnote 9 and elsewhere in the rule, that where "fishing" is a designated use and the tribes practice cultural sustenance fishing in those waters, that "fishing" is construed as "sustenance fishing" and the higher fish consumption rate identified in this rule applies. This will extract the rule making for "water on Indian lands" from the territorial dispute, ensuring that the more stringent WQS' apply. This approach is identified in sections IV.A.1.a.iii and IV.A.1.b., and should be strengthened.

Topic 5 Cancer Risk Level and Exposure Parameters Used in Derivation of the Human Health Criteria (Except for the Fish Consumption Rate)

EPA Summary of Comments and Response:

1. Cancer Risk Level

With respect to the cancer risk management value used in deriving the HHC of 10^{-6}, one commenter noted that this value was unduly protective of public health while another implied the Agency could adopt a more protective risk management level , and several supported EPA's use of 10^{-6}. Still other commenters noted that historically the waters of Maine and the fish that swam in them were at one time clean and free of all chemical pollutants and longed for the waterways of Maine to be restored to such pristine conditions. The Clean Water Act (CWA) provides EPA with the authority and the responsibility to restore and maintain the chemical, physical, and biological integrity of the Nation's waters but does not explicitly give the Agency authority or the responsibility to make the waters free of all pollutants. In promulgating HHC for the tribes in Maine, EPA incorporated an excess cancer risk level of 10^{-6} as the appropriate target level for two reasons. First, it is consistent with Maine DEP Rule 06-096, Chapter 584, which EPA approved for waters in Indian lands on February 2, 2015 and which specifies that water quality criteria for carcinogens must be based on a 10^{-6} CRL.[114] Second, it is consistent with EPA guidance that states, "For deriving CWA section 304(a) criteria or promulgating water quality criteria for states and tribes under Section 303(c) based on the 2000 Human Health Methodology, EPA intends to use the 10^{-6} risk level, which the Agency believes reflects an appropriate risk for the general population."[115] As explained above, EPA considers the tribes to be the general target population for waters in Indian lands. In promulgating HHC that correspond to an excess cancer risk level of 10^{-6} for tribes in Maine, not only is EPA acting consistent with both EPA guidance and Maine's existing rule, but EPA is providing the tribes engaged in sustenance fishing in waters in Indian lands with an equivalent level of cancer risk protection as is afforded to the general population in Maine outside of waters in Indian lands.

2. Compounded Conservatism

EPA received one comment claiming that the default values used to derive EPA's national HHC result in unnecessarily stringent criteria because of "compounded conservatism."[116] EPA disagrees with the comment. EPA selects a mixture of high-end and central (mean) tendency inputs to the equation used to derive HHC in order to derive recommended criteria that "afford an overall level of protection targeted at the high end of the general population (i.e., the target population or the criteria-basis population."[117] As an example, the default body weight (80 kg) used an arithmetic mean value for the US population. BAFs were computed using mean lipid values and median (i.e., 50th percentile) values for dissolved organic carbon and particulate organic carbon. Since EPA received and responded at length to comments received on the choice of default parameter values (e.g. drinking water intake rate, body weight) as part of the 2015 Human Health Ambient Water Quality Criteria: 2015 Update ("2015 Update"), EPA incorporates its

[114] The only exception from the requirement to use a CRL of 10^{-6} in Chapter 584 is for arsenic, for which a CRL of 10^{-4} is required. EPA disapproved the arsenic CRL for waters in Indian lands.
[115] United States Environmental Protection Agency (U.S. EPA). 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* EPA-822-B-00-004. Page 2-6.
[116] EPA understands "compounded conservatism" to describe the impact of using conservative, upper-bound estimates of input values to obtain a conservative estimate of risk modeled as a function of those input values.
[117] United States Environmental Protection Agency (U.S. EPA). 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* EPA-822-B-00-004. Page 2-1

responses to those comments on the 2015 Update.[118] EPA's 2000 Human Health Criteria Derivation Methodology describes EPA's approach for assigning input values for multiple parameters in section 4.3. Moreover, EPA notes that the State of Maine has also chosen to incorporate similarly identified default values recommended by EPA in the past when Maine developed its own HHC.[119]

3. Meaningful Protection

EPA received two comments that its HHC will not make a measurable or meaningful difference in the reduction of lifetime cancer rates for tribes in Maine in comparison with Maine's disapproved HHC. One commenter asserted that EPA's FCR of 286 g/day would only result in a theoretical decrease in the lifetime cancer risk for men from 0.420500 to 0.420491, and for women from 0.375800 to 0.375791, compared to use of Maine's FCR of 32.4 g/day. The other commenter urges the use of a 10^{-5} CRL rather than 10^{-6}, based on its analysis that, when added to the background risk of developing cancer of "about .40000," the theoretical excess lifetime cancer risk for criteria based on a CRL of 10^{-6} would be .400001 compared to .40001 for criteria based on 10^{-5}, a "non-measurable difference" according to the commenter.

The commenters' calculations purport to show that there is a "non-measurable difference" in cancer risk on top of the background level of cancer risk from increased stringency in human health criteria. In each case, the commenters use current lifetime risk of developing cancer of approximately 40% (42.0% for males and 37.6% for females), which can be found on the webpages of the American Cancer Society. However, this should not be used for the comparison because all it does is obscure the difference between two rates that represent fairly low cancer risk tolerance (1 in a million and 1 in 100 thousand), or between two fish consumption rates that are both calculated at a low cancer risk tolerance, by adding in the current relatively high actual lifetime cancer risk from all causes. It is not informative or surprising that a desirable cancer risk tolerance is well below today's incidence rate. The theoretical excess lifetime cancer risk difference is ten-fold when comparing a 1 in a million risk to a 1 in 100 thousand risk and up to nine-fold when comparing criteria based on consuming 286 g/day versus 32.4 g/day of fish. Human health criteria are designed for an individual's excess cancer risk using a predefined probability approach, widely accepted in environmental regulation, based on a person's chance of developing cancer above and beyond the chance of developing cancer from all other causes, over the course of an individual's lifetime.

4. Body Weight

The Penobscot Nation commented that EPA should use a 70 kg body weight in lieu of 80 kg, stating that 70 kg represented local data and citing an EPA RARE report[120] and the Penobscot Nation's Tribal Water Quality Standards as two sources for the local data. EPA agrees with the commenter that site-specific or local data relevant to the population of interest is preferable over default exposure values based on national surveys. However, the body weight used in the cited RARE report was based on EPA's pre-2015 default body weight as obtained from a national survey and not based on measured site-specific or local data. Furthermore, EPA's RARE Report specifically cited the use of 70 kg as an uncertainty of the analysis for an adult tribal member[121] and EPA found no indication that the Penobscot Nation's Tribal

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[118] The Response to Comments on the 2015 Update are available in the docket for this rulemaking and at: https://www.epa.gov/sites/production/files/2015-10/documents/epa-response-to-public-comments-to-human-health-final-criteria.pdf.

[119] *See, e.g.*, Letter from Brian Kavanah, Maine Bureau of Land and Water Quality, to Ellen Weitzler, USEPA, RE: Revisions to 06-096 CMR 584, *Surface Water Quality Criteria for Toxic Pollutants Protection of Sensitive Subpopulations* (Oct. 6, 2011).

[120] *The Penobscot River and Environmental Contaminants: Assessment of Tribal Exposure Through Sustenance Lifeways*, U.S. EPA Region I, Final RARE Report, August 2015. Page 79. https://www.epa.gov/sites/production/files/2015-12/documents/final-rare-report-august-2015.pdf

[121] Id. at p.79

Water Quality Standards incorporate findings from a sound, scientifically based local study of tribal body weights. EPA thus concluded that the commenter did not include a sound scientific rationale that supports deviating from the value of 80 kg obtained from a national survey of body weights.

5. Trophic Levels

The Penobscot Nation also requested EPA use a slightly different weighting scheme when refining the fish consumption rate based on the trophic levels of the fish and shellfish species consumed by the Penobscot Nation. As stated previously, EPA advocates the use of local data whenever possible in deriving human health criteria but notes that local data must be from a sound scientific study before it can be used. The Penobscot Nation cited Table 1 of the Wabanaki Study[122] as supporting their assertion that the Nation consumes primarily species at trophic levels 3 and 4. However, the Wabanaki Study does not provide enough information to support an alternative trophic level breakdown. The Wabanaki Study notes the species it identifies in Table 1 are "representative" species. Within the representative species grouping for resident fish and other aquatic resources, the study does not provide any data about the relative levels of consumption at different trophic levels.

Furthermore, the alternate trophic level weighting scheme put forward by the Penobscot Nation may not apply to the other tribes whose waters are covered by this rulemaking. In the absence of data to support the alternative trophic weighting scheme put forward by the commenter, EPA did not alter the proposed HHC to reflect the comment. If in the future data become available to support an alternate trophic level weighting scheme, EPA would consider them.

Specific Comments

American Forest and Paper Association (Excerpt # 215)

> Commenter ID: Public Hearing June 7, 2016
>
> Name: Jerry Schwartz
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> Organization: American Forest and Paper Association
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> …
>
> The second issue is the excess lifetime cancer risk level. EPA is proposing a ten to the minus six risk level as it did last year in a similar proposal for Washington state, although in Washington EPA used a fish consumption rate of 175 grams per day instead of 286 that it is proposing for Maine. As EPA notes in the Federal Register notice for Maine's proposed rule 10^{-6} means the risk of developing cancer that would be one in a million on top of the background risk of developing cancer from all other exposures. A study in Washington based on that state's 2014 population examines the theoretical annual excess cancer risk based on standards using the ten to the minus six level versus the ten to the minus five level. The study found the difference between those cancer risks is less than one expected cancer per year and the actual change in cancer incidence would be lower and in fact may be zero. We have not done an analysis yet for Maine, but we would expect similar results. Another study in Washington also found that if the human health criteria with 175 grams per day fish consumption rate and a 10 to the minus six level was used in

[122] *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, U.S. EPA. July 2009. https://www.epa.gov/sites/production/files/2015-08/documents/ditca.pdf

Washington, industries and municipalities the would not be able to meet those local permit levels and the potential compliance costs would be in the billions of dollars.

…

EPA human health criteria are a perfect example of compounded conservatism, using very conservative assumptions at the extreme end of the range of possibilities for the exposure values and equation to derive those criteria. For example, the equation assumes that everyone is drinking 2.4 liters of unfiltered and untreated water from rivers, lakes, and streams every day for 70 years. In contrast the probabilistic risk assessment approach gives policymakers an understanding of the central tendency of estimated risk and the probability that actual risk will be on the high end of the range. PRA is more scientifically advanced as it addresses compounded conservatism, links risk targets with the environmental concentrations, improves transparency, and makes greater use of available data. If EPA actually promulgates final criteria for Maine, it should use a PRA approach to do so.

EPA Response: The commenter is correct in that EPA has not implemented probabilistic risk assessment approaches in this rule. The use of probabilistic techniques was not reflected in the 2000 Methodology,[123] which served as the guide for this rule, nor were probabilistic techniques used by EPA in the most recent update to the AWQC in 2015. EPA intends to consider probabilistic techniques in future updates of the 2000 Methodology.

Federal Water Quality Coalition (Excerpt # 172)

Commenter ID: 0352

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

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(1) Beyond the issues raised below, we note one additional issue of scientific concern. For some of the parameters covered in the proposal, EPA uses bioaccumulation values (bioaccumulation factors or bioconcentration factors) that were developed as part of the new recommended Federal human health criteria that were issued in June 2015. Unfortunately, EPA has not provided adequate documentation to support the selection of these values for the State of Maine. The sources of the data used are not clear, and the procedures and choices that EPA used to derive the bioaccumulation values cannot be determined. In order for us to comment effectively, EPA first needs to make that information available for public review.

…

EPA Response: As the commenter notes, for many of the human health criteria covered by the rule, EPA used the bioaccumulation factors (BAF) and bioconcentration factors (BCF) identified in EPA's 2015 Updated Ambient Water Quality Criteria for the Protection of Human Health (EPA 820-F-15-001). Further information regarding data inputs and procedures EPA used in the derivation of these BAFs and BCFs can be found in *Development of National Bioaccumulation Factors: Supplemental Information for*

[123] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). U.S. Environmental Protection Agency, Office of Science and Technology, Washington, DC. EPA 822-B-00-004

EPA's 2015 Human Health Criteria Update, EPA 822-R-16-001 January 2016 available at: https://www.epa.gov/wqc/human-health-water-quality-criteria, where a table of pollutant- and species-specific values can also be found.

In response to the comment that EPA has not provided adequate documentation to support the selection of these values for waters in Maine, the Agency does not have any local data or information, nor did it receive any such local data or information during the public comment period, indicating that the national defaults are not appropriate for the covered waters or providing any alternative regional or local data. EPA's 2015 CWA section 304(a) recommended criteria are calculated using BAFs that are based on peer-reviewed, publicly available data and were developed consistent with EPA's 2000 Human Health Methodology and its supporting documents (see also EPA's 2015 CWA section 304(a) criteria updates and supporting documents for more information at https://www.epa.gov/wqc/human-health-water-quality-criteria). Maine may develop alternate criteria at any time, using data from a sound scientific study, and submit them to EPA for review and action under CWA 303(c).

American Forest and Paper Association (Excerpt # 152)

Commenter ID: 0340

Name: Jerry Schwartz

Organization: American Forest and Paper Association

Compounded Conservatism

Inherent within EPA's national HHC are very conservative default values that result in unnecessarily stringent criteria because of "compounded conservatism." The Proposal includes two even more conservative elements--a fish consumption rate of 286 grams/day for waters in Indian Lands and certain other waters, and a $1x10^{-6}$ excess lifetime cancer risk.

…

Excess Lifetime Cancer Risk

The Proposal is based on an excess lifetime cancer risk level (ELCR) of $1x10^{-6}$. When coupled with the FCR and the other default values in the equation to derive HHC, this results in extremely conservative criteria that provide little, if any, human health protection when compared to more reasonable alternatives.

• Specifically, as EPA noted in the Proposal, $1x10^{-6}$ means the "risk of developing cancer…would be one in a million on top of the background risk of developing cancer from all other exposures" (emphasis added). 81 Fed. Reg. 23243. The background risk of developing cancer is about .40000. Therefore, the theoretical ELCR for criteria based on $1x10^{-6}$ is .400001 versus .40001 for criteria based on 1x10-5, a non-measurable difference.

Even these risks are theoretical because the formula EPA used to calculate Maine HHC assumes all of the following:

° the concentration of a pollutant in all waters is always equal to the HHC; and

° everyone in the U.S. is of average weight; and

° everyone is drinking 2.4 liters of unfiltered and untreated water from rivers, lakes, and streams every day for 70 years; and

° everyone is eating 286 grams of locally caught fish every day for 70 years, all of which are contaminated at the criteria level; and

° none of the pollutants in the fish were lost due to preparation or cooking.

• The Proposal also treats tribal sustenance fishers as the "general population" for purposes of deriving the proposed standards, presumably meaning the HHC for the relevant waters should be based on a 10^{-6} ELCR and an FCR of 286 grams/day, along with all the other conservative assumptions described above. This is inconsistent with the 2000 Methodology, which provides for differing ELCRs for high consuming subpopulations, or for the development of site specific standards for those subpopulations, if needed.

Based on the foregoing HHC based on an ELCR of 10-5 would be more than sufficient to protect public health.

Counsel for Penobscot Nation (Excerpt # 133)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Pursuant to EPA guidance, health-based water quality standards are set to ensure that humans can safely consume fish and other organisms, without also being exposed to contaminants in harmful amounts. Quantitative risk assessment methods are employed to set standards for both threshold and non-threshold contaminants. For threshold contaminants, standards are set so that contaminants don't exceed levels that are safe for humans. For non-threshold contaminants, including carcinogens, exposure to any non-zero amount has the potential to cause cancer, so standards are set such that contaminants don't exceed a risk level determined to be "acceptable." In either case, a risk assessment equation is used to "solve" for the concentration of each chemical that will be permitted in the waters that support fish. The toxicity of each contaminant is considered together with human characteristics and practices that expose people to the contaminant in their environment: how much direct contact with water containing the toxin will people have; how much of the toxin will accumulate in the tissue of fish or other animals to be consumed; how much fish and water dwelling animals will people eat, over how long a period.

…

The Penobscot Nation Supports the Proposed WQS but Recommends Revisions to Certain Parameters Used to Calculate the Pollutant-Specific WQS for Waters in Indian Lands and Waters Where the MI 6207(4) and (9) Sustenance Fishing Designated Use Applies

The Nation supports EPA's approach of deriving HHC for carcinogenic effects using parameters that include: cancer slope factor, excess lifetime cancer risk level, body weight, drinking water intake rate, fish consumption rate(s), and bioaccumulation factor(s); and for noncarcinogenic and nonlinear carcinogenic effects using: reference dose, relative source contribution (RSC), body weight, drinking water intake rate, fish consumption rate(s) and bioaccumulation factor(s). The Nation also supports the use and reliance on EPA's 2000 Human Health Methodology (the "2000 Methodology") and EPA's 2015 criteria update. The Nation also strongly supports the use of local data to calculate HHC over national default values where local data are sufficient to do so.

…

b. The Nation Proposes Revisions to EPA's Suggested Trophic-Specific FCR

EPA correctly notes that the Wabanaki Study presented estimates of the total amount of fish and aquatic organisms consumed and not the amount consumed of each trophic level, and EPA proposes to assume that Maine tribes consume the same relative proportion of fish and aquatic organisms from the different trophic levels 2 through 4 as the general U.S. population (identified in the 2015 criteria update as 36%, 40% and 24% of the total FCR). While this approach is not unreasonable, the Nation proposes instead to use the local data contained in the Wabanaki Study regarding the types of species consumed and cross reference the trophic level designations for those species as used for derivation of EPA's 2015 Criteria Update for Human Health Criteria bioaccumulation factors.

The Nation reviewed the 2015 National Bioaccumulation Factors tables that were used to determine the 2015 EPA Human Health Criteria. One of the tables lists the trophic level that each species is categorized into for the purposes of the BAF calculations. Very few, if any, of the species categorized as trophic level 2 are likely to be consumed by the Nation (and are not among the species identified in the Wabanaki Study); these are mostly organisms like insects, baitfish, mussels, and snails. As identified in the Wabanaki Study, most of the species available and eaten by the Nation would be either Trophic level 4 (salmon, bass, trout, yellow perch, or similar species) or Trophic Level 3 (smelt, bluegill/sunfish, white perch, alewife, crayfish). The Wabanaki Study identifies specific species available and eaten on page 61 (Table 1 – Nutritional data for representative species) of that study. Most of the inland species listed therein are trophic level 3 or 4. In contrast, the clams, oysters, snails, which are trophic level 2 are coastal species. Because EPA is using the Wabanaki Study's inland resident diet to estimate FCR, it is also appropriate to use those inland species for its trophic-specific calculations. This is particularly true for the Penobscot Nation.

Based on this analysis, the Nation therefor proposes a trophic level distribution of 10%, 30%, and 60% of the total amount consumed for trophic levels 2, 3, and 4, respectively). In other words, using trophic-specific fish consumption rates of 28.6 g/day (trophic level 2), 85.8 g/day (trophic level 3), and 171.6 g/day (trophic level 4) for the HHC for those compounds for which the 2015 criteria update includes trophic level specific BAFs. This approach is supported by the species designations identified in the Wabanaki Study, and follows EPA's guidance to prefer local data, when available.

2. Pollutant Bioaccumulation and Bioconcentration Factors

Other than suggesting the above change to the estimates of trophic-specific FCR, the Nation supports EPA's approach to pollutant bioaccumulation and bioconcentration factors.

3. Cancer Risk Level

For the reasons articulated by the EPA, the Nation supports a 10^{-6} CRL in EPA's criteria for carcinogens for waters covered by the proposed action.

4. Relative Source Contribution

For the reasons articulated by the EPA, the Nation supports EPA's approach to relative source contribution.

5. Body Weight

The Nation proposes using local data of 70kg rather than the national average of 80kg. EPA states that it is not aware of any local body weight data applicable to Maine tribes that would suggest a different value. However, there are two local sources of such information with regard to the Penobscot: 1) an EPA peer-reviewed regional applied research effort project, and 2) the Nation's tribal water quality standards legislatively adopted by the Nation's Tribal Council. EPA published the peer-reviewed study entitled: "The Penobscot River and Environmental Contaminants: Assessment of Tribal Exposure Through Sustenance Lifeways, U.S. EPA Region I, Final RARE Report, August 2015 (available at: https://www.epa.gov/sites/production/files/2015-12/documents/finalrare-report-august-2015.pdf). One of the express purposes of that study was to "Establish protocols for assessing the level of exposure to PCBs, dioxins/furans and mercury to PIN tribal members as a consequence of gathering tribal plants for medicinal and nutritional purposes; as well as consuming fish, wood duck, and snapping turtle as a primary source of nutrition." That study identified and used an adult body weight of 70 kg as appropriate for risk assessment for Penobscot sustenance fishers. In addition, the Penobscot tribal water quality standards use a body weight of 70 kg, which reflects a legislative determination by the Nation that 70 kg is a reasonable estimate of adult body weight for tribal members. For consistency with the Nation's tribal water quality standards and EPA's recent study, and because it represents EPA preferred local data, the Nation proposes that EPA use an adult body weight of 70 kg.

6. Drinking Water Intake

For the reasons articulated by the EPA, the Nation supports EPA's approach to drinking water intake.

7. Pollutant-Specific Reference Doses and Cancer Slope Factors

For the reasons articulated by the EPA, the Nation supports EPA's approach to pollutant-specific reference doses and cancer slope factors, however the Nation suggests that the proposed criteria be recalculated based on the above-suggested revisions to: 1. trophic-specific FCR and the related pollutant bioaccumulation and bioconcentration factors, and 2) assumed adult body weight.

Houlton Band of Maliseet Indians (Excerpt # 192)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

…

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).

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.

National Tribal Water Council (Excerpt # 138)

Commenter ID: 0336

Name: Ken Norton

Organization: National Tribal Water Council

Quantitative risk assessment methods are employed to set standards for both threshold and non-threshold contaminants. For threshold contaminants, standards are set so that contaminants don't exceed levels that are safe for humans. For non-threshold contaminants, including carcinogens, exposure to any non-zero amount has the potential to cause cancer, so standards are set such that contaminants don't exceed a risk level determined to be "acceptable." In either case, a risk assessment equation is used to "solve" for the concentration of each chemical that will be permitted in the waters that support fish. The toxicity of each contaminant is considered together with human characteristics and practices that expose people to the contaminant in their environment; how much of the toxin will accumulate in the tissue of fish or other animals to be consumed; how much fish and water dwelling animals will people eat; and over how long a period.

This analysis must take into account the particular effect on Tribal members. EPA's use of unsuppressed fish consumption rates to protect Tribal subsistence/sustenance fishing rights and practices of the Maine Tribes is not unique to Maine. The exposure scenario approach used to derive these traditional consumption rates has also been used elsewhere in the country for development of water quality and cleanup standards in Indian Country (for example the Spokane Tribe). NTWC is pleased that EPA has included best scientific information and input from the affected four Maine Tribes. NTWC strongly supports EPA's approach of treating Tribal members of Maine Tribes, as the target representing the general population, to be protected at the cancer risk level of $1x10^{-6}$, rather than as a sensitive subpopulation.

Anonymous (Excerpt # 11)

Commenter ID: 0255

Name: Anonymous

Organization: None

The EPA was established to insure that water is clean and consumable by all humans. Water also needs to be clean so that fish and other harvested foods from the waters are not polluted with harmful substances for consumption. Above all, indigenous people of Maine rely on fish and other harvested and foraged foods from Maine's rivers. Indigenous populations have a much higher cancer rate than other Maine residents, and shorter life spans. This is partly caused by toxic foods coming from the rivers. People who rely on rivers for sustenance especially need clean water and nontoxic fish.

Maine needs higher water quality standards to protect the fish and other aquatic organisms for a healthy ecosystem, and to protect fishermen, especially subsistence fishermen such as tribal populations.

Topic 6 Mixing Zones

EPA Summary of Comments and Response:

EPA received several comments in support of the mixing zone policy. One of those commenters added that a total ban on mixing zones would be preferable. One commenter raised comments about thermal mixing zones specific to its facility, and those comments are addressed separately after the comment itself.

Two commenters asserted that EPA does not have the legal authority or the scientific basis to ban mixing zones for bioaccumulative pollutants outside the Great Lakes. EPA disagrees. EPA's authority to promulgate a mixing zone policy, and to prohibit its use for bioaccumulative pollutants, derives from section 303(c) of the CWA. While states are not required to adopt mixing zone policies, when a state includes a mixing zone policy in its water quality standards, the policy is subject to EPA's review and approval or disapproval. 40 C.F.R. 131.13. Adoption of a mixing zone policy is necessary for a mixing zone to be authorized in the issuance of a CWA discharge permit. EPA disapproved Maine's mixing zone policy for waters in Indian lands because it did not meet the requirements of the CWA. Recognizing that Maine intended to authorize mixing zones as part of its water quality standards, EPA, pursuant to CWA section 303(c)(4)(A), is now promulgating a mixing zone policy that includes protections that were missing from Maine's policy that EPA disapproved. EPA has determined that a ban on a mixing zone for bioaccumulating pollutants is reasonable and appropriate for the reasons discussed below, and nothing in CWA section 303(c) or EPA's implementing regulations constrains EPA's legal authority to do so.

EPA guidance has long cautioned states and tribes against mixing zone policies that allow mixing zones for discharges of bioaccumulative pollutants, since they may cause significant ecological and human health risks such that the designated use of the waterbody as a whole may not be protected.[124, 125, 126] EPA's WQS Handbook notes that this is particularly the case where mixing zones may encroach on areas used for fish harvesting. The waters in Indian lands, to which this mixing zone policy will apply, not only are used for fish harvesting but have a designated use of sustenance fishing. By their very nature, bioaccumulative pollutants are those that accumulate in fish and shellfish and other organisms. Moreover, as EPA has explained elsewhere, the effects of such pollutants are not short term, nor are they limited to a localized zone of initial dilution.[127] Since the effects could be persistent and occur well beyond the mixing zone, there is no assurance that all designated uses would be protected. EPA is particularly concerned about the potential adverse effects of such a mixing zone on the sustenance fishing use for those reasons.

One commenter points to studies indicating increases in pollutant levels in tissues coincident with a mixing zone ban in the Great Lakes as evidence that the ban is not supported by science and should not be finalized for Maine. However, coincidence is not causality; the commenter points out other likely factors contributing to elevated tissue levels of bioaccumulative pollutants that do not preclude potentially additive effects of point source discharges and mixing zones. The bioaccumulation process does not lend itself to mixing zone concepts, where elevated pollutant levels in water can be tolerated within a limited geographic area, because elevated levels of bioaccumulative pollutants in water are transferred to the

[124] USEPA. 1991. Technical Support Document for Water Quality-based Toxics Control. US Environmental Protection Agency, Office of Water, Washington, DC. Section 2.2.2, p 34; Section 4.3.1, p. 71; Section 4.3.4, p. 72; Section 4.6.2, p.87. EPA 505-290-001.
[125] Final Rule to Amend the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern, 65 Fed. Reg. 67638, 67641-42 (November 13, 2000); 40 CFR part 132.
[126] USEPA. 2014. Water Quality Standards Handbook, Chapter 5 at 5-8. EPA 820-B-14-008
[127] Id.

tissue of both mobile and less mobile species, such as benthic communities and shellfish, where they may persist and be transported out of the mixing zone. It may be that in the absence of the existing prohibition on mixing zones for bioaccumulative pollutants in the Great Lakes basin, mercury and polychlorinated biphenyl (PCB) concentrations would be higher in fish over the last thirty years than documented. Regardless, an assertion that factors other than a mixing zone ban purportedly play a larger role in explaining elevated tissue levels does not diminish the underlying soundness of the mixing zone ban for bioaccumulative pollutants.

EPA also notes that the state has not in the past granted surface water mixing zones for bioaccumulative pollutants, and neither the state nor the regulated community in Maine have raised a concern in their comments about EPA's proposal that mixing zones cannot be authorized for bioaccumulative pollutants. Therefore, EPA's final rule includes the prohibition on a mixing zone for bioaccumulative pollutants.

Specific Comments

Woodland Pulp LLC (Excerpt # 197)

Commenter ID: 0284

Name: Jay Beaudoin

Organization: Woodland Pulp LLC

2.2.7 Mixing Zone

"The mixing zone policy for Maine is contained in 38 MRS Section 451 "Enforcement Generally" which states: The purpose of a mixing zone is to allow a reasonable opportunity for dilution, diffusion or mixture of pollutants with the receiving waters before the receiving waters below or surrounding a discharge will be tested for classification violations. In determining the extent of any mixing zone to be established under this section, the department may require from the applicant testimony concerning the nature and rate of the discharge; the nature and rate of existing discharges to the waterway; the size of the waterway and the rate of flow therein; any relevant seasonal, climatic, tidal and natural variations in such size, flow, nature and rate; the uses of the waterways in the vicinity of the discharge, and such other and further evidence as in the department's judgment will enable it to establish a reasonable mixing zone for such discharge. An order establishing a mixing zone may provide that the extent thereof varies in order to take into account seasonal, climatic, tidal and natural variations in the size and flow of, and the nature and rate of, discharges to the waterway.

Maine's mixing zone policy does not specify how such zones are to be established (other than through the application of best professional judgment)."

Woodland Pulp's Comment: Maine has a mixing zone law passed by the State legislature it is not a policy. This law includes a requirement for information to establish a reasonable mixing zone and it is not based on professional judgment alone. The mixing zone law has been in place for more than 25 years. Woodland Pulp has a thermal mixing zone, which after studies and submittals was determined to be reasonable. A thermal mixing zone is not the same as a mixing zone for bio-accumulating pollutants. The state of Maine has additional rules and requirements for non thermal mixing zones. It is not necessary or appropriate to lump thermal mixing zones in this disapproval.

…

Further the Mill's effluent plume and temperature has been extent for almost 40 years and some form of discharge for more than a century. There is no information to suggest this mixing zone would negatively impact sustenance fishing. However, there is information (A) that shows a positive impact on warm water fisheries (Small Mouth Bass) related to warm water and extended growth periods as well as food (water fleas discharged with effluent) in this receiving water segment.

"SUMMARY - Bass in this section of the St. Croix River averaged 11.2 inches in length and 13 ounces in weight. 36% of the bass were legal (>12 inches). Bass longer than 14 inches represented 13% of all fish sampled, and those longer than 16 inches represented 3%. Bass ages ranged from 1+ to 7+, according to the following frequency distribution:

Age 1+ = 7%

Age 2+= 30%

Age 3+= 13%

Age 4+=32%

Age 5+= 9%

Age 6+=7%

Age7+= 2%

Growth was excellent, with age 1+ reaching lengths up to 6.7 inches, age 2+ up to 11.0 inches, and age 3+ up to

12.2 inches. Low numbers of age 3 bass were taken, due to poor survival of young bass produced from the 1986 spawning. Other eastern Maine lakes experienced similar or poorer survival of young produced in 1986.

(A) Maine Department Of Inland Fisheries and Wildlife Job F-404 St. Croix River, Woodland Dam To Mouth of Stony Brook Smallmouth Bass Management Progress report N0. 1 (1989). Prepared by Rick Jordan Regional Fisheries Biologist MDIFW March 1990.

EPA Response: EPA recognizes that Maine's statutory provision related to mixing zones is a law. The Agency generally refers to mixing zone provisions as a "mixing zone policy," even where they are provided in statutes or regulations. Regarding the differentiation between requirements for a thermal mixing zone from requirements for bio-accumulating discharges, EPA notes that heat is a type of pollutant under the CWA to which water quality standards apply. Water temperature is a master variable that affects all organisms through impacts on metabolic rate, decomposition rates, control of dissolved oxygen, evaporative losses, spawning and growth, and numerous other functions. Therefore, EPA treats heat in the same manner as other pollutants using a uniform mixing zone policy.

Water temperature may affect different species, or other parts of the food web, in both positive and negative ways. Further, thermal standards are promulgated to insure the protection of indigenous, thermally-sensitive species . For example, the designated uses for Class C waters, to which the commenter's Woodland Pulp Mill discharges, include the general use of "habitat for fish and other aquatic wildlife" (38 M.R.S. §465 4.A) with the qualifier that discharges "may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community." (38 M.R.S. §465 4.C). A discharge of heat to a Class C water with an unlimited mixing

zone could cause warming to the extent that indigenous species are no longer able to thrive in it, thereby impairing the aquatic life designated use.

American Forest and Paper Association (Excerpt # 217)

Commenter ID: Public Hearing June 7, 2016

Name: Jerry Schwartz

Organization: American Forest and Paper Association

…

The last issue is that of mixing zones. EPA is proposing to ban mixing zones for discharges of bioaccumulative pollutants. As EPA notes in the Federal Register notice, the Great Lakes Initiative or GLI also includes a mixing zone ban for bioaccumulative pollutants, but the Clean Water Act provision authorizing the GLI and the regulation itself consistently recognize that the GLI was based on the unique characteristics of the Great Lakes. EPA has no basis to rely on the Great Lakes in other parts of the country as it has in Maine or as it proposes to do.

American Forest and Paper Association (Excerpt # 169)

Commenter ID: 0340

Name: Jerry Schwartz

Organization: American Forest and Paper Association

Mixing Zones

EPA is proposing to ban mixing zones for discharges of bioaccumulative pollutants. As EPA notes in the Proposal, the Great Lakes Initiative or GLI also includes a mixing zone ban, but the CWA provision authorizing the GLI (Section 118), and the regulation itself, consistently recognize that the GLI was based on the unique characteristics of the Great Lakes. AF&PA opposes this aspect of the Proposal, as EPA has no basis to extend a ban on mixing zones for these pollutants in other parts of the country, as it has in Maine.

Houlton Band of Maliseet Indians (Excerpt # 209)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

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.

Counsel for Penobscot Nation (Excerpt # 141)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Mixing Zone Policy

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed mixing zone policy

Federal Water Quality Coalition (Excerpt # 174)

Commenter ID: 0352

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

BAN ON MIXING ZONES FOR BIOACCUMULATIVE POLLUTANTS In addition to proposing new human health water quality standards for Maine, EPA also proposes a number of other changes to Maine's water quality standards and related implementation procedures. One of those changes, which we believe is both unauthorized and unsupported as a policy matter, is a ban on mixing zones for bioaccumulative pollutants. EPA notes that it adopted such a ban years ago, for discharges within the Great Lakes Basin, as part of the Great Lakes Initiative. What EPA does not mention is that the GLI ban was issued pursuant to a separate provision of the Clean Water Act, Section 118, which provides the Agency with significant additional authority within the Great Lakes Basin, beyond the authorities that it possesses elsewhere in the country. The scope of that authority was spelled out clearly by the Court of Appeals for the D.C. Circuit, in the case of American Iron and Steel Institute v. EPA, 115 F.3d 979 (D.C. Cir. 1997). That authority, which was the basis for the GLI mixing zone ban, does not extend to the State of Maine, which is far from the Great Lakes, and EPA therefore does not have legal authority to ban mixing zones in Maine.

It is also important to note that the scientific justification for the mixing zone ban in the Great Lakes was specific to that watershed. As the Court said in the American Iron and Steel case, EPA based its ban on the unique nature of the Lakes:

The EPA responds, first, that significant problems caused in the Great Lakes by the release of BCCs even in small amounts justify eliminating mixing zones for them. Even in a relatively open system, a BCC will persist in the ambient water and underlying sediment longer than will a run-

of-the-mill pollutant. The Great Lakes, however, are a more-or-less closed system from which pollutants escape only over a long period of time. See Supplementary Information Document at 1 ("Lake Superior also has the longest retention time--the average time for one molecule of water to exit the system--of 173 years, while Lake Erie has the shortest at 2.7 years.") The retentive character of the Great Lakes combined with the persistent character of BCCs is what warrants, in the EPA's opinion, the elimination of BCC mixing zones. The EPA also observes that the characterization of BCC loading reductions as "insignificant" was made by the agency's economists; the technical and policy staffs, who were aware of the environmental peculiarities of the Great Lakes, characterized those same reductions as significant.

It is clear, then, that on both legal and scientific grounds, the Great Lakes mixing zone ban provides no support for EPA's attempt to ban mixing zones in Maine. In trying to justify the Maine mixing zone ban as a policy matter, EPA makes statements that both mislead and miss the point. Here is what EPA says:

Because fish tissue contamination tends to be a far-field problem affecting entire or downstream waterbodies rather than a near-field problem being confined to the area within a mixing zone, EPA has emphasized that it may be appropriate to restrict or eliminate mixing zones for bioaccumulative pollutants in certain situations such as where mixing zones may encroach on areas often used for fish harvesting, particularly for stationary species such as shellfish, and where there are uncertainties in the assimilative capacity of the waterbody.

EPA cites its Water Quality Standards Handbook to support these statements. But the Handbook does not justify banning mixing zones entirely. It says only that it "may be appropriate" to "restrict or eliminate" mixing zones "in certain situations," two of which are specified. But in the Maine proposal, EPA has entirely prohibited mixing zones for certain pollutants, regardless of whether fish harvesting areas are nearby, and regardless of whether there are uncertainties in the assimilative capacity of the waterbody. Even EPA's guidance, then, does not support the complete ban that EPA is proposing.

The proposed mixing zone ban is also unsupported as a scientific matter. The underlying assumption of a mixing zone ban on bioaccumulative pollutants (e.g., mercury) is that discharges of these pollutants from point sources contribute a significant portion of the levels measured in biological receptors. That assumption is not borne out by relevant studies. Since EPA established a ban on bioaccumulative pollutants in the Great Lakes basin in 1995, several studies of fish tissue trends (temporal changes) have been conducted. In Lake Erie and Lake Ontario, in spite of the mixing zone ban for discharges of mercury, concentrations of mercury have actually increased in some species. (2) Shifts in ecological factors (e.g., the presence of invasive species, changes in species-specific trophic ecology) are thought to be responsible for this temporal trend. A similar finding was observed for lake trout from Lake Huron, where trout mercury bioaccumulation factors were inversely proportional to densities of the fish's key prey species (rainbow smelt).3 If EPA's goal in imposing a mixing zone ban in Maine is to minimize the bioaccumulation of persistent pollutants such as mercury, the scientific basis of this expectation is erroneous. The proposed mixing zone ban should be withdrawn.

(2) Azim, M.E., A. Kumarappah, S.P. Bhavart, S.M. Backus, and G. Arhonditsis. 2011. Detection of spatiotemporal trends of mercury in Lake Erie fish communities: a Bayesian approach. Environmental Science & Technology 45: 2217 – 2226; Visha, A., N. Gandhi, S.P. Bhavsar, and G.B. Arhonditsis. 2015. A Bayseian assessment of the mercury and PCB temporal trends in lake trout (Salvenlinus namaycush) and walleye (Sander vitreus) from Lake Ontario, Canada. Ecotoxicology and Environmental Safety 117: 174 – 186.

(3) Abma, R.A., G. Paterson, A. McLeod, and G. D. Haffner. 2015. Crossbasin comparison of mercury bioaccumulation in Lake Huron lake trout emphasizes ecological characteristics. Environmental Toxicology and Chemistry 34: 355 – 359.

Federal Water Quality Coalition (Excerpt # 212)

Commenter ID: Public Hearing June 9, 2016

Name: Fredric P. Andes

Organization: Federal Water Quality Coalition

This is Fred Andes from the law firm of Barnes and Thornburg, and I'm speaking for the Federal Water Quality Coalition. The Coalition is a broad consortium of various regulated parties throughout the country, including some in Maine, including municipal, industrial and other entities that hold discharge permits and are affected by the Clean Water Act. We regularly participate in EPA rulemakings and other proceedings, and we plan to file comments on the proposed water quality standards for the state of Maine.

…

In terms of issues that we have, our concerns are several. One concerns the mixing zone for bioaccumulative chemicals that is being proposed based on the Great Lakes Initiative guidance. We were involved in the Great Lakes Initiative development, and throughout that process, EPA said that these rules were only for the Great Lakes because the Great Lakes are different. That included statements by the Agency in court on that issue. Now the Agency is saying, “oh, this is a great idea for everywhere.” We don't agree with that, we don't believe the Agency has authority to issue a mixing zone ban outside of the Great Lakes, and we think that part of this proposal should be deleted.

Topic 7 Bacteria Criteria

1. Recreational Bacteria Criteria

EPA Summary of Comments and Response:

EPA received one comment in opposition to the proposed recreational bacteria criteria and some comments in support. Maine DEP objected to EPA's inclusion of wildlife sources in the scope of the bacteria criteria for several reasons. It argued that inclusion of wildlife sources is beyond the scope of the CWA, which DEP asserts is only concerned with human pollution, and that *E.coli* are used only as an indicator of human sewage. It also asserted that EPA incorrectly "construed 'animal sources' of bacteria from studies as equivalent to naturally occurring 'wildlife sources' in the proposed rule"; that EPA cited to only one study in EPA's 2012 Recreational Water Quality Criteria (RWQC) that links potential human health risks with non-human sources of fecal contamination; and that because bacteria from natural sources are likely to be "temporal," removing a use (recreation in and on the water) simply due to a high level of *E. coli* where the bacteria source is of natural origins "is, at best, unwise."[128] None of these comments provides a basis for excluding wildlife sources from EPA's rule, which is based on the 2012 recommended RWQC.

First, the CWA does not limit EPA to consideration of human causes of pollution when developing water quality criteria protective of human health. CWA section 502(23) defines "pathogen indicator" to mean "a substance that indicates the potential for human infectious disease" with no limitation on source. EPA's recommended RWQC identify levels of fecal indicator bacteria (which include fecal coliforms, *E.coli*, enterococci or *Enterococcus* spp.) that will be protective of human health. Those pathogen indicators are not limited to pathogens coming only from human sources.[129]

Second, *E. coli* are typically found in the digestive systems of warm-blooded animals, and can be used to indicate the presence of fecal material in surface waters regardless of their origin, whether from humans, domestic animals, or wildlife. The literature provides many studies documenting wildlife as sources of *E. coli*.[130,131,132] For decades, EPA's regulatory premise concerning recreational water quality has been that nonhuman-derived human pathogens, including those from wildlife, in fecally contaminated waters present a potential risk to human health. [133] EPA has investigated sources of fecal contamination in its

[128] The commenter also refers to the 1997 Guidance ("Establishing Site Specific Aquatic Life Criteria Equal to Natural Background") "cited by EPA," and states that it "stands for possible reevaluation of uses based on known background concentrations not establishing criteria which necessitates regulation of naturally occurring bacteria…." EPA did not cite to that guidance in the context of the proposed bacteria criteria, and it has no bearing on EPA's decision to include wildlife sources in the scope of the criteria.

[129] USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058, pages 1-9.

[130] Levesque, B., P. Brousseau, P. Simard, E. Dewailly, M. Meisels, D. Ramsay, and J. Joly. 1993. Impact of the ring-billed gull (*Larus delawarenesis*) on the microbiological quality of recreational water. *Applied and Environmental Microbiology* 59 (4) 1128-1230.

[131] Center for Watershed Protection. 1999. Microbes and urban watersheds: concentrations, sources, and pathways. *Watershed Protection Techniques*. 3(1):554-565.

[132] Makino. S., H. Kobori, H. Asakura, M. Watarai, T. Shirahata, T. Ikeda, K. Takeshi and T. Tsukamoto. 2000. Detection and characterization of Shiga toxin-producing *Escherichia coli* from seagulls. *Epidemiol. Infect.* 125: 55-61.

[133] USEPA. 2009. Review of Published Studies to Characterize Relative Risks from Different Sources of Fecal Contamination in Recreational Water. U.S. Environmental Protection Agency, Office of Water, Health and Ecological Criteria Division. Washington, DC. EPA 822-R-09-001.

Review of Published Studies to Characterize Relative Risks from Different Sources of Fecal Contamination in Recreational Waters[134] and *Review of Zoonotic Pathogens in Ambient Waters*,[135] and determined that both human and animal feces, including feces from wildlife, in recreational waters do pose potential risks to human health. EPA again confirmed, in the development of the 2012 RWQC, that wildlife can carry both zoonotic pathogens capable of causing illness in humans and fecal indicator bacteria, and these microbes can be transmitted to surface waters.[136]

Contrary to the commenter's assertion, EPA cited more than one study in the RWQC that links potential human health risks with non-human sources of fecal contamination.[137] Furthermore, in the development of the RWQC, EPA did not, as the commenter claimed, equate bacteria from domestic animal sources to those of naturally occurring wildlife. On the contrary, EPA's research for the development of the RWQC clearly recognized that there is a risk differential between human and non-human animal sources, as well as among non-human animal sources.[138] Nevertheless, because zoonotic pathogens are present in animal (including wildlife) fecal matter, creating a potential risk from recreational exposure to zoonotic pathogens in animal-impacted waters, EPA found no scientific basis on which to exclude wildlife altogether from the scope of the RWQC, nor has the commenter provided any scientific basis for excluding wildlife sources altogether from the scope of the EPA's rule for waters in Indian lands in Maine.

Maine DEP commented that because bacteria from natural sources are likely to be "temporal," removing a use (recreation in and on the water) simply due to a high level of *E. coli* where the bacteria source is of natural origins "is, at best, unwise." This circumstance is not a justification for excluding wildlife sources altogether from the scope of recreational bacteria criteria. EPA recognizes that health risks associated with exposure to waters impacted by animal sources can vary substantially, depending on the animal source. In some cases these risks can be similar to exposure to human fecal contamination, and in other cases, the risk is lower.[139, 140, 141, 142] In situations with non-human sources of fecal contamination, the state may choose to conduct sanitary surveys, epidemiological studies and/or a Quantitative Microbial Risk Assessment (QMRA). If sanitary surveys, water quality information, or health studies show the sources of fecal contamination to be non-human, and the indicator densities reflect a different risk profile, then the state has the option to develop and adopt site-specific alternative recreational bacteria criteria to reflect the local environmental conditions and human exposure patterns.[143] For waterbodies where non-

[134] Id.
[135] USEPA. 2009. Review of Zoonotic Pathogens in Ambient Waters. U.S. Environmental Protection Agency, Office of Water, Health and Ecological Criteria Division. Washington, DC. EPA-822-R-09-002.
[136] USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058.
[137] Id., pages 34-38
[138] Id., pages 36-38
[139] Schoen, M.E. and N.J. Ashbolt. 2010. Assessing pathogen risk to swimmers at non-sewage impacted recreational beaches. *Environmental Science and Technology* 44(7): 2286-2291.
[140] Soller, J.A., M.E. Schoen, T. Bartrand, J.E. Ravenscroft, N.J. Ashbolt. 2010. Estimated human health risks from exposure too recreational waters impacted by human and non-human sources of faecal contamination. *Water Research* 44: 4674-4691.
[141] Soller, J.A., T. Bartrand, J. Ravenscroft, M. Molina, G. Whelan, M. Schoen, N. Ashbolt. 2015. Estimated health risks from recreational exposures to stormwater runoff containing animal faecal material. *Environmental Modelling and Software* 72: 21-32.
[142] USEPA. 2010. Quantitative Microbial Risk Assessment to Estimate Illness in Freshwater Impacted by Agricultural Animals Sources of Fecal Contamination. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA 822-R-10-005.
[143] USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058, Section 6.2

human fecal sources predominate, QMRA can be used to determine a different enterococci or *E. coli* criteria value that is equally protective as the criteria EPA is promulgating today.[144]

Maine DEP also objected to EPA's proposal to apply the bacteria criteria year round, and requested that EPA exclude the period of October 1- May 14, similar to Maine's disapproved criteria. The state asserted that EPA had not demonstrated that recreational activities occur in this time frame. Other commenters supported the year round criteria. EPA disagrees with the state's characterization of the record. First, the activities cited by EPA in the proposal were merely examples of readily available information that recreation does occur during the period where the state's bacteria criteria would not apply. The record also included information from one tribal member confirming that activities in and on the Penobscot River occur whenever the waters are ice free. In its comment supporting the proposed criteria, the Penobscot Nation specifically noted that the tribe engages in year round activities in and on the Penobscot River, including for paddling, fishing, and ceremonial uses. EPA had invited comment on whether a seasonal term shorter than October 1- May 14, during which the recreational bacteria criteria would not apply, would still adequately protect recreational uses. EPA received no comments that provided specific information that could support the establishment of a seasonal timeframe in which the absence of bacteria criteria would be protective of uses. Therefore, EPA has retained the year round applicability in the final rule.

Specific Comments

Maine Department of Environmental Protection (Excerpt # 122)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

Bacteria

EPA proposes new recreational bacteria criteria for Maine's Indian waters in part because Maine's existing criteria do not apply to naturally occurring (i.e., wildlife) fecal sources. 81 Fed. Reg. 23254. Under the CWA, States such as Maine have the primary responsibility of preventing, reducing, and eliminating "pollution," 33 U.S.C § 1251(b), which is defined by the CWA as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C § 1362(19). Thus, the CWA regulates human pollution, and not wildlife, and EPA's proposal of WQS designed to regulate "wildlife sources" of bacteria in Maine's Indian waters is beyond the scope of the CWA.

The November 5, 1997 guidance cited by EPA states that, "(f)or human health uses, where the natural background concentration is documented, this new information should result in, at a minimum, a re-evaluation of the human health designation." "Establishing Site Specific Aquatic Life Criteria Equal to Natural Background." ("1997 Guidance"). The 1997 Guidance stands for possible reevaluation of uses based on known background concentrations not establishing criteria which necessitates regulation of naturally occurring bacteria, hence, the existing Maine rule excepts bacteria sources from wildlife. Bacteria from natural sources are likely to be temporal, therefore removing a use (recreation in and on the water) simply due to a high level E. coli an organism that is used as an indicator of human sewage, which does not include E.coli of natural origins is, at best, unwise. EPA's source, the 2012 Recreational Water Quality Criteria ("2012 R

[144] Id., Section 6.2.2

WQC"), is unconvincing regarding the expected impact of non-human sources of bacteria causing human health risks. EPA incorrectly construes "animal sources" of bacteria from studies as equivalent to naturally occurring "wildlife sources" used in the proposed rule. When directly linking human health concerns to "wildlife" sources, EPA's 2012 RWQC indicate, "sources of fecal contamination in these waters were not identified;" or wildlife, "could not be confirmed as the primary source of the zoonotic pathogens", or worse, "found a lack of a statistical association between swimmers' illness risk and FIB (fecal indicator bacteria) levels in a rural fresh waterbody impacted by animal fecal contamination; Calderon et al. (1991)." EPA only directly cited one study to link potential human health risks with non-human sources of fecal contamination. That study, from New Zealand, linked human health risks to agricultural sources (presumably cattle, not wildlife) and qualified that the relationship was "unlikely to hold in all waters" (2012 RWQC, section 3.5 1-2).

The Department also opposes the EPA's proposal to apply these criteria year round. States may adopt seasonal uses pursuant to 40 C.F .R. 131.10. The information cited by EPA as indicating potential recreational activities in or on the water after October 1 continued for only a few days after October 1, and are located several miles upstream of any point source discharge. Neither source cited by EPA offers these activities in October 2016. These activities are unaffected by seasonal chlorination of wastewater and we found no documentation of other recreational activity specific to the Penobscot River.

Marks, D. (Excerpt # 204)

Commenter ID: 0329

Name: Dan Marks

Organization: None

Finally, as requested in section IV.B.1.b, I am in support of EPA's bacteria criteria applying all year long based on the uses identified in that section, including recreation by members of the Indian nations.

Counsel for Penobscot Nation (Excerpt # 157)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Bacteria Criteria

For the reasons articulated by the EPA, the Nation supports EPA’s approach to its recreational and shellfishing proposed bacteria criteria. Specifically, the Nation supports EPA’s proposed use of the 32 NGI per 1,000 primary contact illness rate, which is the same illness rate that Nation used in 23 its own PIN WQS standards resulting in criteria of geometric mean max for E. coli of 100 colonies/100 ml and a STV of 320 colonies/100 ml. As EPA indicates, use of this rate results

in a geometric mean criteria which most closely matches Maine's criteria. Furthermore, the Nation supports EPA's proposed recreational bacteria criteria because they include an explicit duration and frequency of exceedance in order to protect primary contact use. The Nation reiterates its comment that these waters are used year-round by tribal members for paddling and fishing and ceremonial uses. The Nation supports EPA's proposed application of recreational bacteria criterion year-round. Given the dramatic changes in periods of ice cover in recent years, and the likelihood for this change in ice cover to continue to result in unpredictable periods of open water, the Nation would be opposed to any periods (including December through February) in which the recreational bacteria criteria were made inapplicable.

2. Shellfishing Bacteria Criteria

EPA Summary of Comments and Response:

EPA received some comments that supported the proposed shellfishing bacteria criteria. Comments from Maine DEP, however, requested EPA to express the criteria in terms of fecal coliform bacteria rather than total coliform bacteria, noting that the National Shellfish Sanitation Program (NSSP) shellfish program allows the use of either indicator, that Maine DEP sets permit limits on fecal coliform bacteria rather than total coliform, and that Maine Department of Marine Resources (DMR) uses fecal coliform bacteria as its indicator parameter when making shellfish area opening/closure decisions. Maine DMR commented that the rule's detection method differs from the method used by Maine DMR, and requested EPA not to specify a specific numeric standard but rather to promulgate the same narrative criterion that applies to Class SB and SC waters, which refers to the NSSP standards. The NSSP is the federal/state cooperative program recognized by the U.S. Food and Drug Administration and the Interstate Shellfish Sanitation Conference for the sanitary control of shellfish produced and sold for human consumption. EPA agrees that the NSSP program allows for the use of either fecal coliform bacteria or total coliform bacteria as the indicator organism to protect shellfish harvesting. The current NSSP recommendations[145] for those organisms are consistent with EPA's national recommended water quality criteria.[146] In light of the state's concerns and suggestions, EPA is promulgating a final rule that contains a narrative criterion similar to Maine's criterion that EPA approved for Class SB and SC waters (which refers to the NSSP program recommendations). The final rule provides "The numbers of total coliform bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration as set forth in the Guide for the Control of Molluscan Shellfish, 2015 Revision." EPA has added a specific reference to the date of the NSSP recommendations because there are legal constraints on incorporating future recommendations by reference.

Specific Comments

Maine Department of Environmental Protection (Excerpt # 207)

Commenter ID: 0330

[145] http://www.fda.gov/downloads/Food/GuidanceRegulation/FederalStateFoodPrograms/UCM505093.pdf
[146] USEPA. 1986. Quality Criteria for Water 1986, United States Environmental Protection Agency, Washington, DC. EPA 440/5-86-001.

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

The proposed rule also utilizes total coliform bacteria and makes reference to using this indicator organism as it is consistent with the National Shellfish Sanitation Program (NSSP); however, the NSSP program allows states to use fecal coliform bacteria as an indicator also. E. coli is an indicator organism because it is easier to detect and quantify than pathogenic organisms of concern. Maine has written permits limiting fecal coliform bacteria(not total coliform) to 15/100 ml as a geometric mean and 50/100 ml as a daily maximum in marine waters for several years. They were written this way to be consistent with Maine Department of Marine Resources sampling program which uses fecal coliform bacteria as their indicator parameter when making opening/closure decisions. The NSSP establishes a geometric mean of 14/100 ml and not more than 10% of the samples shall exceed a most probable number (MPN) of 49/100 ml. It is much easier to write and determine compliance with a permit if the daily maximum limit is one numeric value that is not conditioned 10% of samples exceeding MPN. The Department suggests EPA continue to focus on organisms and standards that are currently regulated. Both are consistent with the NSSP and a more straightforward method for addressing bacteria in shellfish areas than EPA' s approach.

Bureau of Public Health, Maine Department of Marine Resources (Excerpt # 142)

Commenter ID: 0348

Name: J. Kohl Kanwit

Organization: Bureau of Public Health, Maine Department of Marine Resources

To Whom It May Concern,

I am writing in reference to the EPA proposed rule on water quality standards for the state of Maine, published on April 20, 2016. The Department of Marine Resources (DMR) is the sole authority administering the National Shellfish Sanitation Program (NSSP) in Maine. The NSSP ensures the safety of bivalve shellfish intended for human consumption by establishing a standard set of controls regulating harvesting, processing and distribution. The foundation of the NSSP is the sanitary survey which requires onsite inspection of any land based potential and actual pollution sources within 500 feet of shore at least every 12 years. These findings are then supported by routine water quality sampling. The results are used in combination to classify shellfish growing areas.

The NSSP provides two options for the mandatory water quality sampling program design, adverse and systematic random. There are also two approved methods of detecting and enumerating fecal coliform, the designated indicator for the shellfish sanitation program, multiple tube fermentation (MPN) or membrane filtration (MF). The numbers and frequency of samples required vary by designated status (e.g. remote) or pollution source (point or non-point). The standards for Approved growing areas using the systematic random sampling design and MF testing are 30 or more samples with a P90 of <31 cfu/100ml and a geomean <14 cfu/100ml.

The NSSP model ordinance is revised every two years through the Interstate Shellfish Sanitation Conference process. The most recent revision was published on June 8, 2016 and includes a new

optional testing method for water quality and shellfish meats. While DMR currently has no intention of changing the water quality monitoring program, this new provision illustrates how the NSSP is a “living” document and compliance, as determined by the US Food and Drug Administration, can be achieved through several paths.

DMR does not support the inclusion of specific bacterial standards designated for shellfish harvesting in waters on Indian lands as drafted in the proposed rule on water quality standards. The standards referenced in the proposed rule are not consistent with what DMR currently uses (MPN v. MF) and would require a different sampling regime for waters on Indian lands as opposed to what is done in the rest of the state. DMR feels the existing adoption by reference in the current state regulations is appropriate:

> 38 MRS §465-B. Standards for classification of estuarine and marine waters
>
> 2. Class SB waters.
>
> B. ……The numbers of total coliform bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration.

The state regulations allow for a consistent application of the NSSP in all waters of the state of Maine and a single shellfish growing area classification system. The state water quality laboratories are not equipped to maintain two testing methods nor is it necessary or desirable to do so under the NSSP. Furthermore, the EPA proposed rule references the remote status designation of which Maine has no qualifying areas including in waters on Indian lands. DMR agrees with the Department of Environmental Protection and does not believe the EPA should include specific standards from an established and existing program under the oversight of another federal agency in the proposed rule on water quality standards.

Topic 8 pH

Maine Department of Environmental Protection (Excerpt # 187)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

pH

EPA proposes a new range of pH criterion for Maine's Indian waters only. 81 Fed. Reg. 23255. The Department maintains that the original pH standard of 6.0 to 8.5 was already approved by the EPA and is the valid standard for discharges in Maine statewide. This standard is fully protective of aquatic life and protects recreation in and on the water; 99% of the river and stream miles in Maine are at Class B or higher with 95% meeting standards, including biological structure and function. Almost all of the non-attainment is due to either nutrients or an aspect of run-off (metals, chlorides, bacteria, etc.). Regardless, the pH range is the measure of stringency, not the actual values. EPA's range of 6.5-9.0 is just as protective as the former pH standard. The Department's biologists believe that a range of 6.0 to 8.5 provides better Maine habitat than does the range of 6.5 to 9.0, noting that several functioning Maine streams naturally fall below the 6.0 lower threshold. Additionally, the Department has measured pH below 6.5 where, based on the Department's monitoring, waters are considered to be attaining Maine's aquatic life criteria. The Department believes that a pH of 9.0, however, approaches levels toxic to Maine fish and other aquatic life. Therefore, the Department would like to maintain the current pH range of 6.0-8.5 for the health of the Maine's streams and rivers.

EPA Response: EPA proposed, and is finalizing, an upper pH range of 8.5, so concerns about a pH of 9.0 are misplaced. Maine's comments in support of maintaining the 6.0 pH value provide some anecdotal information, but they do not include sufficient scientific information or studies that would justify a conclusion that 6.0 would protect aquatic life. EPA disagrees with the commenter that the proposed EPA pH range (6.5-8.5) is no more protective than Maine's (6.0-8.5). Sustained pH outside the range EPA proposed can reduce biological diversity in streams because it physiologically stresses many species and can result in decreased reproduction, decreased growth, disease, or death.[147,148,149] For example, pH values of 6.0 and lower have been shown to be detrimental to sensitive aquatic life, such as developing Atlantic salmon eggs.[150] Even more tolerant species, such as brook trout, demonstrate a pH preference within the range of 6.5-8.5.[151] [152] Maine has not provided specific information to support the statement

[147] https://www3.epa.gov/caddis/ssr_ph_int.html
[148] USEPA. 1986. Quality Criteria for Water 1986, United States Environmental Protection Agency, Washington, DC. EPA 440/5-86-001, pH section.
[149] European Inland Fisheries Advisory Commission. 1969. Water quality criteria for European freshwater fish - extreme pH values and inland fisheries. *Water Research* 3: 593-611.
[150] Peterson, R.H., P.G. Daye, J.L. Metcalfe. 1980. Inhibition of Atlantic salmon (*Salmo salar*) hatching at low pH. *Can. J. Fish. Aquat. Sci.* 37: 770-774
[151] Raliegh, R.F. 1982. Habitat suitability index models: Brook trout. U.S. Department of the Interior, Fish and Wildlife Service. FWS/OBS-82/10.24. 42 pp.
[152] Menendez, R. 1976. Chronic effects of reduced pH on brook trout (*Salvelinus fontinalis*). *J. Fish. Res. Board Can*. 33(1): 118-123

that several streams “naturally” fall below a pH of 6.0 rather than, for example, being affected by acid deposition. To the extent that there are waters that naturally fall below 6.5, however, Maine’s natural conditions clause at 38 M.R.S. 464(4.C) may provide the basis for concluding that such waters are not failing to attain their classification due to natural causes. For these reasons, EPA is retaining the lower value of 6.5 in the final rule.

Woodland Pulp LLC (Excerpt # 45)

Commenter ID: 0284

Name: Jay Beaudoin

Organization: Woodland Pulp LLC

"2.2.5 pH

Maine law, at 38 M.R.S §464(4.A(5)), prohibits effluent discharges that cause the pH of fresh waters to fall outside of the 6.0 to 8.5 range. A review of existing permits for facilities that discharge to waters in Indian lands also show additional provisions allowing discharges outside the specified pH range for effluent if the discharge is within 0.5 standard units (SU) of the pH of the ambient receiving water pH (e.g., Woodland Pulp permit). In addition to industrial point source discharges, pH levels may be affected by atmospheric deposition and impacts from legacy pollution. There are no rivers or streams in Indian lands that are listed as impaired for pH."

Woodland Pulp Comment: Woodlands Pulps discharge does not cause the pH of the fresh water receiving segment to fall outside the 6.0 to 8.5 range. The 5.0 to 9.0 ph limit applicable to Woodland Pulps discharge has been in place for more than 40 years. The fresh water receiving reach is not in or part of any Indian lands.

Keeping Woodland Pulp's 5.0 to 9.0 pH limit range will not and has not caused the pH of the receiving segment to fall outside of the 6.0 to 8.5 pH range. The pH of the St. Croix River as measured upstream of Woodland Pulp’s Discharge does naturally fall below 6.0 at times. Additionally, it is not apparent that a pH range of 6.0 - 6.5 has any measureable effect of sustenance fishing.

EPA Response: The pH criterion is intended to protect aquatic life, not the sustenance fishing use. Any effects of the pH criterion on Maine NPDES permit limits will be evaluated case-by-case by Maine DEP during the permit issuance process.

Counsel for Penobscot Nation (Excerpt # 159)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

pH Criterion for Fresh Waters

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed pH criterion for fresh waters.

Topic 9 Temperature

Maine Department of Environmental Protection (Excerpt # 189)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

Temperature

EPA proposes to limit the weekly average monthly rise in ambient temperature to 1.8°F during all seasons of the year provided the weekly average summer maximum of 64.4°F is not exceeded. The summer season is defined as May 15 - September 30. EPA's proposal is less stringent during the summer season (1.8°F vs l .5°F) more stringent than the non-summer months (1.8°F vs 4.0°F) and more stringent as a daily maximum (64.4°F vs 85°F), compared to Maine's current temperature regulations.

The above criteria must be compared to baseline thermal conditions. The baseline thermal conditions shall be measured or modeled from a site where there is no artificial thermal addition from any source and which is in reasonable proximity to the thermal discharge (within 5 miles) and has similar hydrography to that of the receiving waters at the discharge. This will be problematic given the issues with reference sites being representative the Department has encountered over the years in the aquaculture general permit. It also begs the question: what are the seasons (assuming four seasons with summer already defined as May 15 - September 30) and should a baseline be established for each season?

EPA Response: EPA does not agree that it would be difficult to locate a reference site to measure or model baseline thermal condition that is free from thermal discharge, is within 5 miles of the proposed thermal discharge and that has similar hydrography.

Locating a thermal condition reference site is different from locating a reference site for an aquaculture general permit, and Maine's experience with the latter is not comparable to locating or modeling a thermal reference site. Establishing an acceptable (finfish) aquaculture reference site needs to consider many variables to ensure that the benthic biological communities are indeed comparable, including sediment grain size, water depth, site hydrodynamics (erosional versus depositional), proximity to other aquaculture facilities, and other uses of the area (e.g., commercial dragging). Establishing a reference site strictly for water temperature should simply require finding a site beyond the influence of known anthropogenic heat sources, and avoiding areas that undergo significant temperature stratification. Even sites that stratify could be used if temperature is measured at several depths. In fact, some sites that could serve this purpose may already exist. Data buoys monitored under the Northeastern Regional Association of Coastal Ocean Observing Systems (NERACOOS) exist in Maine state waters, as do other monitoring stations established by universities such as the University of Maine. As such, EPA does not believe that it would be difficult to locate a thermal reference site. Therefore EPA has retained the proposed reference site requirement in the final rule. Regarding the questions about seasons, the aquatic life use is protected with the rule's combination of a maximum weekly temperature rise along with an absolute summer maximum temperature that cannot be exceeded at any time. There is no need to establish separate seasonal baselines outside of the defined summer season.

Counsel for Penobscot Nation (Excerpt # 160)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Temperature Criteria for Tidal Waters

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed temperature criteria for tidal waters.

EPA Summary Response to Comments in Topics 10 - 14

EPA Summary of Comments and Response: EPA received comments in support of the proposed ammonia criteria for freshwaters in Indian lands; the proposed dissolved oxygen criteria for Class A waters throughout Maine; the proposal, applicable to all waters in Maine, stating that Maine's statute allowing the waiver of laws to assist in an oil spill response does not apply to state or federal WQS applicable to waters in Maine; the proposal, applicable to waters in Indian lands, stating that Maine's natural conditions provisions do not apply to water quality criteria intended to protect human health; and the proposed human health criterion for phenol for consumption of water plus organisms, applicable to waters in Maine outside of Indian lands. There were no comments requesting changes in these proposed water quality standards. EPA finalized these WQS in language identical to the proposals, for the reasons explained in the preamble to the proposed rule.

Topic 10 Ammonia Criteria

Counsel for Penobscot Nation (Excerpt # 158)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Ammonia Criteria for Fresh Waters

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed ammonia criteria for fresh waters.

Topic 11 Dissolved Oxygen

Hough, J. (Excerpt # 71)

Commenter ID: 0305

Name: Janet Hough

Organization: None

In addition, I support the two WQS that the EPA is proposing for all waters in Maine including waters in Indian lands: Dissolved oxygen criteria for Class A waters to protect aquatic life

Counsel for Penobscot Nation (Excerpt # 163)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Dissolved Oxygen Criteria for Class A Waters

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed dissolved oxygen criteria for Class A waters.

Topic 12 Waiver of WQS in Case of Oil Spill

Hough, J. (Excerpt # 74)

Commenter ID: 0305

Name: Janet Hough

Organization: None

In addition, I support the two WQS that the EPA is proposing for all waters in Maine including waters in Indian lands:

…

and clarification that the Clean Water Act does not allow the commissioner of the Maine Department of Environmental Protection to waive compliance with WQS in case of oil spills.

Counsel for Penobscot Nation (Excerpt # 201)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Waiver or Modification of WQS

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed regulations regarding waiver or modification of WQS.

Topic 13 Natural Conditions

Counsel for Penobscot Nation (Excerpt # 161)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Natural Conditions Provisions

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed natural conditions provisions.

Topic 14 Phenol Criteria for Water + Organisms for Waters Outside of Indian Lands

Hough, J. (Excerpt # 205)

Commenter ID: 0305

Name: Janet Hough

Organization: None

Finally, I support the WQS that the EPA is proposing for waters in Maine outside of Indian lands: Phenol criteria to protect human health.

I look forward to a future where water quality standards continue to improve throughout the State of Maine. Janet Hough, Edmunds Township

Counsel for Penobscot Nation (Excerpt # 206)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

The Penobscot Nation Supports the Proposed WQS for Waters in Maine Outside Indian Lands

1. HHC for Phenol Consumption of Water Plus Organisms

For the reasons articulated by the EPA, the Nation supports EPA's approach to its proposed regulations regarding phenol consumption of water plus organisms.

Topic 15 Applicability of WQS

EPA Summary of Comments and Response: In the April 20, 2016, Federal Register notice, EPA proposed that if Maine adopted and submitted WQS that meet CWA requirements after EPA finalized its proposed rule, they would become effective for CWA purposes upon EPA approval and EPA's corresponding promulgated WQS would no longer apply. No commenters supported this proposal. Two commenters objected to it, and one asked that EPA specify that WQS adopted by the state would have to be at least as stringent as the federally proposed WQS for EPA to approve and make the state WQS effective for CWA purposes.

Upon consideration of comments received on its proposed rule, EPA decided not to finalize the above proposed approach. Consistent with 40 CFR § 131.21(c), EPA's federally promulgated WQS are and will be applicable for purposes of the CWA until EPA withdraws those federally promulgated WQS. EPA would undertake a rulemaking to withdraw the federal WQS if and when Maine adopts and EPA approves corresponding WQS that meet the requirements of section 303(c) of the CWA and EPA's implementing regulations at 40 CFR part 131.

Specific Comments

Houlton Band of Maliseet Indians (Excerpt # 191)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

…

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 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.

(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.

Counsel for Penobscot Nation (Excerpt # 150)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

…

Applicability of EPA Promulgated WQS When Final

EPA invites comment on its proposal that: "If EPA finalizes this proposed rule, and Maine subsequently adopts and submits new or revised WQS that EPA finds meet CWA requirements, once EPA approves Maine's WQS, they would become effective for CWA 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." The Nation objects to this approach. Once finally adopted through rule-making, there is no legal basis on which EPA can withdraw or amend its finally adopted rule under CWA § 303(c) and 40 C.F.R. § 131.22 without going through the appropriate rule-making process. If EPA finalizes this proposed rule, and Maine subsequently adopts and submits new or revised WQS that EPA finds meet CWA requirements, the correct approach should be that once EPA approves Maine's WQS, both the newly approved standard and this federal standard should remain in effect (and the more protective standard should govern) unless or until EPA engages in the rule-making necessary to amend its federally promulgated WQS rulemaking. The same outcome would occur if EPA approves the Nation's application for Treatment as a State and EPA approves the Nation's WQS. Given Maine's refusal to recognize the Nation's right to sustenance fish, and the State's attempt to set an effective cap on the amount of fish that tribal members can safely consume from the waters at issue in these rules, and given EPA's federal trust responsibility to the Nation as a federally recognized Indian Tribe, EPA should not, and indeed cannot, prospectively abdicate its responsibility to the tribe and make a determination that some hypothetical future WQS proposed by Maine can simply replace these proposed standards. Given the hostility of the State of Maine to tribal interests, the Tribes must be provided a forum before the EPA, and not merely as a

commenter within the State's rulemaking process (where the State has repeatedly demonstrated a willingness to ignore tribal interests). By following the proper process, and deferring the decision of withdrawing these proposed rules until EPA has before it an actual proposed and approved WQS from Maine or the Nation, EPA will be able to evaluate the appropriate outcome in its future rulemaking based on actual, and not hypothetical, situations. To do otherwise would both be an unlawful agency action without legal authority, and an abdication of EPA's federal trust responsibility to the federally recognized Indian Tribes protected by these proposed WQS. *(5)*

In any event, if EPA did want some newly approved WQS (whether submitted by Maine or by the Nation upon receiving TAS) to go into immediate effect not withstanding that these rules had not yet been amended or withdrawn, the appropriate time to take comment on that outcome (and the appropriate time to make a decision on that approach), would be at the time of that hypothetical future approval. That way, EPA would have actual substantive WQS on which to make the determination. Attempting to make that determination now, when the issue is not yet ripe, would be inappropriate.

(5) EPA is well aware of the ongoing disputes between Maine and the Nation with regard to the water quality of the Penobscot River and the right of the Nation to sustenance fish therefrom. The Nation will not recount all of that here, but EPA may take administrative notice of Maine's position resulting in EPA's previous disapprovals as well as the litigation positions of Maine in Penobscot v Mills and Maine v. McCarthy.

Topic 16 Economic Analysis

EPA Summary of Comments and Response:

General Support

Two commenters expressed support for EPA's economic analysis. These commenters emphasized that the cost of the improvements required by the rule is not out of reach and the improvements are necessary. As was outlined in the economic analysis for the proposed rulemaking ("EA"), EPA agrees that the economic impacts will not be substantial.

General Criticism

A second group of comments expressed general concerns about the accuracy, thoroughness, and applicability of the EA. The Agency addresses these general concerns below.

First, some commenters stated that the economic analysis of the proposal was deficient because the geographic extent of the proposal is undefined. Some of these commenters also expressed that, given the potential negative impacts on businesses and local economies, EPA should not promulgate a rule overriding state laws on the basis of an EA that the Agency concedes has inherent uncertainties. Specific uncertainties identified by commenters include the potential costs to nonpoint sources and the potential treatment controls that may be implemented by dischargers in response to new requirements.

EPA disagrees with the comment that its EA was deficient because uncertainty – including with respect to the geographic scope of the rule's applicability – constrained the Agency's ability to assess the economic impacts of the rule. EPA's EA identified 33 facilities that discharge to waters in Indian lands or their tributaries. Although the commenter is correct that the geographic extent of the waters covered by this promulgation could change due to litigation or other legal developments regarding Indian land status, EPA used an inclusive approach in its analysis that accounted for all facilities that could reasonably fall within the two general categories of waters to which the HHC may apply. If the geographic scope of waters to which the HHC apply is smaller, then fewer facilities will be affected by the rule and costs will be lower.

All cost analyses have inherent uncertainties and limitations. EPA used the best publicly available information to support the analysis, used conservative assumptions and approaches (i.e., erring on the side of overestimating impacts) where uncertainties exist, and solicited input and data from the public where specific data were lacking to quantify potential costs. In addition to using the best publicly available data to support its analysis, the Agency's approach maximizes the transparency of data and analytical uncertainties and limitations and discusses the potential costs qualitatively where quantification is not feasible.

For example, as discussed in the EA for the proposed rule, ambient monitoring data for waters in Indian lands are extremely limited, and it was not possible to conduct a detailed analysis of potential incremental impairments or associated nonpoint source costs. In Section 5 of that EA, EPA clearly described the data and analytical limitations that preclude a quantitative assessment of potential costs, and provided a qualitative discussion of costs to nonpoint sources and regulatory authorities that could result if there were incremental impairments identified as a result of the proposed criteria. Commenters did not provide any additional monitoring or cost data to EPA to support a more detailed quantitative analysis of nonpoint source dischargers that could be affected by the water quality standards.

EPA maintains that, despite the uncertainties documented in the EA, the results provide an appropriate basis for regulatory development and informed decision-making.

Second, one commenter also states that there will be no measurable benefit to the health of the general population or Indian populations of Maine. EPA disagrees that there will be no health benefits associated with the rule. Due to data constraints, EPA was not able to quantify or monetize such benefits, but the pollutants for which EPA is promulgating water quality standards have demonstrated adverse health effects (for more information about the health effects see EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*[153]). Reducing the presence of such pollutants in the environment and in the food chain can be reasonably expected to have positive impacts, including protecting the health of communities that practice sustenance fishing in Maine, as well as benefiting the general population through cleaner waters, enhanced recreation, fishing, and shellfishing. For a more detailed discussion about the projected changes in cancer risk levels, see EPA's response to comment topic #5.

Location of Affected Facilities Relative to Waters in Indian Lands

Some commenters noted the location of facilities relative to waters in Indian lands, stating that some dischargers (Woodland Pulp and Baileyville POTW) are inappropriately designated as discharging to waters in Indian lands. Two commenters noted that three facilities – Calais School, Calais POTW, and Washington Community College – are upstream of Indian lands, and that Woodland Pulp and Baileyville POTW are 10 miles further upstream from these three facilities. The commenters assert that, since Woodland Pulp and Baileyville POTW are further upstream from the other three facilities, they cannot be discharging directly to waters in Indian lands. Woodland Pulp states repeatedly that neither its discharge nor its mixing zone has any effect on waters in Indian lands.

First, EPA notes that it took an inclusive approach to identifying those facilities that may be discharging to waters in Indian lands and could be affected by EPA's promulgated water quality standards. If the geographic extent of waters covered by the regulations is smaller such that the discharges from Woodland Pulp and Baileyville POTW cannot affect waters in Indian lands (as asserted by the commenter), then including the potential costs to these facilities overstates the economic impact of the rule.

Second, as noted by the commenters, Calais School, Calais POTW, Washington Community College, Woodland Pulp, and Baileyville POTW are all upstream of the waters at Pleasant Point (with Woodland Pulp and Baileyville POTW being furthest upstream). However, EPA identified additional waters that may be considered within Indian lands downstream from the point where Woodland Pulp and Baileyville POTW discharge and upstream from Calais School, Calais POTW, and Washington Community College. As such, it is possible that – as assumed in the economic analysis – these two facilities discharge both directly to waters in Indian lands *and* upstream of waters in Indian lands, while the other three facilities discharge only upstream of such waters. EPA used an inclusive approach that assumes that these facilities could incur costs due to EPA's promulgated water quality standards.

One commenter also questioned why EPA states that only one facility on the St. Croix River, the Passamaquoddy POTW, discharges directly to waters in Indian lands (EA, page 40), while later stating that Woodland Pulp also discharges directly to waters in Indian lands (EA, page 97). EPA notes that this reflects a misreading of the EA, where EPA specifically states that only one facility

[153] United States Environmental Protection Agency (U.S. EPA). 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* EPA-822-B-00-004.

is discharging directly to *marine* waters in Indian lands; at the point of its discharge, Woodland Pulp is discharging to a freshwater (EA, page 40).

Information to Supplement/Correct Information Used in the Economic Analysis

In its comment, Woodland Pulp provides information to either supplement or correct assumptions, information, and data used in the EA. EPA thanks the commenter for this detailed information and has incorporated it into the economic analysis supporting the final rule. Specifically, EPA used information provided by Woodland Pulp to update information about the facility's mixing zone (Section 2.2.7 of the EA supporting the final rule); correct a permit number for West Enfield Hydro (Exhibit 4-1); add information about Woodland Pulp's existing cooling towers, including history, operation, and cost (Section 4.4); and supplement information about existing treatment processes at the facility (Section A.23).

Additionally, Woodland Pulp provided some information about pH adjustment processes used at the facility in its comments. EPA thanks the commenter for this information as well, and has incorporated this new information in the EA supporting the final rule (Section 3.1.4 and Section D.6).

Cost of Mixing Zone Provisions

Woodland Pulp's comment[154] includes several concerns about EPA's assessment of the potential costs to the facility associated with the proposed rule's mixing zone provisions. Woodland Pulp argues that the mixing zone requirement would have significant cost impacts that are unaccounted for in the economic analysis, including the costs for studies to meet the policy requirements, which "would be in the multiple 100s of thousands of dollars range."

EPA agrees that there may be some costs associated with thermal mixing zone studies as required by the policy and acknowledged this cost in the economic analysis, but does not have sufficient data to estimate the costs associated with such studies on a site- or facility-specific basis. EPA has revised the economic analysis for the final rule to provide general additional information about potential costs for conducting thermal mixing zone studies.

Woodland Pulp also expressed some concerns about specific assumptions and statements used by EPA in the economic analysis. First, the commenter asserts that EPA's use of terms such as "large" and "extensive" with regard to the existing mixing zone for its facility is inappropriate and reveals a bias against the discharger, and that EPA's statement that studies and information about the mixing zone are not available demonstrates that EPA did not sufficiently search for the needed information (or that the Agency did not care to find all relevant information).

Additionally, the commenter notes that the mixing zone is actually 4 miles rather than 9.3 as stated by EPA, with the remaining 5.3 miles being the zone of initial dilution. Woodland Pulp also clarified that it uses an outfall rather than a diffuser (because it discharges to an International water), and that the initial plume occupies 1/3 of the river reach.

EPA does not agree that it did not sufficiently search for needed information. The Agency conducted an appropriate search of publicly available information, and. presented factual information to describe the extent of the mixing zone in the proposed rule EA. EPA reviewed the information contained in the fact sheet supporting the commenter's discharge permit issued by Maine DEP; this information is part of the official record for the permit. EPA agrees that the

[154] EPA-HQ-OW-2015-0804-0284

commenter's permit allows a 5.3- mile zone of initial dilution. However, EPA was not inaccurate in stating that the mixing zone is 9.3 miles long, because the zone of initial dilution is a subarea of the entire mixing zone. For the final rule analysis, EPA corrected its description of the extent of the mixing zone accordingly. EPA did not intend to convey any bias against the discharger in its characterization of the extent of the mixing zone in the proposed rule EA. Nonetheless, for the final rule, EPA also revised the text to remove qualifiers that may be misinterpreted as suggesting any bias.

Finally, Woodland Pulp disagreed with EPA's statement in the EA for the proposal that EPA's cost estimates for the facility to retrofit cooling towers represents an upper bound on the potential costs. Rather, Woodland Pulp believes that the costs are underestimated. In its comments, Woodland Pulp noted that its two unused cooling towers have a total capacity of only 1.2 MGD, which is not sufficient for thermal discharge relief. The comment also noted that these unused cooling towers are located on a roof with structural support concerns, complicating the retrofits of these existing systems.

EPA believes that the commenter misunderstood the term "retrofit" as applied in this case. Rather than estimating costs to "retrofit" the existing, unused cooling towers to working order, EPA instead estimated costs to construct *new* cooling towers as a retrofit to the operations of the facility. EPA disagrees with the commenter that the costs for the construction of the new cooling towers are understated; rather, EPA used conservative assumptions, which may overstate costs for the facility. Specifically, EPA estimated the costs for constructing and operating cooling towers using the same approach from its analysis of the *Final Section 316(b) Existing Facilities Rule* and assuming costs for "difficult" projects. Cost estimates for "difficult" projects are based on a variety of assumptions that lead to higher costs, including that the project will encounter difficulties such as "space constraints, reconfiguration of process piping, long piping runs, conflicts with existing piping and infrastructure, and utilities."[155] Use of these costs will overstate costs for facilities where these constraints and conditions are not present.

In its discussion of the costs associated with cooling towers, Woodland Pulp provided some information about the costs associated with its existing cooling towers (those currently in use and the unused towers), stating that the main cooling tower (consisting of two cells) was built in 1996 at a cost of $2.2 million (in 2016-equivalent dollars) and that the unused cooling towers were installed at the same time at a cost of approximately $920,000 (in 2016-equivalent dollars). EPA thanks the commenter for this information and notes that these figures support EPA's own order-of-magnitude estimates of capital costs for the construction of new cooling towers at the facility ($4.9 million).

pH

Woodland Pulp expressed concerns about the proposed pH provision, stating that it is untimely, inappropriate, and unnecessary to tighten the facility's pH restrictions. Referencing a passage from the economic analysis, Woodland Pulp asserts that it does not adjust pH prior to discharge. However, elsewhere in its comments, Woodland Pulp confirms adjustments to pH prior to discharge,[156] and provides additional information about the neutralization processes used.

[155] United States Environmental Protection Agency (U.S. EPA). 2014b. Technical Development Document for the Final Section 316(b) Existing Facilities Rule. EPA 821-R-14-002. May.

[156] For example, on page 13 of the comment, Woodland Pulp states that "[t]reatment is by primary clarification, pH adjustment, anaerobic settling, and aerated secondary treatment" (EPA-HQ-OW-2015-0804-0284).

Woodland Pulp also asserts that there have been times when the facility's effluent has fallen outside of the proposed pH range limitation, in contradiction to EPA's assumption in the economic analysis that the facility has met the proposed pH limitations in the past. The commenter states that EPA does not cite the historical data used in this review; but that is incorrect. Appendix D of the economic analysis states that the historical DMR data reviewed included 2010-2013 data for Outfall 001 in the fact sheet, which showed pH ranging between 6.6 and 8.3 SU, as well as 2011-2015 DMR data showing a range between 5.1 and 8.7 SU. Additionally, while it may be true – as the commenter states – that the facility's discharge has on occasion fallen outside of EPA's revised pH range, these observations do not indicate that EPA's assumption that the facility can meet the revised range is incorrect. Woodland Pulp has provided no evidence to contradict EPA's assertion that the facility can meet the revised pH range without process modifications, given its discharge history (with all observations being within the proposed range between 2010 and 2013) and current pH adjustment configurations.

Specific Comments

Coalition of Dischargers in Maine (Excerpt # 176)

Commenter ID: 0332

Name: William E. Taylor

Organization: Coalition of Dischargers in Maine

For the same reason, the economic impact analysis is insufficient and cannot be accurate since the actual scope of the proposal is unknown. A clear understanding of economic impact is particularly important since the proposed WQS provide no measurable benefit to the health of either the general population or Indian populations in Maine.

…

The Proposed Maine Rule and Supporting Documents Mischaracterize Important Facts About the Passamaquoddy Reservation and Impacts to Reservation Waters

In the Economic Analysis for the proposed WQS, EPA identifies five St. Croix River dischargers to waters in Indian lands, or their tributaries. EPA notes that only one of those dischargers, the Passamaquoddy POTW, discharges directly to waters in Indian lands to which EPA's proposed criteria would apply. See page 40 of the Economic Analysis. Later in the Economic Analysis, EPA contradicts itself and claims that the Woodland Pulp facility also "discharges directly to waters in Indian lands." See page 97 of the Economic Analysis. EPA identified three other facilities, Calais School, Calais POTW, and Washington County Community College, which discharge to the St. Croix River significantly upstream of the waters in Indian lands at Pleasant Point.

However, EPA makes no mention at that point of the Woodland Pulp facility, which is more than 10 miles farther upstream than the other three listed dischargers and therefore can have no measurable impact on waters at Pleasant Point.

...

Many long-term waste discharge treatment decisions have been based on the current WQS and permits issued under those standards. To now disapprove WQS upon which

permits have been based for many years unnecessarily increases and exacerbates the economic and regulatory impacts. Yet, EPA continues to fail in its obligations to approve or disapprove WQS. In its February 2, 2015 review and decision document, EPA again neither approves or disapproves certain proposed state WQS revisions. Most of these revisions for which EPA is not making a decision date back to 2006, and EPA's failure to reach a decision at this time on these revisions will cause further adverse impacts to Maine permittees.

EPA Response: The commenter's points regarding the St. Croix river are addressed in Topic 4. The comment that EPA has continued to fail to approve or disapprove proposed state WQS revisions is simply untrue. Collectively, EPA's decisions approving and disapproving Maine's WQS on February 2, March 16, and June 5, 2015, and January 19 and April 11, 2016 addressed all outstanding state WQS. There are no new or revised state WQS awaiting review and approval or disapproval by EPA.

Maine Department of Environmental Protection (Excerpt # 120)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

In addition, absent a clear definition of all Maine waters covered by the proposed rule, it would appear impossible for EPA (or anyone else) to perform an accurate or meaningful economic impact analysis. Without knowing exactly which facilities will be affected by the proposed rule, the Department (and presumably EPA) cannot measure or even estimate the economic impact or cost to Maine's communities and businesses that may need to upgrade systems or engage in other capital expenditures to meet EPA's new WQS. Indeed, it is unclear the extent or whether the EPA factored in these possible costs to point source dischargers in its estimates. Additionally, for non-point discharges, EPA itself stated that it "did not fully evaluate the potential for costs to nonpoint discharges ... " 81 Fed. Reg. 23259.

Woodland Pulp LLC (Excerpt # 199)

Commenter ID: 0284

Name: Jay Beaudoin

Organization: Woodland Pulp LLC

"Within the set of 33 facilities that discharge to waters in Indian lands or their tributaries, EPA identified Woodland Pulp LLC as the only facility for which the permit establishes a mixing zone that may extend to waters in Indian lands. *(16)*"

Woodland Pulp Comment: Woodland Pulp's Mixing zone does not occupy, extend to or impact any Indian reservation or Trust lands. The mixing zone was found to be

reasonable in accordance with Maine law. This mixing zone has been in place for nearly 20 years and EPA's discussion and proposed disapproval is untimely and inappropriate.

…

"Woodland Pulp LLC is currently permitted to contribute large thermal loadings to the St. Croix River and has an extensive thermal mixing zone (9.3 miles long). "

Woodland Pulp Comment: The use of the words large and extensive imply a bias and lack of understanding. The freshwater receiving segment is a warm water reach, water temperatures in summer above the discharge meet or exceed 78 degrees in most years. This temperature is above the upper incipient temperature for cold water fisheries such as brook trout and salmon. Maine however uses cold water fisheries as a basis for assessing temperature impacts which implies a much larger delta than actually occurs. Because this river is an International river Woodland Pulp uses an outfall instead of a diffuser. Accordingly, the mixing zone is not 9.3 miles but 4 miles with the other 5.3 miles being the zone of initial dilution where the effluent traverses to the other side of the reach. Initally the plume occupies about 1/3 of the river reach.

"MEDEP established the limits of this mixing zone many years (and permit cycles) ago and information on site-specific studies or models used to establish compliance is limited or not readily available for review."

Woodland Pulp Comment: The Mixing Zone was established in 1996, two permit cycles have occurred since. The use of the word many implies a bias. The statement about studies being limited or not readily available for review suggests the author(s) did not look too hard or were not interested in looking for that information. Studies occurred over multiple years and decades and are not limited.

"The current permit employs a variation of a mass balance using effluent temperature and river flow to calculate predicted river temperature increase at the edge of the mixing zone and compare this temperature to applicable criteria.

There are currently no in-stream monitoring requirements in the permit, although it does require the permittee to investigate technological alternatives to reduce cumulative thermal loading from the facility and report on projects and estimate reduced heat load as part of the next permit application."

Woodland Pulp Comment: Instream monitoring was conducted over a number of years, technological alternatives have been installed and reported and temperature has been reduced. Because the river is naturally dark colored and because the effluent is also colored the diurnal fluctuation of the river is on the order of 2 degrees F. The natural warm river temperature in this segment and diurnal fluctuation makes discerning to what degree the temperature in the river in the receiving reach is influenced by the Mill's discharge difficult. The dams on the St. Croix River allow the flows in this receiving water segment to be artificially augmented. Similarly, flows on renowned up stream fisheries such as Grand Lake Stream are also artificially augmented and enhanced by storage and releases from upstream dams. In its natural state the receiving reaches minimum flow would be significantly lower. In both the receiving segment and at popular fisheries such as Grand Lake Stream the absence of dams would significantly decrease available fish habitat. Releases from Dams such as the Woodland Dam also result in enrichment of certain aquatic insect stages, such as black flies, which in turn enhance available food in the receiving water segment.

…

3.1.4 pH

"The remaining facility (Woodland Pulp) has a permit that allows for discharges of effluent within a wider pH range (5.0 to 9.0 SU) based on technology-based limits in Effluent Guidelines and Standards (ELGs) for the Pulp, Paper, and Paperboard Point Source Category (40 CFR 430). The facility adjusts the pH of its effluent before discharge and historical DMR data demonstrate that the facility has been able in the past to meet the proposed criterion. See Appendix D for summary of EPA's review."

Woodland Pulp Comment: As noted Woodland Pulp's pH limit of 5.0 to 9.0 has been in place for more than 40 years. Woodland Pulp does not discharge to any waters in Indian lands. Woodland Pulp does not adjust the pH of its effluent before discharge. It is not cited what historical data was reviewed, but there have been times when the pH of the effluent as well as the river above the discharge, fell outside a 6.5 to 8.5 pH range. EPA's call to tighten Woodland Pulp's ph limit is untimely, unnecessary and inappropriate.

"Detailed information on neutralization methods employed by Woodland Pulp and their performance would be needed to evaluate the potential for additional costs related to treatment of acidic effluent. Given the limited information available and evidence that the facility already adjusts pH and achieves levels above 6.5, EPA assumed that any incremental costs would be minimal."

Woodland Pulp Comment: Woodland Pulp mixes acidic, neutral and alkaline effluents prior to secondary treatment. This results in a primarily alkaline influent to secondary treatment with sulfuric acid added to keep influent to secondary treatment pH levels below 9.0 – 9.5 s.u. Fungi and anaerobic activity in the secondary aeration basins further neutralize pH to a typical 7.5-7.8 pH over a 7 day retention time. Information is not limited and could have easily been found in the 2014 permit fact sheet. Woodland Pulp's effluent is not acidic. EPA or their contractor should not make unfounded assumptions especially where they are potentially impacting the costs of business and the local economy.

"3.1.6 Mixing Zone

EPA disapproval of Maine's mixing zone policy may affect dischargers for which MEDEP established mixing zones. Compared to the disapproved mixing zone policy, the proposed mixing zone policy provides greater protection for designated aquatic life uses by:

- clarifying the extent to which criteria may be exceeded in a mixing zone;
- specifying that mixing zone must be as small as necessary, and pollutant concentrations must be minimized and reflect the best practicable engineering design of the outfall to maximize initial mixing;
- requiring the use of methodologies in EPA's "Technical Support Document for Water Quality-based Toxics Control";
- prohibiting the use of a mixing zone for bioaccumulative pollutants and for bacteria; and
- establishing a number of restrictions to protect designated uses, including requirements that the mixing zone not result in lethality to organisms passing through or within the mixing zone, and not endanger critical areas such as breeding and spawning grounds, habitat for threatened or endangered species, and areas with sensitive biota, shellfish beds, fisheries, and recreational areas."

Woodland Pulp Comment: Maine has a mixing zone law which is not a policy. EPA's proposed mixing zone policy has significant cost impacts which are not accounted for. The costs for studies to meet EPA's policy requirement would be in the multiple 100's of thousands of dollars range. EPA's policy creates an unnecessarily broad requirements for a thermal mixing zone and does not differentiate from bio-accumulating discharges where it should.

"EPA found only one permit that contains adjusted effluent limits based on a mixing zone (Woodland Pulp, with a mixing zone for heat). The implications for that discharger of changes in the mixing zone policy are uncertain, but could include the need to conduct more detailed assessments of thermal impacts, recalculate the spatial or volumetric limitations for the zone of initial dilution (ZID) and thermal mixing zone, and require zones of passage. A smaller available mixing zone resulting from the proposed rule may lead the discharger to seek a CWA section 316(a) thermal variance *(19)* rather than having to meet otherwise applicable thermal limitations. To support such a variance request, the discharger would need to conduct a section 316(a) Demonstration Study during renewal of the discharge permit. Such field studies can require significant levels of effort. Further, if the thermal effluent variance request is denied, the discharger may be required to upgrade or install new technologies to reduce discharge thermal loading and/or modify discharge conditions or structures. Design, engineering and implementation of such new technologies or adoption of improved operational practices can represent major costs."

Woodland Pulp's Comment: It is inappropriate for EPA to be promulgating a rule that seeks to override state law, significantly impact an already depressed county economy and without conducting proper cost analysis. The statement "the implications for that discharger of changes in the mixing zone policy is uncertain but could include" is very inappropriate. Not withstanding the fact that the Woodland Mill's mixing zone does not impact waters in Indian lands or sustenance fishing, the EPA and its contractor have an obligation to properly vet and cost out such mandates.

"To understand the potential implications for the discharger, EPA reviewed information available for this facility. Exhibit 3-5 summarizes key information regarding the thermal mixing zone at this facility.

Exhibit 3-5. Discharger with Thermal Mixing Zone Affecting Waters in Indian Lands

Facility	Permit Conditions
Woodland Pulp LLC (ME 0001872)	1. Thermal discharge to the St. Croix River with seasonal limits (June 1 – September 30) 2. Permit defines a zone of initial dilution (ZID) over a 5.3 mile segment of river (to Baring railroad trestle) and a mixing zone extending 4.0 mile downstream from the edge of the ZID (from Baring railroad trestle to Milltown dam) 3. Thermal survey conducted by GPC in 1989 indicated >2°F increase below the discharge point. ME Division of Environmental and Assessment (ME DEA) developed QUAL2E model using GPC data to calibrate the model. The model predicted a temperature increase of 1.1°F at end of ZID. ME DEA and GPC concurred that separation of discharge impacts from natural diurnal temperature fluctuations was difficult and that it was preferable to establish a formal mixing zone.

4. The 1996 WDL established the original average and daily maximum thermal load limitations and ZID and thermal mixing zone.
5. The 1996 WDL stated that no testing shall be conducted for thermal violations within designated ZID or established mixing zone. The 1996 WDL also contained special conditions requiring the plant to investigate ways to reduce heat loads.
6. Four cooling towers were installed in 1997. Plant ceased using two of them in 1998 due to operation and maintenance problems.
7. 2005 permit required continuous in-stream monitoring between June and September but requirements were discontinued in 2012.
8. Based on its review of the monitoring report for 2012, MEDEP concluded that "the thermal discharge resulted in temperature greater than would be allowed under DEP's temperature rule, if not for the existence of a mixing zone where the rule does not apply"

Sources:
Woodland Pulp LLC: MEPDES Permit #ME0001872; Maine WDL Application #W002766-5N-J-R, June 28, 2014

[22] DMR data are available from http://cfpub.epa.gov/dmr/index.cfm. Accessed October 23, 2015

"4.1.1 Dischargers to Waters in Indian Lands or Tributaries

Factors that may affect the potential magnitude of compliance costs include effluent flow and type of facility. Larger flows are typically associated with the largest treatment costs, although per-unit costs may decrease due to economies of scale. A facility's industrial category may also be indicative of the potential to incur costs.

As described in Section 1.2, EPA determined that 33 facilities (major and non-major) discharge to waters in Indian lands or their tributaries. Exhibit 4-1 provides a summary of the facilities that discharge to waters in Indian lands or their tributaries. Appendix A provides additional information on these facilities.

EPA notes that almost all (29) facilities discharge to fresh waters, to which the proposed HHC for the consumption of water and organisms would apply. Some of these facilities discharge directly to the waters in Indian lands to which EPA's proposed criteria would apply. Many of the facilities, however, discharge upstream of the waters in Indian lands (including tributaries of such waters), and limits on those discharges would need to ensure that EPA's proposed criteria are met at the boundary of the waters in Indian lands, not at the point of discharge. Four facilities discharge to estuarine or marine waters, to which the HHC for the consumption of organisms only would apply. Only one of these (the Passamaquoddy POTW) discharges directly to waters in Indian lands to which EPA's proposed criteria would apply. The other three facilities (Calais School, Calais POTW, and Washington County Community College) discharge to the St Croix River significantly upstream of the waters in Indian lands at Pleasant Point."

Woodland Pulp Comment: Woodland Pulp's secondary treated effluent point source is more than 10 miles further upstream than the Calais School, Calais POTW and Washington County Community College.

"Exhibit 4-1. Summary of Dischargers to Waters in Indian Lands or Their Tributaries

MEPDES Number	Facility Name	Facility Type	Receiving Surface Waters (Class)	Permitted Monthly Average Flow (MGD
ME0036668	West Enfield Hydro Project	Industrial (hydroelectric)	Penobscot River (B)	0.403
ME0036668	Woodland Hydro	Industrial (hydroelectric)	St. Croix River (C)	0.194
ME0001872	Woodland Pulp	Industrial (pulp mill)	St. Croix River (C)	30
ME0022063	Woodland Pulp: North Site	Industrial (logging)	St. Croix River (C)	16.16

Woodland Pulp Comment: The Woodland Pulp North site contains a boiler and turbine which could be used to make power by burning biomass or gas. A natural gas compression facility is also located at this site.

MEPDES Number	Facility Name	Pollutants with Detected Effluent Data Available[1]	Pollutants with Reasonable Potential
ME0036668	West Enfield Hydro Project	None	None
ME0036668	Woodland Hydro	None	None
ME0001872	Woodland Pulp	Mercury	None
ME0022063	Woodland Pulp: North Site	None	None

Woodland Pulp Comment: ME0036668 is the permit number for Woodland Hydro. This permit number is not associated with West Enfield Hydro.

"4.4 Costs from the Proposed Mixing Zone Policy

As discussed in Section 3.1.6, one facility discharging to waters in Indian lands (or their tributaries) has an existing permit that establishes a mixing zone (Woodland Pulp LLC, which has a thermal mixing zone)."

Woodland Pulp Comment: Woodland Pulp's secondary treated effluent point source is more than 10 miles further upstream than the Calais School, Calais POTW and Washington County Community College. If these facilities "discharge to the St Croix River significantly upstream of the waters in Indian lands at Pleasant Point". Then Woodland Pulp's discharge should be similarly classified.

"The impacts of proposed WQS are difficult to predict and will depend on how the policy is implemented for this permit. Possible outcomes include: various revisions to permit conditions that could require recalculating thermal discharge limits; the need for facility specific studies to define a mixing zone consistent with the proposed mixing zone policy; or changes in the facility processes or operations to reduce the effluent thermal load. There were too many unknowns for EPA to be able to assess low end of the cost implications of the proposed mixing zone policy. Therefore, to assess potential cost impacts of the proposed mixing zone policy, EPA considered a worst-case scenario in which the facility would need to retrofit cooling towers to meet more stringent thermal limits."

Woodland Pulp Comment: EPA wrongly assumes that cooling towers at Woodland Pulp have a much larger capacity than they actually have. The capacity of the cooling towers

not in use is 1.2 MGD. They are located on a roof and there are concerns related to the supporting structure.

"Specifically, EPA estimated the costs of retrofitting cooling towers at the facility using the same approach from its analysis of the Final Section 316(b) Existing Facilities Rule (U.S. EPA, 2014b) and assuming costs for "difficult" retrofits.*(40)* In applying that approach in this analysis, EPA approximated the maximum reported intake flow (MRIF; used in calculating the costs) as equal to the total monthly average permitted flows for process and non-cooling water (MGD). EPA annualized all capital costs using a 3 percent discount rate (see Appendix E for results using a 7 percent discount rate), and, consistent with U.S. EPA (2014b), assuming a cooling tower useful life of 30 years.

Exhibit 4-7 presents rough cost estimates for the facility. Total annualized costs are approximately $273,000. Note that the estimates do not account for potential cost savings from water and energy efficiency improvements.

Exhibit 4-7. Estimates of Cooling Tower Retrofit Costs at Facility with Thermal Mixing Zone for Discharges to Waters in Indian Lands or Tributaries

Facility Name (Flow Rate)[1]	Cost Component [2]	Estimated Costs (Thousand Dollars)		
	Component Costs (2009$)	Component Costs (2014$)		Annualized Costs (2014$) [3]
Woodland Pulp [4] (15.0 MGD)	Capital costs [5]	$4,281	$4,899	$243
	Fixed O&M costs	$13	$15	$15
	Variable O&M costs - chemicals	$13	$15	$15
	Variable O&M costs – Pump and Fan Power	$0	$0	$0
	Total		***$273***	

1. Maximum intake flow rate is assumed to be equal to the total monthly average non-contact cooling water flow rate in each permit, assuming that cooling towers would be sized based on that flow.

2. Cost components from U.S. EPA (2014b), Exhibit 8-9. Capital cost = $411/gpm; fixed O&M costs = $1.27/gpm; variable O&M costs for chemicals = $1.25/gpm; Variable O&M costs for pump and fan power = $0.0000237/gpm.

3. EPA annualized capital costs using a 3 percent discount rate (see Appendix E for results using a 7 percent discount rate), and, consistent with U.S. EPA (2014b), assuming a cooling tower useful life of 30 years.

4. Information provided in the 2014 WDL suggests that Woodland Pulp operates two cooling towers of the total four cooling towers constructed at the plant. Accordingly, retrofit costs are expected to be overstated.

5. EPA notes that the cost estimates for Woodland Pulp are generally consistent with anecdotal information EPA found on the construction costs of the four cooling towers at the Woodland Pulp facility in 1996: $3.5 to $7.2 million (after adjusting to 2014 dollars), as compared to $4.9 million estimated by EPA.

As discussed above, cooling tower retrofits represent an upper bound scenario for potential impacts. The cost estimate for the Woodland Pulp facility may be further overstated since EPA assumed that new cooling towers would be required whereas the plant already has four cooling towers and operates two of these towers. For the purpose of this analysis, EPA assumed that the Woodland Pulp may need to take additional measures to reduce the heat load of its effluent, for which the cost of constructing the cooling towers provides an upper bound."

Woodland Pulp Comments: Whereas this proposed rule has potentially significant It is not appropriate to base a cost analysis on erroneous anecdotal information Woodland Pulp main cooling tower is in 2 cells and cost $ 1,400,000 in 1996 ($2,157,231.27 in 2016 dollars) Hot and warm water from the Mills warm water tank is passed through the

unit and recycled back into the intake water treatment plants clearwell. Its capacity is 12 MGD. The other two cooling towers operate on independent cells, this unit cost $600,000 in 1996 ($924,527.69 in 2016 dollars) capacity of each cell is about 600,000 gpd or 1.2 MGD total. These units were used to cooling paper machine and pulp dryer vacuum filter cooling water. Due to the lack of pre-filtration these units fouled and were not reliable. Theses units are located on a roof and supporting infrastructure upgrades are needed to make them operational. We do not agree that retrofit costs are overstated, we find them to be under. Not withstanding that retrofitting these small towers will not provide for significant thermal discharge relief, nor will a total cooling capacity of 15 MGD. The Mill's secondary treatment system relies on effluent temperature in the winter months.

It is unclear what purpose lumping a thermal mixing zone in with human health criteria serves. The receiving reach is a warm water fishery which is abundant and healthy as a result of the thermal discharge.

"As described in Sections 4.1 through 4.4, EPA estimates that one facility may incur some incremental costs to meet the proposed HHC for waters in Indian lands, 14 facilities could incur costs due to proposed bacteria criteria for waters in Indian lands, and one facility could incur costs due to the proposed mixing zone policy.

Exhibit 6-3. Summary of Upper Bound Estimated of Compliance Costs for Proposed Mixing Zone Policy[1]

Facility Name	Flow Rate (MGD)	Annualized Costs (thousands; 2014$)[2]
Woodland Pulp	15.0	$273
Total (Upper Bound)	**--**	***$273***

1. See Section 4.4 for a description of methods, assumptions, and uncertainties.
2. One-time costs annualized over 30 years using a 3 percent discount rate; for costs annualized using a 7 percent discount rate, see Appendix E.

A.1.2 Reasonable Potential Analysis

This facility and Woodland Pulp (Section A.32) both discharge to the St. Croix River, a water in Indian lands. Effluent monitoring data for both facilities show detected levels of mercury. Additionally, the flow meets with discharge from the Calais POTW downstream, eventually reaching Passamaquoddy Bay which is a water in Indian lands at Pleasant Point. As such, EPA conducted the reasonable potential analysis considering the impacts of dischargers to waters in Indian lands, both at the point of discharge (for Baileyville POTW and Woodland Pulp) and cumulatively downstream where the discharges from all three facilities meet in Passamaquoddy Bay. Exhibit A-2 summarizes the load allocation among the facilities based on permitted flows and average effluent concentrations.

Exhibit A-2. Mercury Load Allocation for St. Croix River and Passamaquoddy Bay

Facility	Permitted Flow (MGD)[1]	Avg Effluent Conc. (µg/L)[2]	Loading (lb/day)[3]	Share of Loading[4]
Discharge Point				
Woodland Pulp	30.0	0.00206	0.00051	98.1%
Baileyville POTW	0.6	0.00194	0.00001	1.9%
Total		0.00052	100.0%	
Downstream				

Woodland Pulp	30.0	0.00206	0.00051	78.7%
Calais POTW	1.5	0.01033	0.00013	19.8%
Baileyville POTW	0.6	0.00194	0.00001	1.5%
Total		0.00065	100.0%	

1. Based on permit fact sheets.
2. See Exhibit A-1 for Baileyville POTW, Exhibit A-4 for Calais POTW, and Exhibit A-35 for Woodland Pulp.
3. Permitted flow times average effluent concentration times 0.00834 (conversion from µg/L to lb/gallon).
4. Facility loading divided by total loading.

At the point of Baileyville POTW's discharge, where its flow enters waters in Indian lands, the St. Croix River has a harmonic mean flow of 1,171 MGD."

Woodland Pulp Comment: Baileyville's secondary treated effluent point source is more than 10 miles further upstream than the Calais School, Calais POTW and Washington County Community College. If these facilities "discharge to the St Croix River significantly upstream of the waters in Indian lands at Pleasant Point". Then Baileyville's discharge should be similarly classified.

"Downstream in Passamaquoddy Bay, EPA estimated an equivalent receiving water flow of 24,333 MGD (see Appendix C). EPA calculated the river's assimilative mercury capacity from the facility at that point based on the flow, the applicable criterion (see Section 3), a background concentration equal to 10 percent of the criterion, and the facility share. If the facility's contribution to the receiving water is higher than the associated assimilative capacity, then there is reasonable potential. As shown in Exhibit A-3, the facility (Baileyville POTW) has no reasonable potential to exceed the proposed mercury criteria.

"A.3.2 Reasonable Potential Analysis

This facility discharges to the St. Croix River, downstream of the Baileyville POTW and Woodland Pulp facilities. Downstream of Calais, the river enters Passamaquoddy Bay at Pleasant Point. As noted in Section A.1.2, Baileyville POTW and Woodland Pulp both have detected mercury concentrations in their effluent, as does the Calais POTW. EPA conducted the reasonable potential analysis considering the cumulative impact of the three dischargers at the point where the flow enters waters in Indian lands. Exhibit A-2 shows the mercury allocation among the three dischargers.

At the point where the facility's(Calais POTW flow reaches waters in Indian lands (Passamaquoddy Bay at Pleasant Point), EPA estimated that the flow is 24,333 MGD (see Appendix C). EPA calculated the receiving water's assimilative capacity from the facility at that point based on the flow, the applicable criterion (see Section 3), a background concentration equal to 10 percent of the criterion, and the facility share. If the facility's contribution to the receiving water is higher than the associated assimilative capacity, then there is reasonable potential. As shown in Exhibit A-5, the facility does not have reasonable potential to exceed the proposed or baseline criteria.

A.31 Woodland Hydro

The Woodland Hydro Project (NPDES permit ME0036668) is a hydroelectric generating facility owned by Woodland Pulp, with discharges of non-contact cooling water and other miscellaneous discharges *(48)* from 6 separate outfalls to the St. Croix River (Class C). The facility has a discharge limit of 194,000 gallons per day. According to the permit fact

sheet for the facility, “the Department has determined that neither effluent limitations nor monitoring requirements are necessary to ensure that applicable water quality standards are met” (p. 4). As such, EPA assumes that there is no reasonable potential for this facility to exceed the proposed criteria, and that this facility will not have any costs.

A.32 Woodland Pulp

Woodland Pulp (NPDES permit ME0001872) is a kraft pulp mill. The facility has a monthly average flow limitation of 30 MGD and an average monthly flow (January 2010 through July 2013) of 24.8 MGD. The facility discharges treated wastewater to the St. Croix River, which is classified as a Class C freshwater at the point of discharge. The 2014 permit fact sheet reports that the facility employs treatment via primary clarification, sand filters, and sludge separation."

Woodland Pulp Comment: Treatment is by primary clarification, ph adjustment, anaerobic settling, and aerated secondary treatment. Intake water is treated by sand filters. The 2014 permit fact sheet details Woodland Pulp’s treatment system.

"A.32.1 Effluent Data

Exhibit A-35 summarizes the last five years of effluent monitoring data for priority pollutants for which data are available and at least one observation was above the detection level.

Exhibit A-35. Summary of Effluent Data: Woodland Pulp

Pollutant[1]	Total Number of Observations[2]	DL (µg/L)[3]	Effluent Concentrations (µg/L)[4]	
			Maximum	Average
Mercury	18	0.004	0.002	

Source: Priority pollutant scan report for October 2010 through October 2015.

1. Includes only pollutants for which there was at least one detected value (all others were unmonitored or all nondetects).
2. Number of observations includes results above and below detection levels.
3. DL = detection level; blanks indicate that no detection level was specified.
4. For pollutants with some detected values, nondetects were assumed to be half the detection level.

A.32.2 Reasonable Potential Analysis

This facility discharges directly to waters in Indian lands. As such, EPA conducted the reasonable potential analysis for this facility at the point of discharge. Based on effluent concentrations in Exhibit A-35, a receiving water harmonic mean flow of 1,171 MGD, a monthly average flow limit of 30 MGD, and a background concentration equal to 10 percent of the applicable criterion (see 2014 permit fact sheet), there is no reasonable potential to exceed the HHC.

As described in Section A.15.2, this facility and the Baileyville POTW both discharge to the St. Croix River in Indian lands, and both have detected mercury concentrations in their effluent. Exhibit A-2 shows the mercury load allocations for the two facilities based on flow limitations and average effluent concentrations.

At its point of discharge, where Woodland Pulp’s effluent reaches waters in Indian lands, the St. Croix River has a harmonic mean flow of 1,171 MGD. EPA calculated the river’s assimilative capacity from the facility at that point for each pollutant based on the flow, the applicable criterion (see Section 3), a background concentration equal to 10 percent of the criterion, and the facility share. If the facility’s contribution to the receiving water is

higher than the associated assimilative capacity, then there is reasonable potential. As shown in Exhibit A-36, the facility does not have reasonable potential to exceed any criteria.

Exhibit A-36. Reasonable Potential Analysis for Woodland Pulp

Pollutant	Multiplier[1]	RWC (lb/day)[2]	Share[3]		Assimilative Capacity from Facility (lb/day)[4]
Proposed			**Baseline**		
Mercury, discharge point	1.3	0.00130	98.1%	0.00466	NA
Mercury, downstream	1.3	0.00130	78.7%	0.07767	NA

1. Multiplier from US EPA (1991; Table 3-2) based on number of observations and coefficient of variation.
2. RWC = receiving water contribution. Based on the maximum observed concentration (converted from µg/L to pounds per million gallons using a conversion factor of 0.00834) times the multiplier times facility flow limitation.
3. See Exhibit A-2 for mercury load allocation.
4. Based on the applicable criterion (freshwater at the point of discharge and marine downstream; converted from µg/L to pounds per million gallons using a conversion factor of 0.00834) minus background concentration (10 percent of criterion) times stream flow in Indian lands times the facility share. “NA” indicates that the aquatic life criterion is more stringent than the human health criterion, so no incremental costs are expected to result from the proposed human health criterion. Bolded red values indicate that the calculated facility RWC is higher than the assimilative capacity from that facility, and there is reasonable potential

A.33 Woodland Pulp: North Site

Woodland Pulp also has a separate permit for its North Site (NPDES permit ME0022063). This permit is for non-contact cooling water and miscellaneous non-process wastewaters *(49)* discharged to the St. Croix River (Class C). The facility is authorized to discharge up to 15.0 MGD of cooling water (with an average reported discharge of approximately 14 MGD) and 160,000 gallons per day of non-process wastewaters (with an average daily flow of approximately 60,000 gallons). However, the non-process wastewater discharge is not active.

Additionally, due to the nature of other discharges (cooling water only), there are no limits on human health related pollutants, nor any priority pollutant scan requirements associated with this permit. For this analysis, EPA assumes that there is no reasonable potential for this discharger to exceed the proposed criteria, and that it will not have any costs."

"C.2 Dissolved Concentration Potential

NOAA developed dissolved concentration potential (DCP) estimates for East Coast estuaries (NOAA and EPA, 1989) based on the rate and volume of freshwater inflows into the estuary, relative to the total volume of the estuary. The DCP reflects the effect of flushing and estuarine dilution on a load of a conservative, dissolved pollutant to an estuary, assuming average concentration throughout the estuary and steady-state conditions.

For this analysis, EPA used the DCP for Passamaquoddy Bay to calculate a rough estimate of potential concentrations in the Bay from permitted discharges to the St. Croix River from Calais POTW and Woodland Pulp facilities about 20 and 30 miles upstream, respectively, from Indian lands at Pleasant Point.

The DCP may be used to calculate the concentration in the Bay, C_{bay}, as follows: [1] CCBBBBBB=LL × DDDDDD10000

Where L is the pollutant load in tons per year, calculated from the permitted flow rate and effluent concentration.

NOAA/EPA estimated a DCP for Passamaquoddy Bay of 0.27. After replacing the pollutant load L in equation 1 by the product of the effluent concentration and flow rate, adding appropriate unit conversion factors, and rearranging the terms, we get the following ratio between concentration in the effluent and concentration in the Bay, i.e., dilution factor:

[2] $\square\square_{eeeeeeeeeeeeeee\square\square BBBBBB} = 100008.34 \times QQ_{eeeeeeeeeeeeeee} \times 365 \times 0.0005 \times DDDDDD$

Where $Q_{effluent}$ is the effluent discharge flow limit, in MGD.

The dilution factor is 16,222:1 for the Calais POTW, based on a permitted monthly average discharge flows of

1.5 MGD, and 811:1 for the Woodland Pulp facility, based on permitted monthly average discharge flows of 30 MGD.

Note that this approach to estimating dilution factors differs from that used by MEDEP in cases where a facility discharges directly to estuarine or coastal waters. EPA determined that the use of DCP is appropriate in this case since the discharge does not occur directly in estuarine waters but occurs in the St. Croix river 20 to 30 miles upstream from Passamaquoddy Bay; it can reasonably be assumed to be well-mixed by the time it reaches the Bay.

D.6 Woodland Pulp

The permit authorizes the daily maximum discharge of 40 MGD of treated process waste water, treated sanitary waste waters, treated landfill leachate, treated residuals storage pads leachate and other miscellaneous waste waters associated with the kraft pulp and papermaking process and related operations, and a monthly average discharge of 5.6 MGD of treated storm water runoff and a non-contact cooling waters to St. Croix River. The most stringent dilution factor is 4.6:1."

Woodland Pulp Comment: There is no 40 MGD limit in Woodland Pulp's 2014 permit. The permit established a daily maximum pH range limitation of 5.0-9.0 SU, based on technology standards in 40 CFR part 430 (Effluent Guidelines and Standards for the Pulp, Paper, and Paperboard Point Source Category), with a footnote exempting the permittee from violations of the limit if the discharge is within 0.5 SU of the pH of the precipitation or the ambient receiving water pH.

"Evaluation: Within the facility is an "acid sewer" line with flow that must be treated and neutralized."

Woodland Pulp Comment: Woodland Pulp mixes acidic, neutral and alkaline effluents prior to secondary treatment. This results in a primarily alkaline influent to secondary treatment with sulfuric acid added to keep influent pH levels below 9.0 – 9.5 s.u. Fungi and anaerobic activity in the secondary aeration basins further neutralize ph to a typical 7.5-7.8 pH over a 7 day retention time. Information is not limited and could have easily been found in the 2014 permit fact sheet. Woodland Pulps effluent is not acidic. EPA or their contractor should not make unfounded assumptions especially where they are impacting the costs of business and the local economy.

"The permit provides no indication of compliance problems with meeting the current pH permit conditions. Historical DMR data included in the fact sheet for Outfall 001 and the period of 2010-2013, shows pH ranging between 6.6 and 8.3 SU, whereas DMR data for the period of 2011-2015 show a range of 5.1 to 8.7 SU. While the facility operations could potentially be affected by the proposed pH criterion (which is more limiting that the existing pH range in effluent limits), the limited information available in the permit fact sheet suggests that the facility may already be able to meet the proposed pH criterion.

E Potential Point Source Compliance Costs, 7% Discount Rate

This section summarizes the point source compliance costs using a 7 percent discount rate as an alternative to the main analysis, presented in Section 6.1, which uses a 3 percent discount rate. For more details on the methodology for these analyses, see Section 4.

Exhibit E-3. Summary of Upper Bound Estimated of Compliance Costs for Proposed Mixing Zone Policy[1]

Facility Name	Flow Rate (MGD)	Annualized Costs (thousands; 2014$)[2]
Woodland Pulp	15.0	$399
Total (Upper Bound)	**--**	***$399***

1. See Section 4.4 for a description of methods, assumptions, and uncertainties.
2. One-time costs annualized over 30 years using a 7 percent discount rate; see Section 6.1 for costs annualized using a 3 percent discount rate.

(16) Additional facilities have permits for thermal discharges but do not have mixing zones for these discharges.

(19) Section 316(a) of the CWA authorizes the NPDES permitting authority to impose alternative effluent limitations (i.e., a thermal variance from the otherwise applicable effluent limit) if the discharger demonstrates that the otherwise applicable thermal discharge effluent limit is more stringent than necessary to assure the protection and propagation of the waterbody's balanced, indigenous population (BIP) of shellfish, fish and wildlife.

(40) As discussed in EPA (2014; page 8-25), "For manufacturing facilities, EPA recognizes that cooling tower retrofits will need to be integrated into the existing manufacturing processes at different locations within the plant and it is expected that in many instances difficulties will be encountered to a greater degree and frequency than at power generators. Such difficulties may involve space constraints, reconfiguration of process piping, long piping runs, conflicts with existing piping and infrastructure, and utilities. These are some of the factors that EPRI cited as contributing to a "difficult" designation for a cooling tower retrofit. In addition, the cooling towers are likely to be installed as smaller units serving individual processes throughout the plant, thus reducing the opportunity for savings from economies of scale that may be achievable at power generators."

(48) Including shaft lubrication waters, foundation leakage waters, and/or leakage from wicket gates or other equipment.

(49) Primarily boiler blowdown and water softener backwash

Counsel for Penobscot Nation (Excerpt # 135)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

Economic Analysis

The Nation supports EPA's proposed economic analysis and would like to highlight EPA's conclusion that there would be very little economic impact to the State or existing dischargers based on the proposed WQS in Penobscot territory and its sustenance fishery reservation.

Bowdell, F. (Excerpt # 41)

Commenter ID: 0280

Name: Fran Bowdell

Organization: None

As I understand it, there are 15 waste water treatment plants, an industrial business, and a paper mill that discharge into the Penobscot River. Maine issues permits and monitors the discharges from these sources. The

EPA has oversight of this process. The natural question here is how much would it cost to make the necessary improvements? And who would pay? I understand that there are sources of grants available (some federal, some not) that if applied for could help to make the necessary improvements. The cost analysis that was done to assess the cost of improvements (available from EPA) does not seem to me to be out of reach. It is not an impossible task, just a necessary one.

American Forest and Paper Association (Excerpt # 216)

Commenter ID: Public Hearing June 7, 2016

Name: Jerry Schwartz

Organization: American Forest and Paper Association

EPA projected minimal compliance cost for Washington just as it does for Maine. We don't think either of those compliance cost studies are valid and both significantly underestimate actual cost likely to be incurred.

…

Understandably there's a lot of emotion around these issues but government agencies must adopt policies based on facts, data and analysis and appropriately balance benefits and costs. Potentially imposing huge compliance costs to reduce less than one theoretical

cancer per year does not meet that test. Accordingly we urge EPA to withdraw the proposal. Thank you.

Topic 17 Other

EPA received some comments related to the rule that did not fall within the general topic categories above, and EPA provides specific responses below to those comments. EPA also received a number of comments on matters related to water quality generally but not specifically to the rule. EPA appreciates those commenters' concerns about protecting water quality, including drinking water, but is not responding to those comments because they are beyond the scope of the rule.

Maine Department of Environmental Protection (Excerpt # 208)

Commenter ID: 0330

Name: Paul Mercer

Organization: Maine Department of Environmental Protection

… The Department has similar concerns about whether a sufficient degree of care was used by the EPA in promulgating these standards. For instance, in addition to deficiencies in economic impact analysis mentioned, the Department has noticed errors in the WQS, such as the listing of a non-priority pollutant, Bis(2-Chloro-1-Methylethyl) Ether, in EPA figures.

EPA Response: EPA recognizes that there has been some confusion about this pollutant. In the final rule EPA has promulgated the chemical abstract service (CAS) number currently used by the state of Maine with the correct name, bis(2-chloro-1-methylethyl) ether. For further information, see the technical support document titled *Clarification of the relationship between bis(2-chloro-1-methylethyl) ether (CASRN 108-60-1) and bis(2-chloroisopropyl) ether* in the docket.

Counsel for Penobscot Nation (Excerpt # 201)

Commenter ID: 0333

Name: David M. Kallin and Kaighn Smith Jr.

Organization: Counsel for Penobscot Nation

...

In a separate proceeding, the Nation currently has pending before the EPA an application for Treatment as a State (TAS) seeking authority and approval of the Nation's water quality standards under the CWA. The Nation's position is that EPA's actions with regard to this Docket ID No. EPA-HQ-OW-2015-0804, does not constitute any determination by EPA about any issue presented in the Nation's separate TAS proceeding. The Nation asks that EPA confirm that EPA shares this position, or in the

alternative, if EPA does not share this position, the Nation incorporates by reference all materials submitted by it in that separate proceeding.

EPA Response: EPA confirms the Penobscot Nation's understanding that this rule does not constitute any determination by EPA about any issue presented in the Nation's pending, separate TAS application.

Houlton Band of Maliseet Indians (Excerpt # 218)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

…

The Band also supports EPA's determination that certain WQSs approved in other Maine waters many years ago, no longer satisfy CWA requirements. (9) Id.

(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.

EPA Response: EPA has encouraged Maine to revise these six WQS for waters outside Indian lands to protect uses based on the best available scientific information, and EPA expects that Maine will do so during its next triennial review.

Center for Biological Diversity (Excerpt # 129)

Commenter ID: 0300

Name: Brett Hartl

Organization: Center for Biological Diversity

Thank you for the opportunity to comment on the Environmental Protection Agency's ("EPA") proposed federal water quality standards applicable to Maine. *(1)* While we are encouraged that the EPA has taken this important step to improve Maine's water quality

standards relating to aquatic life, we are concerned that EPA appears to be moving forward in finalizing these standards without consulting on the potential impacts to endangered species as required by the Endangered Species Act ("ESA"). We ask that EPA complete consultations under Section 7 of the Endangered Species Act with the National Marine Fisheries Service ("NMFS") before finalizing these criteria. Until consultations are complete, EPA cannot ensure it is adopting legally defensible criteria.

The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than one million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life.

In April, the EPA proposed several water quality standards for Maine. In particular, for class "A" fresh waters, EPA proposed a year-round dissolved oxygen ("DO") concentration of less than 7 mg/L, or 75% of saturation. Additionally, between October 1 and May 14, EPA proposed a 7-day mean DO concentration of less than 9.5 mg/L and a 1-day minimum of less than 8 mg/L for class "A" waters to protect early life stages of cold water species.

We appreciate EPA's attempt to protect early life stages of coldwater species. However, by failing to engage in mandatory consultations with NMFS, EPA is ignoring the possibility that this standard is still insufficient to protect all life-stages of federally listed threatened and endangered species in Maine. The shortnose sturgeon, Atlantic sturgeon, and Atlantic salmon are especially sensitive to decreased levels of dissolved oxygen, with sturgeons in particular having a poor ability to oxyregulate when oxygen levels fluctuate. *(2)*

The Clean Water Act ("CWA") mandates that water quality standards protect all aquatic organisms established taking into consideration their use and value for . . . propagation of fish and wildlife," among other things. *(3)* EPA's regulations require states to develop standards that will "[s]erve the purposes of the Act," meaning that they will "provide water quality for the protection and propagation of fish, shellfish and wildlife," among other things. *(4)* Any new or revised WQS must be submitted to EPA for review, to determine whether it meets the CWA's requirements, and for approval or disapproval under Section 303(c)(2)(A) and (c)(3)). If EPA disapproves a state's new or revised standard, the CWA provides the state ninety days to adopt a revised standard that meets CWA requirements. If the State fails to do so, the EPA must promptly propose and then promulgate a federal standard unless EPA approves a state replacement standard first. *(5)* If the state ultimately adopts a new standard, and EPA approves that standard, then EPA would withdraw its federal-promulgated standard.

Under Section 7 of the Endangered Species Act ("ESA") and its implementing regulations each federal agency, in consultation with the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively the "Services"), must insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. *(6)*

"Agency action" is broadly defined under the ESA to include "all activities . . . of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." *(7)* The Services' regulations provide the following examples of agency actions:

(a) actions intended to conserve listed species or their habitat;
(b) the promulgation of regulations;
(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
(d) actions directly or indirectly causing modifications to the land, water, or air. *(8)*

Under the Services' joint regulations implementing the ESA, an action agency such as the EPA must initiate consultation under Section 7 whenever its discretionary action "may affect" a listed species or critical habitat. *(9)* The Joint Consultation Handbook defines "may affect" as:

> The appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat. When the Federal agency proposing the action determines that a "may affect" situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action "is not likely to adversely affect"…. listed species. *(10)*

As the court in Karuk Tribe of California v. U.S. Forest Service stated, "[A]ctions that have any chance of affecting listed species or critical habitat — even if it is later determined that the actions are 'not likely' to do so — require at least some consultation under the ESA." *(11)* Thus, only where the action agency determines that its action will have "no effect" on listed species or designated critical habitat, even if the effect is beneficial, is the consultation obligation lifted. *(12)* Promulgating the dissolved oxygen standard is an agency action that clearly and unambiguously meets the low threshold triggering the consultation processes.

EPA's duty to complete its Section 7 consultation process prior to finalizing any criteria is confirmed by the Memorandum of Agreement ("MOA") that EPA entered with the Services in 2001 to set forth those agency actions where EPA must comply with the ESA. In the MOA, the EPA and Services agreed that:

EPA promulgation of State or Tribal water quality standards is a Federal rule-making process and EPA will comply with the consultation requirements of section 7 of the ESA with any promulgation. *(13)*

> Section 7(d) of the ESA provides that once a federal agency initiates consultation, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." *(14)* The Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) to ensure that no actions are taken in the meantime that will jeopardize the species or result in an adverse modification of its critical habitat.

Section 9 of the ESA prohibits any person, including any federal agency, from "taking" any listed species without proper authorization through a valid incidental take permit. *(15)* The definition of "harm" has been defined broadly by regulation as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *(16)* Courts have found

federal agencies liable for unlawful take of listed species where agency-authorized activities resulted in the killing or harming of such species. *(17)*

Consultation with NMFS is important even where, as is the case here, the EPA is taking steps to improve water quality. If the water quality standards are still insufficiently protective of endangered species — often the most sensitive species to water pollution and degraded water quality— then harm and take will continue to occur, and the recovery of those endangered species will be delayed or precluded. Consultations are designed to serve two functions. First, they are required to insure that the action agency does not jeopardize threatened or endangered species, or adversely modify or destroy critical habitat. Second, consultations allow action agencies to meet the requirements of the ESA to minimize take of listed species. This is accomplished when the NMFS issues the EPA an incidental take statement ("ITS"). As part of the ITS, NMFS must provide reasonable and prudent measures ("RPMs") to minimize the impact of any taking of listed species. *(18)* But without consultations — and without meeting the procedural requirements of the ESA — the severity and magnitude of the threats to listed species is simply unknown and it is never properly minimized.

As a practical example of why consultations would be beneficial, EPA has proposed to include the following regulatory language in the Maine water quality standard:

Mixing zones shall not be authorized for bioaccumulative pollutants or bacteria. (v) In addition to the requirements above, the department may approve a mixing zone only if the mixing zone:

> …(C) Is not likely to jeopardize the continued existence of any endangered or threatened species listed under section 4 of the ESA or result in the destruction or adverse modification of
>
> such species' critical habitat;…
>
> G) Will not endanger critical areas such as breeding and spawning grounds, habitat for state-listed threatened or endangered species, areas with sensitive biota, shellfish beds, fisheries, and recreational areas… *(19)*

While the Center clearly supports such language being included in Maine's water quality standards, we are concerned about the implementation of such a provision. Since the EPA is not the permitting authority in Maine, all NPDES permits are issued by the State and are not subject to consultations. *(20)* Thus, how would Maine ever know if this condition was being violated absent some type of spatial delineation on maps provided by NMFS in advance of any specific permitting decision? Only if the EPA consults with NMFS at the outset, will NMFS be able to provide a framework that insures that mixing zones are not permitted in key areas which could cause a listed species to be placed in jeopardy. Without consultations, this regulatory provision is virtually meaningless in practice.

CONCLUSION

Given that an ESA consultation on the federal water quality standards for Maine would only involve three species, a consultation with NMFS should not be onerous or time-consuming. However, given the precarious status of these species, consultations are still urgently needed, and the failure to consult would represent a significant violation of the ESA. We appreciate this opportunity to comment.

(1) Proposal of Certain Federal Water Quality Standards Applicable to Maine, 76 Fed. Reg. 23239 (Apr. 20, 2016) (hereafter "PROPOSED RULE").

(2) See generally Daniel J. Farrae et al., Assessing the influence of habitat quality on movements of the endangered shortnose sturgeon, 97 Envtl Biology Fishes 6, 691-699 (2013) (discussing the short nose sturgeon's tolerance to decreased dissolved oxygen levels); Mark R. Collins et al., Primary Factors Affecting Sturgeon Populations in the Southeastern United States: Fishing Mortality and Degradation of Essential Habitats, 66 Bull. Marine Sci., 3, 917-28, 923(2000) (discussing sturgeon's poor abilities to oxyregulate); M. N. Kutty & R. L. Saunders, Swimming Performance of Young Atlantic Salmon (Salmo salar) as Affected by Reduced Ambient Oxygen Concentration, 30 J. Fisheries Res. Board of Can. 2, 223-227 (1973) (discussing the Atlantic salmon's tolerance to habitat variability and decreased dissolved oxygen levels).

(3) 33 U.S.C. § 1313(c)(2)(A).

(4) 40 C.F.R. § 130.3.

(5) 33 U.S.C. § 1313(c)(3)-(c)(4).

(6) 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

(7) 50 C.F.R. § 402.02.

(8) Id.

(9) 50 C.F.R. § 402.14(a); see also Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007)

(10) U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998).

(11) 681 F.3d 1006, 1027 (2012).

(12) Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447-48 (9th Cir. 1996).

(13) Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act at 2 (Jan. 2001).

(14) 16 U.S.C. § 1536(d).

(15) U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31(a) (extending the "take" prohibition to threatened species). The term "take" is statutorily defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

(16) 50 C.F.R. § 17.3; see also Babbitt v. Sweet Home Ch. Of Communities for a Great Oregon, 515 U.S. 687 (1995).

(17) See, e.g., Defenders of Wildlife v. Adm'r, Envtl. Prot. Agency, 882 F.2d 1294 (8th Cir. 1989).

(18) 50 C.F.R. § 402.13.

(19) PROPOSED RULE at 23,266-7.

(20) See generally, National Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007)

EPA Response: EPA engaged in informal consultation with the United States Fish and Wildlife Service (USFWS), which administers Endangered Species Act (ESA) Section 7 consultations for freshwater species, and with the National Marine Fisheries Service (NMFS), which administers Section 7 ESA consultations for marine species and anadromous fish. EPA consulted on the effects of promulgation of the freshwater ammonia, DO in Class A waters, freshwater pH, and tidal temperature criteria to protect aquatic life, and the mixing zone policy, on the ESA listed species of Atlantic salmon, Atlantic sturgeon, and shortnose sturgeon. The USFWS and NMFS concurred with EPA's biological assessment that EPA's promulgation of these WQS is not likely to adversely affect ESA-listed species and/or designated/proposed critical habitat under their

jurisdiction.[157]

Houlton Band of Maliseet Indians (Excerpt # 219)

Commenter ID: 0353

Name: Chief Brenda Commander

Organization: Houlton Band of Maliseet Indians

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.

Dana, C. (Excerpt # 13)

Commenter ID: 0257

Name: Carol Dana

Organization: None

I don't know how your site works on where epa wanted our input. I got a survey about what I don't know. My concern about the river (Penobscot) is that dioxin has been in there for some time. It's the worst carcinogen known to man. I read that in National Geographic 1995. They say its such a miniscule amount it's safe. What about the accumulative effect. The animals drink that water and we eat the animals. Never mind the fish we've eaten. My uncle and his friend used to not go home after school. They went fishing because they knew they could eat after. I think the paper companies should be sued. They spray the forest also with a derivative of agent orange to keep down growth they don't need. All this goes to the water. It's a disgraceful shame. We've seen so many people here with all kinds of cancer, they call it a cancer cluster. Millinocket is the same.

[157] August 16, 2016 letter from Kimberly B. Damon-Randall, Assistant Regional Administrator for Protected Resources, NOAA, to Ralph Abele, Water Quality Branch Chief, EPA Region 1; and November 23, 2016, letter from Anna Harris, Project Leader, Maine Field Office, USFWS, to Ralph Abele, Water Quality Branch Chief, EPA Region 1.

I'm sure there are other areas with the same problems. I would just like to see this out in the open, not cloaked about the fish. What about people?! Removing the dams was a good start but it all goes to the ocean. Our clams are dying off. When will it end? We are poisoning ourselves. Someone has poisoned our environment. Innocent people paid the price. What will EPA do about that?

Penobscot member of Indian Island

Water Matters Concerned Citizen (Excerpt # 88)

Commenter ID: 0312

Name: Robin Farrin

Organization: Water Matters Concerned Citizen

In April of 2016 I designed a survey (see attachment) for the Passamaquoddy Water District area citizens to participate in. I did so because of the over whelming people I knew of who did not trust the water that comes from their taps and the overwhelming comments I've heard over the three years living in Eastport of how the water causes cancer. Because of these serious concerns I chose to create a survey (see the results in the attachment.)

I intend to do another survey now that the summer folks are here to determine how they feel about the water. I have presently formed a concerned citizen committee, which we are now working on creating a referendum to have the fluoride removed from our tap water supplied by the Passamaquoddy Water District.

We also intend to start up a quarterly column in our local Quoddy Tides Newspaper to keep local citizens updated on water testing kits, water filters and any other issues pertaining to safe water.

For further info feel free to contact me, Robin Farrin at: watermaterscc@gmail.com

Strickland, P. R. (Excerpt # 104)

Commenter ID: 0323

Name: Paul R. Strickland

Organization: None

There are active discussions going on all over Maine about water availability and water quality. We are beginning to realize that clean water is a finite resource. Growing up in West Texas I have vivid memories of waiting for the water tank truck to arrive and fill our cistern due to a lack of water. I wouldn't wish that on anyone.

I am concerned that polluted water will eventually leach into groundwater and contaminate our aquifers.

Crawford, G. (Excerpt # 101)

Commenter ID: 0320

Name: Gretchen Crawford

Organization: None

Dear EPA staff working on improving water quality in Maine,

As a child of two State of New Jersey teachers I was privileged to spend every summer with my family at Moosehead Lake.

My parents bought and renovated a cabin right on the water, and my father built a dock that we swam and fished from. We had an aluminum boat to go to distant camping sites as well.

The water was clean and the fish abundant back then in the 1960s. Our family of six ate salmon and trout we caught ourselves, fried in a cast iron skillet with butter. It was always delicious.

The fish was safe to eat, and eat we did! The water was safe to swim in.

Things are so different now. Pregnant women are told not to eat fish, small-mouthed bass, a non-native species, seem more plentiful than trout and salmon, and must be contaminated with endocrine-disrupting chemicals as the males are growing ovaries.

I could not encourage my children to eat the fish here anymore.

Hitchings, C. (Excerpt # 77)

Commenter ID: 0306

Name: C. Hitchings

Organization: None

As Shellfish Conservation Officer for the Town of Blue Hill in the early 1970's I was very disappointed to realize from my research how the pollution of our waters had affected the wildlife and health quality of food gleaned from our rivers and bays.

I am further disappointed that after 40 years we have not made more progress in learning from and correcting the effects of our attitudes toward and treatment of Nature.

Maine Lobstering Union (Excerpt # 203)

Commenter ID: 0356

Name: Kim Ervin Tucker

Organization: Maine Lobstering Union

Unfortunately, the greatest threat to our waters and the integrity of our food supply from those waters — for all Maine people including the Penobscot — is the State of Maine.

While you all have been pursuing the much-needed changes to water quality standards to combat the CWA violations by the State of Maine, the State has continued to actively undermine your work.

I have just learned in late June, that on May 10, 2016, the Maine DEP granted Mallinckrodt an amendment to its 2013 Discharge Permit — allowing Mallinckrodt to increase the amount of water it discharges from the contaminated HoltraChem site in Orrington. The amendment allows Mallinckrodt to increase its discharges of contaminated water from this site from 60,000 gpd to 100,000 gpd. All of this contaminated water is going into the Penobscot River Watershed at Orrington. This permit allows Mallinckrodt to dump contaminated water (containing mercury and other pollutants) from the same contaminated site from which Mallinckrodt, and their successor HoltraChem Mfg. Co., dumped tons of mercury into the Penobscot River that resulted in mercury contamination of the water and biota of the Penobscot River Watershed, including the upper Penobscot Bay down to the southern tip of Islesboro island.

While the State of Maine took action against Mallinckrodt and HoltraChem for the contamination on land at the Orrington site, the State took no action to compel Mallinckrodt to remediate the significant damage done to the Penobscot River Watershed from their intentional dumping of tons of mercury into this important water body. Because the State of Maine would not take legal action against Mallinckrodt and HoltraChem to punish their contamination of Maine waters, the Maine People's Alliance and the Natural Resources Defense Council ("NRDC") brought federal litigation to compel remediation of the pollution of the Penobscot River Watershed. This litigation is still pending in federal court in Bangor, Maine (Maine People's Alliance and NRDC v.HoltraChem Mfg. Co. and Mallinckrodt Inc., Case No. 1:00-cv-00069-JAW).

The federal court in that case has appointed independent experts who have conducted a twelve-plus year study of the damage done by Mallinckrodt's pollution of the River and Bay – the Penobscot River Mercury Study ("PRMS"). Based on that study's results – which confirm mercury dumped by HoltraChem and Mallinckrodt is present throughout the Penobscot River and Bay (at least down to the southern tip of Islsboro). Most of this mercury is now buried by natural attenuation and is located at a depth of 20 to 40 cm down in the sediment.

However, some is still at the surface and continues to be a source of methylmercury contamination of our water and biota. The federal court now has appointed experts to determine how best to remediate the mercury contamination from the Orrington site in the River and upper estuary of the Bay.

In addition, because the PRMS revealed that methylmercury contamination that persists in a mobile sediment pool at the mouth of the Penobscot River and upper estuary of the Penobscot Bay was contaminating lobsters and crabs located in that area, the Maine Department of Marine Resources closed a 7-square mile area in this area to lobstering and crabbing in 2014. DMR expanded this closure area by an additional 5.5 square miles in June 2016 allegedly because of "public health" concerns about mercury in this area. However, since the 2014 Study that DMR conducted on lobster and crab in the expanded closure area does not show that lobsters in the new closure area have levels of mercury that violate any U.S. EPA-FDA Action Level or even reach the Screening Values set by U.S. FDA, the basis for this closure is mystifying.

Curiously, almost simultaneously with DMR's decision to expanded this closure area by "emergency rule," Maine Department of Environmental Protection granted an amendment to Mallinckrodt's 2013 water discharge permit – allowing them to increase the amount of contaminated water being discharged from the Orrington site from 60,000 gpd to 100,000 gpd. I am attaching the 2013 permit from DEP to Mallinckrodt and the May 10, 2016 amendment.

Although in the amended permit DEP did not increase the amount of mercury that Mallinckrodt can discharge from the 2013 level — it strains credulity to imagine that such a substantial increase in the daily discharges (from 60k to 100k gpd) would not result in an increase in mercury discharges. Thus, this DEP amendment will likely do further damage to the water quality in the River and Bay, and the DEP permit and DMR closure will impede and obstruct the sustenance fishing rights of the Penobscot Nation and all Maine people in the Penobscot River Watershed.

In combination, these actions by the State of Maine impinge on the Penobscot's treaty rights to sustenance fish in the Penobscot River and Bay. These actions by the State of Maine also damage the reputation for wholesomeness of all Penobscot Bay lobsters and crabs in the national and worldwide marketplace. I am attaching links to the DEP permits, the DMR Study and closure notice.

The 2013 and 2016 DEP Mallinckrodt permits and DMR emergency closure (without cause) are not the only examples of actions by the State of Maine that pose an immediate and significant threat to the sustenance fishing rights of the Penobscot Nation and all Maine citizens. In a separate email I have forwarded a prior communication that was sent to U.S. Army Corps of Engineers' D.C. leadership in 2015 regarding the State of Maine's efforts (with the U.S. Army Corps of Engineers and Maine Department of Transportation) to do an unnecessary and environmentally devastating million cubic yard dredge in the upper Penobscot Bay. This dredge proposes to expand the size and depth of the federal navigation project in Searsport, Maine.

In violation of NEPA, the Corps has refused to conduct an EIS of their proposed joint dredging project in Searsport and have only done an incomplete and superficial EA, using grossly outdated information. The 2013 EA was drafted using incomplete data collected by the Corps in 2004-2008. Shortly after this email was sent to Corps Leadership in 2015 the DEP Water Quality Certification application, needed to conduct this dredge, submitted by the Corps and Maine DOT in April 2015, was pulled from Maine DEP. However, we have heard chatter that an application for this project is about to be filed again "in 2016". For this reason, I am forwarding this information on the Searsport dredge to you to see if your rulemaking efforts could assist us in fighting this ill-conceived project – which will do irreparable damage to the waters of Penobscot Bay.

Specifically, we request a rule: (i) prohibiting any unnecessary dredging or disturbance of the bottom in the area of the upper Penobscot Bay where Mallinckrodt mercury was demonstrated to exist during the PRMS (i.e. any area north of the Southern tip of Islesboro); and (ii) prohibiting filing any application with Maine DEP to dredge in the upper Penobscot Bay in the absence of an EIS and proper prior sediment testing using the protocol established by the court's experts in the PRMS (i.e. testing every 1 cm segment of a core sample from the first 0-20 cm; ever 2 cm from 21-40 cm, and every 5 cm from 41 cm to the remainder of the core sample up to 90 cm).

Please contact me to discuss any ways that we could work with you to assist in adoption of these new Water Quality Rules which are in the interest of all of Maine's people — it is very troubling that our government officials, including the Attorney General, are acting

against the interest and public health of the people of the Penobscot Nation and all Maine people by opposing your efforts.

Thank you for all you are doing to protect Maine's water quality, food supply and People.

Sincerely,

Kimberly J. Ervin Tucker

Counsel to the Maine Lobstering Union

Anonymous (Excerpt # 40)

Commenter ID: 0279

Name: Anonymous

Organization: None

I believe that we need to constantly improve the quality of water throughout the United States and actively work to prevent a disaster similar to what happened in Flint.